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# IN THE COURT OF APPEALS OF INDIANA

Jamie Israel,
*Appellant,*

v.

Yaima Israel,
*Appellee.*

May 16, 2022

Court of Appeals Case No. 21A-DC-1063

Appeal from the Marion Superior Court

The Honorable Kurt M. Eisgruber, Judge
The Honorable Christopher B. Haile, Magistrate

Trial Court Cause No. 49D06-1901-DC-429

**Bailey, Judge.**

# Case Summary

[1] Jamie Israel ("Husband") appeals certain provisions of the trial court's decree of dissolution of his marriage to Yaima Israel ("Wife"). Husband alleges error regarding the trial court's disposition of marital assets, legal custody of the parties' child, and attorney's fees; we discern no error as to these issues. However, Husband also challenges the trial court's decision to include a non-disparagement clause that restrains the parties from ever making disparaging remarks about one another, regardless of whether Child is present. As to this latter issue, we agree with Father that the non-disparagement clause amounts to an unconstitutional prior restraint on speech.

[2] Ultimately, we affirm in part, reverse in part, and remand with instructions.

# Issues

[3] Husband raises six issues on appeal which we restate as follows:

I. Whether the trial court erred when it valued the marital residence in accordance with an appraisal report.

II. Whether the trial court erred when it valued the personal property of the marital estate based on the parties' stipulation.

III. Whether the trial court erred when it divided Husband's retirement accounts between the parties.

IV. Whether the trial court erred when it granted sole legal custody of the parties' child to Wife.

V. Whether the trial court erred when it denied Husband's request for an award of his attorney's fees.

VI. Whether the non-disparagement clause of the dissolution decree violates the First Amendment to the United States Constitution.

# Facts and Procedural History

[4] The parties were married on July 1, 2012, and had one child of the marriage ("Child") who was born on June 29, 2013. On January 4, 2019, Wife filed a verified petition for dissolution of the marriage, including a request for provisional orders. Wife subsequently requested a child custody and psychological evaluation pursuant to Indiana Trial Rule 35, and the court granted that request. On May 9, 2019, Husband filed his counter petition for provisional orders.

[5] On May 10, 2019, the trial court held a hearing on the parties' respective motions for provisional orders. On May 13, the court issued its preliminary orders which included orders that the parties had joint legal and physical custody of Child and that Wife had temporary exclusive possession of the marital residence.

[6] On January 22, 2021, the parties filed their "Stipulations as to Assets and Liabilities and Child Support Components" ("Stipulation"). App. at 89. The

Stipulation included stipulations that: Wife's weekly gross income was $2,248 and Husband's was $1,923; the household goods and furnishings were valued at $4,460; and the equity of Husband's Fidelity retirement accounts as of December 20, 2020, was $70,870 for the "Miami" account, $263,111 for the "NCAA" account, and $4,577 for the "IU TDA" account. The Stipulation did not state the value, debt, or equity of the marital residence.

[7] The court conducted the final dissolution hearing on January 25, February 1, and March 29 of 2021. Pursuant to Husband's Trial Rule 52 request, on May 12, 2021, the trial court issued Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage ("Final Decree"). The court attached to the Final Decree a document labeled Exhibit 1 and titled "Marital Balance Sheet." Appealed Order at 15. Exhibit 1 showed that the value of the total net marital estate was $593,346.72, Husband was awarded 56% of that total (i.e., $332,108.36), and Wife was awarded 44% of that total (i.e., $261,238.36).

[8] Regarding the marital estate, the Final Decree stated in relevant part that:

- the marital estate was to be divided 56/44 in Husband's favor;

- the marital residence had a value of $313,500 and equity in the amount of $207,864, and Wife was awarded the marital residence;

- the household goods had a value of $4,460 which the parties were to split equally;

- the "Miami" retirement account had equity of $70,870 and was awarded to Husband;

- the "IU TDA" retirement account had equity of $4,577.53 and was awarded to Husband;

- the "NCAA" retirement account had equity of $263,111, $204,708.83 of which was awarded to Husband, with the remaining $58,402.17 set over to Wife as an equalizing payment.

[9] Regarding physical and legal custody of Child, the Final Decree stated, in relevant part:

> 11) Custody. … Dr. [Kevin] Byrd conducted his custody evaluation and on August 26, 2019[,] provided a lengthy written report, which written evaluation was admitted into evidence.
>
> A. Dr. Byrd opined that "I would rest legal custody of [Child] on [Wife's] shoulders for the time being. [Husband] has a history of 'knowing better' than the professionals that provide health care for [Child] and this will interfere with the delivery of services. Further, until substantial progress is made i[n] co-parent counseling, [Husband] and [Wife] are not capable of joint decision-making." Dr. Byrd opined that the parties should have shared physical custody. Dr. Byrd recommended the parties utilize the OurFamilyWizard app in order to keep each other apprised of [Child's] appointments and procedures. [Wife] paid the fee and accepted the app, however, [Husband] refused to utilize OurFamilyWizard until shortly before trial when it was recommended by the Parenting Coordinator.

B. Dr. Byrd recommended that the parties should continue to work with Stephanie Lowe-Burry who was the counselor for [Child] alone. For a period of time, the parties did work with Mrs. Lowe-Burry, however, in late summer 2020, [Husband] created enormous obstacles in connection with [Child's] appointments with Lowe-Burry and directed her to not have further communication with [Child]. [Husband's] attitude exhibited that he felt he knew better than Lowe-Burry what was best for [Child] and refused to allow the resumption of therapy by Lowe-Burry with [Child]. On September 8, 2020, [Wife] filed her *Motion to Order Resumption of Therapy*. [Husband] objected to such Motion and, after a hearing, on September 23, 2020, the Court ordered [Husband] to cooperate with resumption of therapy with Lowe-Burry. Even after such Order, [Husband] refused to cooperate and, ultimately, Lowe-Burry determined the conflict created by [Husband] was so significant[] that it was not in the best interests of [Child] to continue to meet with Lowe-Burry, and she terminated the relationship.

C. Dr. Byrd recommended a parenting coordinator be utilized by the parties. [Wife] located a parenting coordinator, however [Husband] refused to agree to have a parenting coordinator involved with the family. On July 29, 2020, [Wife] filed her *Verified Petition for Appointment of Parenting Coordinator*. [Husband] objected to such request. After conducting a hearing, this Court issued its Order on October 29, 2020, appointing Robert Shive as parenting coordinator. The Court makes no finding as to co-parent counseling. Whether or not such counseling would be of

benefit to the parties is left to the discretion of the parenting coordinator.[1]

D. Dr. Byrd recommended the parties have shared physical custody on a 5-5-2-2 arrangement. The parties have had shared physical custody on an alternating week basis since May 2019 and [Child] has adjusted to this schedule. The parties should continue to have shared physical custody alternating weeks with [Child].

E. The parties have substantial difficulty discussing and jointly coming to agreement concerning the health, education, and welfare of [Child] and as a result joint legal custody is unworkable.

F. Mother should have sole legal custody of [Child].

*Id*. at 4-5.

[10] Regarding attorney fees, the trial court stated:

> As a result of the significant number of legal matters raised and resolved during the course of these dissolution proceedings, both parties have incurred significant attorney fees. Each has requested the other pay their attorney fees. The parties should each pay their own fees incurred in this matter.

*Id*. at 11.

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[1] The Final Decree also stated that the court's prior order appointing the parenting coordinator was to be "enforced and extended" and that each party "should fully cooperate with the parenting coordinator in all respects." *Id*. at 11.

[11] The Final Decree also contained a "Non-Disparagement" clause which stated in full:

> The parties shall refrain from making disparaging comments about the other in writing or conversation to or in the presence of [Child], friends, family members, doctors, teachers, associated parties, co-workers, employers, the parenting coordinator, media, the press, or anyone. Disparaging remarks include[e], but are not limited to, negative statements, criticisms, critiques, insults[,] or other defamatory comments. The parties shall not say or do anything or allow a third party to say or do anything about the other party in [Child's] presence that may estrange [Child] from the other party or impair his regard for the other party. The parties shall not involve [Child] in matters that are adult matters and that solely involve the parents or the other parent.

*Id*. at 11-12.

[12] Husband now appeals.

# Discussion and Decision

## Standard of Review

[13] Per Husband's request, the trial court entered findings pursuant to Indiana Trial Rule 52. Our standard of review in that situation is well-settled:

> First, we determine whether the evidence supports the findings and second, whether the findings support the judgment. In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. We do not reweigh the evidence but consider only the evidence favorable to

> the trial court's judgment. Challengers must establish that the trial court's findings are clearly erroneous. Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. However, while we defer substantially to findings of fact, we do not do so to conclusions of law. Additionally, a judgment is clearly erroneous under Indiana Trial Rule 52 if it relies on an incorrect legal standard. We evaluate questions of law de novo and owe no deference to a trial court's determination of such questions.

*Estate of Kappel v. Kappel*, 979 N.E.2d 642, 651-52 (Ind. Ct. App. 2012) (quotations and citations omitted); *see also Steele-Giri v. Steele*, 51 N.E.3d 119, 124 (Ind. 2016) ("On appeal [in a family law matter] it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal.") (quotation and citation omitted). Moreover, "there is a well-established preference in Indiana for granting wide latitude and deference to our trial judges in family law matters." *Id*. (quotation and citation omitted).

## Division of Marital Property

[14] Indiana Code Section 31-15-7-4 requires that a trial court divide marital property acquired before or during the marriage by either spouse in a "just and reasonable manner." Indiana Code Section 31-15-7-5 states that the trial court must "presume that an equal division of the marital property between the parties is just and reasonable." However, the presumption may be rebutted by "relevant evidence," including statutory factors such as:

• each spouse's contribution to the property's acquisition, regardless of whether the contribution produced any income;

• the extent to which a spouse acquired property, either before the marriage or through inheritance or gift;

• each spouse's economic circumstances at the time of divorce;

• the parties' conduct during the marriage, as it related to the disposal or dissipation of assets; and

• the parties' respective earnings or earning ability.

*Roetter v. Roetter*, 182 N.E.3d 221, 227 (Ind. 2022) (citing Ind. Code §§ 31-15-7-5(1)-(5)). In dividing marital property, a trial court must consider all of the statutory factors regarding reasonableness, but "it is not required to explicitly address all of the factors in every case." *Rose v. Bozeman*, 113 N.E.3d 1232, 1235 (Ind. Ct. App. 2019) (citation omitted).

## Valuation of the Marital Residence

[15] Husband asserts that the trial court erred in valuing the marital home at $313,500. "[A] valuation submitted by one of the parties is competent evidence of the value of property in a dissolution action and may alone support the trial court's determination in that regard." *Kakollu v. Vadlamudi*, 175 N.E.3d 287, 299 (Ind. Ct. App. 2021) (quotation and citation omitted), *trans. denied*. Moreover, "[i]f the trial court's chosen valuation is within the range of values

supported by the evidence, we will affirm." *Campbell v. Campbell*, 118 N.E.3d 817, 821 (Ind. Ct. App. 2019), *trans. denied*.

[16] The trial court based its valuation of the marital residence on the appraisal report of an appraiser hired by Husband. That report was entered into evidence as Petitioner's Exhibit 20, without objection, and supported the value the trial court placed on the marital residence. Husband's contention that the trial court should have based the value of the marital residence on Husband's testimony that he would have bought the residence for $345,000 is merely a request that we reweigh the evidence and judge witness credibility, which we may not do. *See Steele-Giri*, 51 N.E.3d at 124. The trial court did not err when it valued the property at $313,500 based on the appraisal report.

## Division of Personal Property

[17] On appeal, Husband asserts for the first time that the trial court erred in crediting him with having received personal property equal to the value of $2,230[2] because the personal items he took with him when he departed the marital residence and the items the court later awarded to him did not equate to a total value of $2,230.

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[2] Husband stipulated that the value of the "Household Goods and Furnishings" of the marital estate had a total value of $4,460. App. at 89, 91. Husband also proposed in his Exhibit C that the personal property valued at $4,460 be divided equally between the parties—i.e., each party was to receive "$2,230"—and that is what the trial court ordered. Ex. at 150-51.

[18] "When a party challenges the trial court's division of marital property, he must overcome a strong presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal." *Galloway v. Galloway*, 855 N.E.2d 302, 304 (Ind. Ct. App. 2006) (citation omitted). "[T]he burden of producing evidence as to the value of the marital property rests squarely on the shoulders of the parties and their attorneys." *Id*. (quotation and citation omitted). In addition, an issue raised by an appellant for the first time on appeal is waived. *See e.g., Plank v. Cmty. Hosp. of Ind., Inc.*, 981 N.E.2d 49, 53 (Ind. 2013) ("[A]ppellate review presupposes that a litigant's arguments have been raised and considered in the trial court."); *Carney v. Patino*, 114 N.E.3d 20, 29 n.6 (Ind. Ct. App. 2018) ("The trial court cannot be found to have erred as to an issue or argument that it never truly had an opportunity to consider."), *trans. denied*.

[19] Not only did Husband fail to provide any evidence regarding the value of any of the personal property items he was awarded, but he failed to raise the issue of the value of those items in the trial court at all. Therefore, he has waived the issue on appeal. *See id.*

## Retirement Accounts/Tax Consequences

[20] Husband asserts for the first time on appeal that the trial court erred by failing to consider tax consequences when assessing the values of his three Fidelity

retirement accounts.[3] However, again, an issue raised by an appellant for the first time on appeal is waived. *See Plank*, 981 N.E.2d at 53. Moreover, the burden of producing evidence as to the value of the retirement accounts was on the parties. *See Galloway*, 855 N.E.2d at 304. Because Husband failed to raise in the trial court the issue of the tax consequences resulting from the disposition of the retirement accounts and also failed to provide any evidence of such tax consequences, he has waived the issue of alleged tax consequences for review. *See id.*; *see also Hardin v. Hardin*, 964 N.E.2d 247, 254 (Ind. Ct. App. 2012) (holding Husband waived his argument related to the tax consequences of the disposition of marital property where he failed to present any evidence of the alleged tax consequences to the trial court).

## Legal Custody

[21] Husband maintains that the trial court erred when it granted sole legal custody of Child to Wife. Indiana Code Sections 31-17-2-13 and -15 provide that, when considering an award of joint legal custody, the trial court must consider the best interests of the child. In making that determination, the trial court must also consider six other listed factors, including "whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing

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[3] Indiana Code Section 31-15-7-7 states: "The court, in determining what is just and reasonable in dividing property under this chapter, shall consider the tax consequences of the property disposition with respect to the present and future economic circumstances of each party." However, "only tax consequences necessarily arising from the plan of distribution are to be taken into account." *Granger v. Granger*, 579 N.E.2d 1319, 1320 (Ind. Ct. App. 1991) (citation omitted), *trans. denied*.

the child's welfare." I.C. § 31-17-2-15(2). Thus, where the evidence showed that the parties "displayed neither the willingness nor the ability to communicate and cooperate for the best interests of [Child]," we have held the trial court did not abuse its discretion in awarding sole legal custody to one parent. *Kakollu v. Vadlamudi*, 175 N.E.3d 287, 297 (Ind. Ct. App. 2021), *trans. denied*.

[22] Here, the trial court found that Dr. Byrd, who conducted the custody evaluation, recommended that Wife have sole legal custody because Husband had a history of failing to cooperate with Child's service providers and the parties had "substantial difficulty discussing and jointly coming to agreement concerning the health, education, and welfare of [Child]." Appealed Order at 5. In addition, the trial court noted that Husband had "created enormous obstacles in connection with [Child's] appointments" with his counselor and refused to cooperate with the resumption of Child's therapy even after ordered to do so by the court.[4] *Id*. at 4. In fact, Child's counselor "determined the conflict created by [Husband] was so significant" that she had to terminate the therapeutic relationship with Child. *Id*. Husband also refused Wife's request to have a parenting coordinator assist the family as recommended by Dr. Byrd.

[4] Thus, the trial court's legal custody determination was not based "solely" on the opinion of Dr. Byrd, as Husband contends, but was also based on other evidence of Husband's refusal to cooperate with Wife and Child's service providers in obtaining services for Child. Appellant's Br. at 21.

[23] That evidence supports the trial court's findings on legal custody, and those findings support the ultimate determination that Wife should have sole legal custody of Child. Husband's assertions to the contrary are merely requests that we reweigh the evidence and judge witness credibility, which we will not do. *See Steele-Giri*, 51 N.E.3d at 124.

## Attorney's Fees

[24] Husband challenges the trial court's denial of his request that Wife be ordered to pay his attorney fees. Indiana Code Section 31-15-10-1 authorizes a trial court to order a party to pay the other party's costs and attorney's fees, and the court has broad discretion in granting or denying a request for such costs and fees. *See, e.g.*, *Barton v. Barton*, 47 N.E.3d 368, 377 (Ind. Ct. App. 2015), *trans. denied*. We will reverse a trial court's decision regarding attorney fees "only where the trial court's award is clearly against the logic and effect of the facts and circumstances before the court." *Id*.

[25] In determining whether to order a party to pay some or all of the other party's attorney's fees, the trial court may consider "the parties' resources, economic condition, ability to engage in gainful employment and earn income, and other factors bearing on the reasonableness of the award." *Ahls v. Ahls*, 52 N.E.3d 797, 803 (Ind. Ct. App. 2016) (citation omitted). In considering these factors, the court promotes "the legislative purpose for awarding attorney's fees, that is, to insure that a party in a dissolution proceeding who could not otherwise afford an attorney is able to retain representation." *Id*.

[26] Here, the trial court's decision to deny each party's request that the other pay his or her attorney's fees was supported by evidence that—as Husband admits—at the time of the final hearing, each party had a similar salary from employment. In addition, as the trial court noted, both parties incurred significant attorney fees "[a]s a result of the significant number of legal matters raised and resolved" by both parties during the course of the litigation. Appealed Order at 11. We further note that Husband was awarded 54% of the marital estate, versus Wife's 44%. Thus, the evidence of the parties' relative income and resources supports the trial court's decision that each party pay his or her own costs and attorney's fees. Husband's assertions to the contrary[5] are requests that we reweigh the evidence and judge witness credibility, which we may not do. *See Steele-Giri*, 51 N.E.3d at 124.

## Non-Disparagement Clause

[27] Finally, Husband asserts that the non-disparagement clause of the Final Decree is an unconstitutional prior restraint of speech. The First Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law … abridging the freedom of speech ….". U.S. Const., amend. I. "A prior restraint is a term used to describe 'administrative and judicial orders forbidding certain

[5] Specifically, Husband points to his own testimony that, at the time of the final hearing, he was "tapped out" and had paid "about all he could pay" in attorney fees. Tr. v. III at 150. He also notes that his salary was lower than Wife's throughout a portion of the litigation.

communications when issued in advance of the time that such communications are about to occur.'" *WPTA-TV v. State*, 86 N.E.3d 442, 447 (Ind. Ct. App. 2017) (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)). "Restraining orders and injunctions that forbid future speech activities," such as non-disparagement orders, "are classic examples of prior restraints." *In re Paternity of G.R.G.*, 829 N.E.2d 114, 124 (Ind. Ct. App. 2005) (citation omitted); *see also Shak v. Shak*, 144 N.E.3d 274, 277 (Mass. 2020) ("Nondisparagement orders are, by definition, a prior restraint on speech.").

[28] "The common thread running through free speech cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on free speech rights." *WPTA-TV*, 86 N.E.3d at 447 (citing *Neb. Press Ass'n. v. Stuart*, 427 U.S. 539 (1976)). Thus, while "a prior restraint is not per se unconstitutional," *id.*, it does come to a court "'bearing a heavy presumption against its constitutional validity,'" *In re Paternity of K.D.*, 929 N.E.2d 863, 868 (Ind. Ct. App. 2010) (quoting *N.Y. Times Co., v. U.S.*, 403 U.S. 713, 824 (1971)). To determine whether a prior restraint is constitutional under the First Amendment, the United States Supreme Court "has looked to (a) 'the nature and extent' of the speech in question, (b) 'whether other measures would be likely to mitigate the effects of unrestrained' speech, and (c) 'how effectively a restraining order would operate to prevent the threatened danger.'" *Shak*, 144 N.E.3d at 279 (quoting *Neb. Press Ass'n*, 427 U.S. at 562). In addition, "'the [United States Supreme] Court has repeatedly emphasized that the prior censorship of expression can be justified only by the most compelling

government interest.'" *David K. v. Lane*, 839 F.2d 1265, 1276 (7th Cir. 1988) (quoting *Brown v. Glines*, 444 U.S. 348, 364 (1980) (Brennan, J., dissenting)).

[29] There is a compelling government interest "in protecting children from being exposed to disparagement between their parents." *Shak*, 144 N.E.3d at 279 (quotation and citation omitted); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (noting safeguarding the physical and psychological well-being of minors is a compelling state interest); *G.R.G.*, 829 N.E.2d at 125 (holding a non-disparagement order was constitutionally permissible where it furthered the best interests of the child).

[30] To the extent the non-disparagement clause at issue in this case prohibits each parent from disparaging the other in Child's presence, the order furthers the compelling State interest in protecting the best interests of Child and does not violate the First Amendment. *See id*. Father does not contend otherwise. However, we agree with Father that the non-disparagement clause in this case goes far beyond furthering that compelling interest to the extent it prohibits the parents from "making disparaging comments" about the other in the presence of "anyone" even when Child is *not* present. Appealed Order at 11. *Cf. G.R.G.*, 829 N.E.2d at 124 (specifically noting that the constitutional non-disparagement clause at issue in that case did *not* preclude discussions with third parties outside the child's presence). Thus, the following portion of the

first sentence of the non-disparagement clause[6] is an unconstitutional prior restraint and must be stricken: "…friends, family members, doctors, teachers, associated parties, co-workers, employers, the parenting coordinator, media, the press, or anyone."

# Conclusion

[31] The trial court did not err in valuing the marital residence and personal property of the marriage, nor in dividing the retirement accounts. The court did not abuse its discretion in awarding Wife sole legal custody of Child and in denying Husband's request for an award of attorney fees. The non-disparagement clause of the Final Decree was an unconstitutional prior restraint on speech and overbroad to the extent it forbade the parties from making disparaging comments about the other when outside the presence of Child.

[32] Affirmed in part, reversed in part, and remanded with instructions to modify the non-disparagement clause in conformity with this opinion.

Najam, J., and Bradford, C.J., concur.

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[6] Husband does not challenge any other part of the non-disparagement clause.