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**IN THE
COURT OF APPEALS OF INDIANA**

DEBRA D. NOGGLE,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 48A05-0809-CV-546
)	
JAMES A. NOGGLE,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0702-DR-153

July 17, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

James (“Husband”) and Debra (“Wife”) Noggle’s marriage was dissolved in Madison Superior Court. Appealing the dissolution decree, Wife argues that the trial court abused its discretion in its division and distribution of Husband’s retirement accounts. We affirm.

Facts and Procedural History

Husband and Wife were married in 1984, and two children were born to the marriage. Husband is employed as a teacher and part-time disc jockey. When Wife became pregnant with their first child, the parties agreed that Wife would stay at home to raise the children. Wife was also responsible for maintaining the household and paying the bills.

The parties separated on February 9, 2007, and shortly thereafter, Wife filed her Petition for Dissolution of Marriage. After several hearings were held in this cause, the trial court issued its findings of fact and conclusions of law on January 2, 2008. Husband filed a motion to correct error, and a hearing was held on the motion on April 25, 2008. On May 27, 2008, the trial court issued Corrected Findings of Fact and Conclusions of Law, which provide in pertinent part:

9. That in making the division of property, the Court has considered the following:

- A. I.C. 31-15-7-5;
- B. HUSBAND’s income;
- C. WIFE’s income;
- D. That WIFE has been a stay-at-home mother;
- E. HUSBAND resides with his elderly mother;
- F. The economic circumstances of each of the parties;
- G. WIFE does not have health insurance available to her; and,
- H. Earnings and earning ability of the parties.
- I. WIFE’s excessive credit card use during the marriage.

10. That during the marriage WIFE began to control the marital finances when HUSBAND had to acquire additional jobs in an effort to meet marital expenses. HUSBAND became employed not only as a teacher at Pendleton Heights High School, but also as a teacher at Ivy Tech. In addition, HUSBAND started his own disc jockey business. Even though HUSBAND was working three jobs, he was primarily responsible for the maintenance of the marital residence and the martial rental property and the maintenance of the marital automobiles.

11. That HUSBAND receives royalties through The Teaching Company.

12. That after WIFE took control of the marital finances, WIFE began to make numerous charges on numerous credit cards. HUSBAND was unaware of those charges and credit cards. During 2005, HUSBAND discovered WIFE had caused \$42,000.00 [] to be owed on the credit cards. HUSBAND's mother gave the parties \$33,000 [] to pay on numerous balances of credit cards. HUSBAND believes the balances on the credit cards had been reduced to approximately \$9,000.00 [] in 2005.

13. That a few months before HUSBAND moved out of the marital residence, he again discovered that WIFE made numerous charges on numerous credit cards causing the balances to be \$43,000 [].

14. HUSBAND was ordered in the Provisional Order to pay the mortgages on the marital residence and the rental property, the property taxes, the property insurance and the minimum payments to Kohl's, Menards, the Chase cards, the Discover card, the Capital One cards, HHGregg, American Express, the Lowes charges, Sallie Mae, Dr. Kirkpatrick, Dr. Gossert and Dr. Mohler and as a result had to borrow \$6500.00 [] from his mother.

18. The HUSBAND has the following Indiana State Teachers Accounts which are not subject to a Qualified Domestic Relations Order:

A. ISTRF Annuity Savings Account worth [\$126,063.00] with [\$114,555.00] which accumulated during the marriage.

B. ISTRF Defined Benefit Plan worth [\$285,207.00] with [\$173,834.00] which was accumulated during the marriage.

Total of the ISTRF funds [\$411,270.00.]

Total accumulated prior to the marriage is [\$122,881.00.]

Total accumulated during the marriage is [\$288,389.00.]

19. Other Retirement Accounts and Life Insurance:

AIG 403(B) AND PENSION	\$46,505.00
FIRST INVESTORS MUTUAL FUNDS	\$32,566.00
WASHINGTON NATIONAL ANNUITY	\$7,942.00
FIRST INVESTORS Life Insurance (cash value)	\$2,093.53

Total \$89,106.53

20. That there remains the following funds available:
A. HUSBAND's attorney trust account \$10,912.44; and
B. WIFE's attorney is holding a Farmers Insurance Check \$82.25

Total \$10,994.69

23. That HUSBAND has requested the Court to make an equal division of the assets, and WIFE has asked that she receive sixty percent (60%) of the assets as she gave up her career to be a stay-at-home spouse and mother.

Appellant's App. pp. 25-29.

After determining that the value of husband's retirement and life insurance accounts acquired during the marriage totaled \$377,504.33, and that the total marital debts totaled \$49,187.69,¹ the court determined that the total remaining to be divided equaled \$328,316.84. The court divided this equally and found that "WIFE's one-half should be paid by HUSBAND to WIFE when HUSBAND commences receiving his ISTRF proceeds, at the rate of \$750.00 per month until paid in full, without interest." Id. at 31. The funds held in Husband's attorney's trust account and \$1,630.36 still owed by the purchaser of the marital residence were also divided equally between the parties. Finally, Husband was ordered to pay Wife's attorney fees in the amount of \$2305.00.

On June 26, 2008, Wife filed a Motion to Correct Error objecting to the Corrected Dissolution Decree. After a hearing held on August 14, 2008, the trial court denied Wife's motion. Wife now appeals. Additional facts will be provided as necessary.

Standard of Review

The trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52, therefore

¹ Husband was ordered to pay \$47,645 of the marital debt.

we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. We neither reweigh the evidence or assess the credibility of witnesses, but consider only the evidence most favorable to the judgment.

Webb v. Webb, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007) (citations omitted).

Discussion and Decision

In this appeal, Wife challenges the trial court's division and distribution of Husband's retirement accounts. The division of marital assets is within the trial court's discretion, and we will reverse only for an abuse of discretion. DeSalle v. Gentry, 818 N.E.2d 40, 44 (Ind. Ct. App. 2004). A party challenging the trial court's division of marital property must overcome a strong presumption that the trial court "considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal." Id. "We may not reweigh the evidence or assess the credibility of the witnesses, and we will consider only the evidence most favorable to the trial court's disposition of the marital property." Id.

"The division of marital property in Indiana is a two-step process." Thompson v. Thompson, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004), trans. denied. First, the trial court determines what property must be included in the marital estate. Id. Second, the trial court must then divide the marital property under the statutory presumption that an equal division of marital property is just and reasonable. Id. However, the trial court may deviate from this presumption. Id. at 912-13.

As to the first step, Indiana Code section 31-15-7-4(a) provides as follows:

In an action for dissolution of marriage under IC 31-15-2-2, the court shall divide the property of the parties, whether:

- (1) owned by either spouse before the marriage;
- (2) acquired by either spouse in his or her own right:
 - (A) after the marriage; and
 - (B) before final separation of the parties; or
- (3) acquired by their joint efforts.

Thus, all marital property, including property owned by either spouse prior to marriage, “goes into the marital pot for division[.]” Hill v. Hill, 863 N.E.2d 456, 460 (Ind. Ct. App. 2007).

“This ‘one-pot’ theory insures that all assets are subject to the trial court’s power to divide and award. While the trial court may ultimately determine that a particular asset should be awarded solely to one spouse, it must first include the asset in its consideration of the marital estate to be divided.” Id.

Where, as here, there are assets that were acquired by Husband prior to marriage, the trial court may achieve a just and reasonable property division by determining the appreciation over the course of the marriage of such assets and dividing the appreciation between the spouses, while setting over to the appropriate spouse the pre-marriage value of the assets at issue. Doyle v. Doyle, 756 N.E.2d 576, 579 (Ind. Ct. App. 2001).

First, Wife argues that the trial court abused its discretion by failing to include the entire value of Husband’s ISTRF accounts in the marital pot. However, in her proposed findings of fact and conclusions of law, Wife herself did not include the entire value of those accounts as a marital asset. Wife included only the coverture value of Husband’s ISTRF accounts in her proposed division of the marital assets. See Appellee’s App. pp.

4-5, 7. Although we agree that Indiana Code section 31-15-2-2 provides that the trial court shall divide property owned by either spouse prior to the marriage, the trial court included the coverture value of Husband's ISTRF accounts in the marital pot exactly as Wife proposed. Accordingly, Wife invited the error and cannot now complain.² See Shannon v. Shannon, 847 N.E.2d 203, 206 (Ind. Ct. App. 2006), trans. denied (“[If] there were any error, Husband invited that error in that he included his total worker's compensation award in the list of marital property included in his proposed property division worksheet.”); Balicki v. Balicki, 837 N.E.2d 532, 541 (Ind. Ct. App. 2005), trans. denied.

Next, Wife argues that the trial court abused its discretion when it ordered that Wife's portion of the ISTRF funds would not be paid to Wife until Husband retired. Husband's ISTRF accounts are not subject to a Qualified Domestic Relations Order. In its Corrected Decree, the trial court ordered that Wife's interest in Husband's ISTRF accounts “should be paid by HUSBAND to WIFE when HUSBAND commences receiving his ISTRF proceeds, at the rate of \$750.00 per month until paid in full, without interest.”³ Appellant's App. p. 31. Once again, although Wife proposed a different payment amount, in her proposed findings, Wife requested that Husband make a monthly payment to Wife when he “commences receiving his ISTRF funds[.]” See Appellee's App. p. 8. Accordingly, Wife cannot now complain that the trial court abused its

² For this reason, we need not address Wife's argument that the trial court's failure to include the entire value of Husband's ISTRF account in the marital pot resulted in an unequal division of the marital assets.

³ The original decree contained the same provision for distribution of Wife's portion of the ISTRF retirement funds. Appellant's App. p. 16.

discretion in ordering Husband to make payments exactly as Wife proposed. See Balicki, 837 N.E.2d at 541.

Wife also claims that the trial court abused its discretion in dividing Husband's retirement accounts because "in reality, [Wife] has no present and perhaps not even a future interest in any of these funds, which are dictated solely by events outside of her control." Appellant's Br. at 13. Wife asserts that, as the court did in its original decree, the trial court should have set over all of the non-ISTRF retirement accounts to her, and should have ordered that "she be made the beneficiary on [Husband's] ISTRF accounts for whatever the balance of her interest is at the time of is death." Id.

We are sympathetic to Wife's argument that she did not receive a "present value" in her share of the marital assets, but this was unavoidable under the circumstances of this case because nearly all of the parties' marital assets consisted of Husband's retirement accounts. As we noted above, Wife requested that Husband make a monthly payment to Wife when he "commences receiving his ISTRF funds." Appellant's App. p. 8. Moreover, Wife did not ask the trial court to order Husband to add her as a beneficiary to his ISTRF accounts.

Indiana Code section 31-15-7-8 (2008) provides that upon entering an order dividing martial property, "the court may provide for the security, bond, or other guarantee that is satisfactory to the court to secure the division of property." Accordingly, the trial court may, in its discretion, provide for a security interest such as Wife is requesting on appeal. See Romine v. Gagle, 782 N.E.2d 369, 380 (Ind. Ct. App.

2003), trans denied (“The term ‘may’ in a statute ordinarily implies a permissive condition and a grant of discretion.”).

However, Wife has not convinced us that the trial court abused its discretion in this case by failing to provide her with a security interest on her share of Husband’s ISTRF accounts. Wife has not cited to any portion of the record that would establish that beneficiary designation is available on Husband’s elected distribution of his ISTRF accounts, and she did not request such beneficiary designation in her proposed findings.

Finally, the non-ISTRF retirement accounts, totaling \$89,106.53, were awarded to Wife in the original decree. However, in its Corrected Decree, the court awarded those accounts to Husband, and ordered Wife’s half of the marital assets to be distributed from Husband’s ISTRF accounts.

In issuing the Corrected Decree, the trial court listed one additional factor that it considered in its division of the marital property: “WIFE’S excessive credit card use during the marriage.”⁴ Appellant’s App. p. 25. The marital debts totaled nearly \$50,000, and although \$20,000 of this debt was incurred for the children’s college expenses, the remainder of the debt consisted of credit accounts. Husband was ordered to pay \$47,645 of the debt. Given this distribution of the marital debt, we cannot conclude that the trial court abused its discretion when it ordered the non-ISTRF retirement accounts set over to Husband.

⁴ Wife argues that there was no evidence that she dissipated marital assets. However, the trial court did not find that Wife dissipated marital assets. Moreover, there is evidence to support the finding that Wife’s credit card use was excessive and that Husband was unaware of the total accumulated debt on the credit accounts at the time of their separation. Moreover, the trial court divided the marital assets evenly despite Wife’s credit card use, and ordered Husband to pay the majority of the credit card debt.

Conclusion

Wife has not established that the trial court abused its discretion in division of the marital assets. Accordingly, we affirm the judgment of the trial court.

Affirmed.

RILEY, J., and KIRSCH, J., concur.