MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In Re: The Marriage of

Bryan Bernstein,

Appellant-Respondent,

v.

Leaanne Bernstein,

Appellee-Petitioner.

February 12, 2024

Court of Appeals Case No. 23A-DN-292

Appeal from the Allen Superior Court

The Honorable Carolyn Foley, Special Judge

Trial Court Cause No. 02D08-2006-DN-606

Memorandum Decision by Judge Riley.
Judges Crone and Pyle concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Bryan Bernstein (Husband), appeals the trial court's dissolution of his marriage to Appellee-Respondent, Leaanne Bernstein (Wife).

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

ISSUES

[3] Husband presents this court with three issues, two of which we find dispositive and which we restate as:

(1) Whether the trial court failed to make adequate findings of fact to support its conclusions after a motion for findings of fact and conclusions thereon was made pursuant to Indiana Trial Rule 52; and
(2) Whether the trial court abused its discretion in concluding that a financial advisor-client privilege did not exist.

[4] Wife presents this court with one issue on appeal, which we restate as: Whether Wife is entitled to appellate attorney fees pursuant to Appellate Rule 66(E).

FACTS AND PROCEDURAL HISTORY

[5] Wife and Husband were married on August 30, 1969. On June 25, 2020, Wife filed her petition for the dissolution of the marriage. At the time of Wife's petition, there were no unemancipated children of the marriage. The parties participated in several mediations without success. On May 4, 2022, Husband filed a motion to exclude Adam Smith (Smith) as a witness and, alternatively,

to determine that he was not an expert witness. The motion alleged that Smith is the parties' son, Wife's current financial advisor, and had been Husband's financial advisor prior to the filing for dissolution. In his motion, Husband asserted that because Smith acted as his financial advisor in the past, he had access to Husband's privileged information. Husband claimed that "[a]llowing [Smith] to testify would violate [Husband's] privilege of confidentiality." (Appellant's App. Vol. II, p. 46). On May 27, 2022, the trial court denied Husband's motion.

[6] On August 25-26 and September 1, 2022, the trial court conducted a hearing on Wife's petition to dissolve the marriage. On January 13, 2023, the trial court entered the Decree of dissolution of marriage, finding in favor of the presumptive equal division of the marital estate between the parties.

[7] Husband now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Adequacy of Findings*

[8] Wife requested findings of fact and conclusions thereon pursuant to Trial Rule 52(A), which provides in relevant part: "[u]pon . . . the written request of any party filed with the court prior to the admission of evidence, the court in all actions tried upon the facts without a jury or with an advisory jury . . . shall find the facts specially and state its conclusion thereon." Ind. Trial Rule 52(A). Such findings should contain all of the facts necessary for a judgment for the party in whose favor conclusions of law are found. *Erb v. Erb*, 815 N.E.2d

1027, 1030 (Ind. Ct. App. 2004); *see also In re Estate of Inlow*, 735 N.E.2d 240, 250 (Ind. Ct. App. 2000) ("Special findings must contain all facts necessary to recovery by a party and the ultimate facts from which the court has determined the legal rights of the parties."). Further, "Trial Rule 52(A) 'is a method for formulating the ruling of the trial court, providing more specific information for the parties, and establishing a particularized statement for examination on appeal.'" *Mitchell v. Mitchell*, 695 N.E.2d 920, 923 (Ind. 1998) (quoting *Bowman v. Kitchel*, 644 N.E.2d 878, 879 (Ind. 1995)). In other words, when a request for special findings pursuant to Trial Rule 52 is made, a trial court is required to make complete special findings sufficient to disclose a valid basis under the issues for the legal result reached in the judgment. *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 834 (Ind. Ct. App. 2005), *trans. denied*. The purpose of such findings and conclusions is to provide the parties and the reviewing court with the theory upon which the case was decided. *Id*.

[9] It is well recognized that in dissolution proceedings, the trial court's careful review of the assets and debts included in the marital estate and their eventual division in its findings of fact and conclusions thereon facilitates our review on appeal. In his appellate brief, Husband requests this court to evaluate the trial court's findings of fact and conclusions thereon with respect to Husband's allegations that Wife dissipated and disposed of marital assets; the trial court's decision to apply the deferred distribution method to distribute Husband's pension benefits; and the trial court's equal division of the parties' marital estate.

1. *Dissipation and Distribution of Marital Assets*

[10] Husband alleged that Wife engaged in dissipation and disposition of marital assets. Specifically, Husband identified one instance of disposition of retirement funds, three instances of dissipation of funds in favor of the parties' son, Smith, and one instance of dissipation of retirement funds into risky and speculative investments. The alleged value of these five instances of perceived dissipation and disposition amounted to a significant amount and represented a large part of the marital estate.

[11] "Waste and misuse are the hallmarks of dissipation." *In re Coyle*, 671 N.E.2d 938, 943 (Ind. Ct. App. 1996). Our legislature intended that the term carry its common meaning denoting "foolish" or "aimless" spending. *Id*. Dissipation has also been described as the frivolous, unjustified spending of marital assets which includes the concealment and misuse of marital property. *Id*. It generally involves the use or diminution of the marital estate for a purpose unrelated to the marriage and does not include the use of marital property to meet routine financial obligations. *Id*. Factors to consider in determining whether dissipation has occurred include: (1) whether the expenditure benefited the marriage or was made for a purpose entirely unrelated to the marriage; (2) the timing of the transaction; (3) whether the expenditure was excessive or de minimis; and (4) whether the dissipating party intended to hide, deplete, or divert the marital asset. *Goodman v. Goodman*, 94 N.E.3d 733, 743 (Ind. Ct. App. 2018). Thus, whether a dissipation has occurred cannot be

determined by applying one factor; rather, the proper inquiry requires the trial court to weigh and balance various considerations.

[12] Disposition of marital assets, on the other hand, refers to transfers or transactions that are unusual or out of the ordinary but does not require a showing of waste or misuse to support a deviation from an equal division of the marital estate. *In re Coyle*, 671 N.E.2d at 944. Accordingly, the conduct of the parties as it relates to either the disposition or the dissipation of marital assets is relevant.

[13] In its Decree, the trial court, after enumerating Husband's allegations of dissipation and disposition of marital assets by Wife, cited to *In re Coyle* for its premise on dissipation and listed the legal factors to consider in its review. Without setting forth the specific and detailed facts as determined from the presented evidence and relevant to support its conclusion, nor having formulated a particularized statement to aid this court's review, the trial court concluded "[w]hile certainly Wife's investment strategies have resulted in a large loss and may appear, in retrospect, unwise or imprudent, in applying the factors as set forth above, the [c]ourt finds that Husband has failed to establish that Wife engaged in disposition or dissipation." (Appellant's App. Vol. II, p. 31). Not only did the trial court fail to include adequate findings to facilitate our review of its decision, the court also conflated the different legal theories of dissipation and disposition, as well as the different bases under which Husband claimed dissipation or disposition had occurred. As the trial court's findings are

insufficient—or rather are completely nonexistent—in accordance with Trial Rule 52(A), we remand for further proceedings.

2. *Husband's Pension Benefits*

[14] In dividing Husband's pension benefits, which had been in pay status since 2012 and were earned during the parties' marriage, the trial court discussed the relevant case law which advised courts of the variety of methods in distributing pension benefits. After enumerating the respective legal factors to consider for the immediate offset method and for the deferred distribution method, the trial court, without more, concluded, "[u]nder the totality of the circumstances presented to the [c]ourt, the [c]ourt finds that the deferred distribution method is the appropriate methodology for distribution of Husband's pension benefits." (Appellant's App. Vol. II, p. 32). However, the trial court did not specify which circumstances or presented facts propelled the application of one methodology over the other. In the absence of those factual findings, we cannot discern the appropriateness of the trial court's conclusion. Accordingly, we remand to the trial court for the formulation of findings of fact in accordance with Trial Rule 52(A).

3. *Equal Division of the Marital Estate*

[15] Although our Legislature established a statutory presumption in favor of an equal division of the marital estate, this presumption can be rebutted by a showing that one party has dissipated marital assets or disposed of marital property in an unusual or extraordinary manner. I.C. § 31-15-7-5; *In re Coyle*,

671 N.E.2d at 944. In support of its conclusion that "[u]nder the totality of the circumstances, Husband has not rebutted the presumption of the equal division of the parties' marital estate[,]" the trial court noted "See Paragraph 9, above[,]" which merely refers to the trial court's inadequate findings on dissipation and disposition. (Appellant's App. Vol. II, p. 37). Inasmuch as dissipation or disposition may affect the presumption of an equal division of property, we must conclude that the trial court's decision that an equal division of the marital estate is just and reasonable is unsupported by its findings, as it is yet unclear to what extent, if any, dissipation or disposition impacted the assets of the marital estate.

[16] In sum, Wife requested special findings pursuant to Trial Rule 52(A), and it is well established that such findings "must contain all facts necessary to recovery by a party and the ultimate facts from which the court has determined the legal rights of the parties." *See In re Estate of Inlow*, 735 N.E.2d at 250. The trial court's findings do not contain any facts, let alone the facts necessary to establish how the court arrived at its conclusions, and are therefore insufficient to permit meaningful appellate review. Accordingly, we remand this case to the trial court for further proceedings not inconsistent with this opinion.

II. *Privilege by Testifying Witness*

[17] On May 4, 2022, Husband filed a motion to exclude the parties' son, Smith, as a witness and, alternatively, to determine that he is not an expert witness. The motion alleged that Smith is Wife's current financial advisor and was

Husband's financial advisor prior to the filing for dissolution. In his motion, Husband claimed that "[a]llowing [Smith] to testify would violate [Husband's] privilege of confidentiality because Smith had acted as his financial advisor in the past and had, at that time, access to Husband's privileged information." (Appellant's App. Vol. II, p. 46). The motion also advised that Smith is a biased witness and has an interest in defending his actions as Wife's financial advisor because he benefitted significantly from Wife's business and gifts, which are now being characterized by Husband as amounting to dissipation and disposition of the marital estate. On May 27, 2022, the trial court rejected the proposed privilege and duty of confidentiality between a financial advisor and his client and denied Husband's motion. During the final hearing, Husband objected to Smith's testimony, to which the trial court ruled that it did not see "a privilege as it related to financial advisors within the Indiana" Rules of Evidence. (Transcript Vol. V, p. 103).

[18] We agree with Husband that the trial court's sole reliance on the Rules of Evidence to determine the existence of a privilege was misplaced. Rather, our Legislature has adopted several privileges not included in the Rules of Evidence, such as the accountant-client privilege, physician-patient privilege, and the newsman's privilege. *See generally Ernst & Ernst v. Underwriters Nat'l Assur. Co.*, 381 N.E.2d 897 (Ind. Ct. App. 1978).

[19] A fundamental principle of our system of adversarial justice is that the public has a right to every person's evidence. *Id*. at 84. Every person has a general duty to give what testimony he is capable of giving and any exemptions from

that obligation are distinct exceptions to the positive general rule. *Id*. This general principle, however, is subject to two broad exemptions: rules of exclusion and rules of privilege. *Id*. Unlike rules of exclusion, rules of privilege do not aid in the ascertainment of truth; instead, they frustrate the factfinding process by shutting out material and relevant information. *Id*. Their sole justification is the "protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." *Id*.

[20] Husband argues that the trial court should have applied the balancing test set forth in this court's opinion in *Ernst & Ernst* in determining whether a financial advisor-client privilege exists. Specifically, incorporating *Ernst & Ernst's* citation to Wigmore, Husband notes that there are four basic conditions of social policy which must be satisfied to establish a privilege: (1) the communications must originate in the confidence that they will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. *Ernst & Ernst*, 381 N.E.2d at 902 (quoting 8 J. Wigmore, Evidence, s 2285 (McNaughton rev. ed. 1961)). Husband misapplied *Ernst & Ernst*.

[21] In *Ernst & Ernst*, this court examined the scope of the accountant-client privilege found in Indiana Code section 25-2-1-23 (1993). *Id*. at 899. The court noted Wigmore's four-part test, which is used to justify the granting of a privilege, and determined that *Ernst & Ernst's* interpretation of the accountant-client privilege did not meet this test. *Id*. 902. Although *Ernst & Ernst* referred to Wigmore's test, contrary to Husband's interpretation, *Ernst* & *Ernst* does not stand for the proposition that a balancing test must be used to determine the existence or applicability of a privilege. *See also Terre Haute Reg'l Hosp., Inc. v. Basden*, 524 N.E.2d 1304, 1311 (Ind. Ct. App. 1988). Rather, *Ernst & Ernst* stands for the precedent that a statutory privilege must be limited to its purpose. *Id.; Ernst & Ernst*, 381 N.E.2d at 902. As stated in *Ernst & Ernst*,

> Thus, privileges do not exist in a vacuum. They are enacted to foster some relationship or protect some interest that is believed to be of sufficient social importance to justify the sacrifice of relevant evidence to the factfinding process. In analyzing the *nature and scope of any statutorily created privilege*, the first step is to determine the specific interest or relationship that the privilege seeks to foster. Only by doing this can a specific claim of privilege be evaluated against the principle that the public is entitled to every person's evidence."

[22] *Id*. (emphasis added). The *Ernst* court concluded that the purpose of the accountant-client privilege was to protect the welfare of the client and was personal to the client, not the accountant. *Id*. at 904. Accordingly, *Ernst & Ernst*, as also interpreted by *Terre Haute Regional Hospital*, does not stand for the proposition that the Wigmore four-part test should be used for the creation of

new privileges, but rather is applied to determine the scope of privileges created by statute. *See Terre Haute Reg'l Hosp.,* 524 N.E.2d at 1311. Since Husband cannot point to a statutorily created financial advisor-client privilege—and we did not locate any—we conclude that the trial court did not abuse its discretion in denying Husband's motion and objection to Smith's testimony.

[23] III. *Appellate Attorney Fees*

[24] On appeal, Wife requests this court to award her appellate attorney fees pursuant to Indiana Appellate Rule 66(E). Appellate Rule 66(E) authorizes our court to also award appellate attorney fees. Our court's discretion to award Rule 66(E) appellate attorney fees is limited to circumstances where the appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). "[T]he sanction is not imposed to punish mere lack of merit but something more egregious." *Troyer v. Troyer*, 987 N.E.2d 1130, 1148 (Ind. Ct. App. 2013) (citation omitted), *trans. denied*. As such, our court exercises caution in awarding appellate attorney fees because of the "potentially chilling effect the award may have upon the exercise of the right to appeal." *Holland v. Steele*, 961 N.E.2d 516, 529 (Ind. Ct. App. 2012), *trans. denied.*

> Indiana appellate courts have formally categorized claims for appellate attorney fees into "substantive" and "procedural" bad faith claims. To prevail on a substantive bad faith claim, the party must show that the appellant's contentions and arguments are utterly devoid of all plausibility. Procedural bad faith, on the other hand, occurs when a party flagrantly disregards the form

> and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. Even if the appellant's conduct falls short of that which is "deliberate or by design," procedural bad faith can still be found.

Thacker, 797 N.E.2d at 346-47 (internal citations omitted).

[25] Relying on both procedural and substantive bad faith, Wife, in a single paragraph argument, suggests that the combination of Husband's disregard for the briefing rules of this court and the lack of merit to his argument are sufficient to award her appellate attorney fees. We disagree. Far from presenting egregious and willful violations of the Rules of Appellate Procedure, we find that Husband's appellate brief abided by the briefing rules formulated in Appellate Rule 46(A) and, as demonstrated by this opinion, invoked arguments steeped in merit and consistent with reasonable advocacy grounded in established legal principles.

CONCLUSION

[26] Based on the foregoing, we hold that the trial court failed to make adequate findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52. In addition, we conclude that the trial court did not abuse its discretion by rejecting Husband's proposed financial advisor-client privilege. We also deny Wife's request for appellate attorney fees pursuant to Appellate Rule 66(E).

[27] Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion.

[28] Crone, J. and Pyle, J. concur