

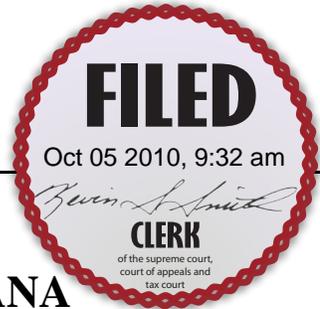
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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MARRIAGE OF:)

TYRA L. BROOKS,)

Appellant-Respondent,)

vs.)

LARRY D. BROOKS,)

Appellee-Petitioner.)

No. 10A05-0909-CV-546

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Cecile A. Blau, Special Judge
Cause No. 10D02-0710-DR-185

October 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Tyra L. Brooks (“Wife”) appeals from the trial court’s dissolution decree, which dissolved her marriage to Larry D. Brooks (“Husband”). She raises the following restated issues:

- I. Whether the trial court abused its discretion when it denied Wife’s motion to continue the final hearing;
- II. Whether the trial court abused its discretion when it allowed Husband’s book of exhibits to be admitted into evidence; and
- III. Whether the trial court properly divided the marital estate.

We affirm.

FACTS AND PROCEDURAL HISTORY

Husband and Wife were married on March 15, 1993 and separated on September 30, 2007. The parties had one child, S.B., who was born in 1991. Husband filed a petition for dissolution of the marriage on October 2, 2007. During the marriage, Husband earned an income by operating two related businesses, Skyler, Inc. (“Skyler”) and L. Brooks Fleet Maintenance LLC (“Fleet Maintenance”). Husband’s income at the time of the dissolution hearing was established through his income for 2006 and 2007, which was \$172,948.00 and \$172,967.00, respectively. *Tr.* at 33, 34. At the time of the dissolution, Wife’s income was \$12.70 per hour for between thirty-seven and thirty-nine hours per week. *Id.* at 89. During the marriage, the parties accumulated substantial tax liability and marital debt.

Skyler was an Indiana corporation that had a month-to-month contract with FedEx, under which Skyler moved freight for FedEx on semi-trucks owned by Skyler. This contract was terminable at will by either FedEx or Husband. Skyler had no other customers or source

of income. The business was operated in a building owned by FedEx, and Skyler had no ownership interest in the building. Skyler employed eight employees. FedEx paid Skyler, Skyler paid its employees and expenses, and the residual income was Husband's income that was reported on his tax returns. Skyler's assets consisted of six semi-trucks with a total value of \$68,078.75 and a total debt of \$123,488.02. *Id.* at 29.

Fleet Maintenance was a semi-truck maintenance business that was taken over by Husband in order to perform maintenance on the semi-trucks owned by Skyler. Prior to the acquisition of Fleet Maintenance, Skyler outsourced the maintenance of its trucks. Fleet Maintenance employed mechanics, who provided their own tools, but were paid by Fleet Maintenance, to perform the maintenance on the trucks. Because both Skyler and Fleet Maintenance were owned by Husband, Fleet Maintenance did not charge Skyler for maintenance work, and therefore, Fleet Maintenance generated very little profit. The only assets of Fleet Maintenance were office equipment and a forklift, and the business had a total value of \$3,416.00.

At the time of the dissolution, Husband and Wife had a large tax liability, totaling \$230,350.61, which included unpaid federal income taxes for 2006 and 2007, unpaid withholding taxes for Skyler, and unpaid payroll taxes as well as penalties, interest, and State tax liens. The parties owned three pieces of real estate: (1) the marital residence in Henryville, Indiana, which was appraised at \$400,000.00 and encumbered with a lien of \$316,905.80; (2) three vacant lots in Memphis, Indiana with a total estimated value of \$40,000.00 and encumbered with a lien of \$65,079.22; and (3) another parcel of property in

Henryville that was appraised at \$113,000.00 and encumbered with a lien of \$128,890.80. The parties also owned several land and water vehicles, which had a net value of \$24,429.53.

After nearly two years, the trial court set this dissolution matter for final hearing on August 7, 2009. On July 27, 2009, Wife filed a motion for continuance of the final hearing, which the trial court denied. The final hearing was held, during which Husband introduced a volume of exhibits, containing information regarding the parties' financial information. Wife objected, but the trial court admitted the exhibits. The trial court issued its dissolution decree, which divided the marital estate. The trial court ordered Husband to assume all of the tax liability, which was calculated to be \$230,350.61. *Appellant's App.* at 13, 15. It also determined that Husband was to receive all of the real estate and land and water vehicles with the associated debt, minus the Wife's Infiniti. *Id.* at 14, 15. Additionally, the trial court valued Skyler and Fleet Maintenance. It placed a value of negative \$55,409.26 on Skyler based upon the value of its assets minus the associated debt, although it did determine that Skyler had some value since it generated Husband an income. *Id.* at 13. The trial court valued Fleet Maintenance with a value of \$3,416.00 and assigned all interest in the two businesses to Husband. *Id.* at 13, 15. The trial court also found that Wife was not entitled to the future income of Husband. *Id.* at 16. Wife was also awarded various home furnishings and household goods from the marital residence. Wife now appeals.

DISCUSSION AND DECISION

I. Denial of Continuance

The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *Troyer v. Troyer*, 867 N.E.2d 216, 219 (Ind. Ct. App. 2007). An abuse of discretion may be found in the denial of a motion for continuance when the moving party has shown good cause for granting the motion. *Id.* However, no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial, and the withdrawal of an attorney does not automatically entitle a party to a continuance. *Id.*

Wife argues that the trial court abused its discretion when it denied her motion for a continuance of the final hearing. She specifically contends that it was error to deny her motion because a continuance was necessary to obtain a business valuation of the parties' two businesses prior to the property division. Wife claims that there was good cause for a continuance because a business valuation had been ordered by the trial court, and a continuance was necessary as the valuation had not yet been completed at the time of the final hearing. She further asserts that she was prejudiced by the denial of a continuance because, without a business valuation, the trial court could only "guess at the marital estate of assets and liabilities and its division," and she therefore received an unequal portion of the marital estate. *Appellant's Br.* at 19.

In the present case, Wife filed her motion for a continuance on July 27, 2009 and stated that she needed additional time to obtain an attorney. The final hearing was set for

August 7, 2009. Husband objected to the motion telephonically, and the trial court denied the motion. Wife orally renewed her motion at the beginning of the final hearing, stating that she needed more time to obtain a business valuation, as well as to procure an attorney. *Tr.* at 12. The trial court again denied her motion, and the final hearing occurred.

Wife filed her motion for continuance approximately six weeks after the trial court had set the final hearing date, only a few days before the final hearing, and additionally, after the dissolution proceedings had been pending for nearly two years. In her motion, Wife did not mention the need to perform a business valuation as the grounds for a continuance, and she did not raise that as grounds for postponing the hearing until the day of the final hearing. Further, at no time during the six-week period of time between the setting of the final hearing and the final hearing itself, or in the two years that the matter was pending, did Wife do anything to procure an expert to determine a value of the businesses or to attempt to ascertain the value of the businesses. Wife has not shown that she was prejudiced by the denial of her motion. We therefore conclude that the trial court did not abuse its discretion when it denied Wife's motion for a continuance.

II. Admission of Exhibits

The decision to admit or exclude evidence rests within the discretion of the trial court. *Matzat v. Matzat*, 854 N.E.2d 918, 919 (Ind. Ct. App. 2006). We will only reverse if there is a manifest abuse of that discretion. *Id.* ““An abuse of discretion in this context occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law.”” *Id.* (quoting *Carpenter v. State*, 786 N.E.2d

696, 702-03 (Ind. 2003)). Additionally, “[t]he failure to make a contemporaneous objection to the admission of evidence at trial, so as to provide the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced, results in waiver of the error on appeal.” *In re Guardianship of Hickman*, 805 N.E.2d 808, 822 (Ind. Ct. App. 2004), *trans. denied*.

Wife argues that the trial court abused its discretion when it allowed a book of exhibits prepared by Husband to be admitted into evidence at the final hearing. She claims that these exhibits, which contained information regarding the value of the marital estate and the businesses, should not have been admitted because, without a business valuation by an expert, the evidence was not relevant. She contends that, with the lack of a business valuation, the admission of Husband’s evidence allowed a one-sided view of the marital estate’s assets and liabilities and constituted an abuse of discretion.

Here, at the beginning of Husband’s testimony, his attorney presented the book of exhibits, and the trial court made the following statement:

All right. [Wife] do you understand what [Husband’s] proposing? We do this in several cases where there are a lot of Exhibits. The Court does find it very helpful . . . that does not mean that all this would be automatically into evidence if it’s irrelevant or not appropriate then it may be taken out but to get us started we’ll go ahead and the Court will . . . take a copy of the Exhibit book.

Tr. at 21-22. Wife made no objection at that time. At the conclusion of Husband’s presentation of evidence, a formal offer of the exhibit book was made by Husband’s counsel, and the trial court asked Wife if she had any questions regarding the exhibits. *Id.* at 71. Wife

responded, “Uh I just have comments I guess....” *Id.* The following exchange then occurred:

The Court: . . . I’m not going to presume you agree or disagree but basically in regards to these are there any that you feel were not truthful or you have questions with or would you rather go ahead and we’ll admit these and then you can have your comments about each one?

[Wife]: Well I feel it’s hard to say because there still has not been a business evaluation done. This is all based on his word. His testimony.

The Court: Okay well then I’m going to formally admit these Exhibits

Id. at 72-73.

Assuming without deciding that Wife’s objection was sufficient to preserve the issue, we conclude that the trial court was within its discretion to admit Husband’s exhibits because such evidence was relevant to the proceedings. Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ind. Evidence Rule 401. “All relevant evidence is admissible, except as otherwise provided by the United States or Indiana constitutions, by statute not in conflict with these rules, by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.” Evid. R. 402.

As to the exhibits admitted, Exhibits 1 through 6 and Exhibit 12 established the value of Skyler and Fleet Maintenance and included the operating and licensing agreements for the businesses, evidence of their assets and liabilities, explanation of business accounts, and tax

returns for the businesses. *Pet'r's Exs.* 1-6, 12. Exhibits 7 and 8 were tax returns from 2006 and 2007, which established Husband's income for those two years. *Pet'r's Exs.* 7-8. Other exhibits showed Wife's knowledge of the conduct of the businesses, demonstrated Husband's difficulty in paying monthly bills, and listed delinquent marital bills. *Pet'r's Exs.* 9-11. Still other exhibits listed income and expenses of the parties, banking information, credit card statements, and payment schedules and values of the real estate and vehicles owned by the parties. *Pet'r's Exs.* 13-20. Lastly, one exhibit summarized the parties' net worth. *Pet'r's Ex.* 21. Each of these exhibits was relevant to the valuation and division of the marital estate. Further, as to Wife's argument that Husband should not have been allowed to have this evidence admitted, we find that while expert testimony may have been a preferential way to establish the value of the business, it is not the only permitted evidence relevant to such issue, and Husband's evidence assisted in the determination of the value of the marital estate. We therefore conclude that the trial court did not abuse its discretion when it admitted Husband's exhibit book into evidence.

III. Division of Marital Estate

The disposition of marital assets is an exercise of the trial court's sound discretion. *Eye v. Eye*, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006). We review a claim that the trial court improperly divided marital property for an abuse of discretion. *Id.* In doing so, we consider the evidence most favorable to the trial court's disposition of the property, without reweighing the evidence or assessing the credibility of witnesses. *O'Connell v. O'Connell*, 889 N.E.2d 1, 10 (Ind. Ct. App. 2008). Although a different conclusion might be reached in

light of the facts and circumstances, we will not substitute our judgment for that of the trial court. *Helm v. Helm*, 873 N.E.2d 83, 90 (Ind. Ct. App. 2007). “An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute.” *Hatten v. Hatten*, 825 N.E.2d 791, 794 (Ind. Ct. App. 2005), *trans. denied*.

In a dissolution of marriage, the trial court must divide marital property in a just and reasonable manner, including property owned by either spouse prior to the marriage, acquired by either spouse after the marriage and prior to final separation of the parties, or acquired by their joint efforts. Ind. Code § 31-15-7-4. The trial court’s disposition of the marital estate is to be considered as a whole, not item by item. *Eye*, 849 N.E.2d at 701. An equal division of marital property is presumed to be just and reasonable. Ind. Code § 31-15-7-5. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence of the following factors:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
 - (A) before the marriage; or
 - (B) through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to:

(A) a final division of property; and

(B) a final determination of the property rights of the parties.

Id. “Importantly, ‘when ordering an unequal division, the trial court must consider *all* of the factors set out in [the statute].’” *Eye*, 849 N.E.2d at 701 (quoting *Wallace v. Wallace*, 714 N.E.2d 774, 780 (Ind. Ct. App. 1999) (emphasis in original), *trans. denied* (2000)). We begin with the strong presumption that the trial court considered and complied with the applicable statute, which must be overcome by a party challenging the trial court’s division of marital property. *Hatten*, 825 N.E.2d at 794.

Wife argues that the trial court abused its discretion in its unequal division of the marital estate because such a division was not just and reasonable. She specifically contends that it was error to award Husband nearly all of the marital assets and liabilities based upon his larger income and ability to pay down the marital debt. She claims that this will result in Husband having a large amount of unencumbered assets and real estate in the future after he has paid down the debt. Wife further asserts that the trial court incorrectly viewed Husband’s income as being solely employment income and not as part of the value of the businesses.

In its order dividing the marital estate, the trial court assigned all of the marital assets, minus Wife’s Infiniti, and all of the marital debt, totaling \$793,961.90, to Husband. This debt included \$230,350.61 in tax liability, \$510,875.82 in real estate debt, and \$52,735.47 in debt for the land and water vehicles. Husband received all interest in Skyler, which was

determined to have a negative value of \$55,409.26, and Fleet Maintenance, which was determined to have a value of \$3,416.00, and was ordered to be responsible for all of the debts, taxes, and other unpaid responsibilities of the businesses. In its determination of the distribution of the marital estate, the trial court considered: the disparate incomes of the parties; that there was no total equity in the assets accumulated by the parties during the marriage; that both parties were responsible for the considerable amount of marital debt; and that both Husband and Wife had lived beyond their means during the marriage. *Appellant's App.* at 16.

The marital estate had a negative value. While the trial court set aside a majority of the assets to Husband, it also set aside all of the debt. Therefore, Husband's share of the marital estate had a negative value. Although the businesses may have a positive value sometime in the future when all of the indebtedness has been satisfied, the businesses have negative present value. The marital estate was therefore distributed in Wife's favor as she received none of the marital debt, while Husband was assigned all of the debt, resulting in a negative share of the marital estate. Even if Husband was able to sell all of the marital assets he received in the property distribution for their appraised value, he would still be responsible for the large tax liability. We therefore conclude that the trial court did not abuse its discretion when it divided the marital estate.

Affirmed.

RILEY, J., and BAILEY, J., concur.