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IN THE
COURT OF APPEALS OF INDIANA

James K. Alifimoff,
Appellant / Cross-Appellee / Respondent,

v.

Regina K. Stuart,
Appellee / Cross-Appellant / Petitioner.

July 29, 2022

Court of Appeals Case No. 21A-DN-2320

Appeal from the Allen Circuit Court

The Honorable Wendy W. Davis, Judge
The Honorable Ashley N. Hand, Magistrate

Trial Court Cause No. 02C01-1703-DC-274

Pyle, Judge

Statement of the Case

[1] James Alifimoff ("Husband") appeals the trial court's denial of his motion to correct error filed with respect to the trial court's distribution of the marital assets in the dissolution of his marriage to Regina Stuart ("Wife"). Husband specifically argues that the trial court abused its discretion when it: (1) determined that suspended passive activity losses generated from the parties' passive real estate holdings were too speculative and remote to be included in the marital pot; and (2) included in the marital pot a tract of land located in Smith County, Kansas ("the Smith County tract"). On cross-appeal, Wife argues that the trial court abused its discretion in valuing four parcels of land located in Osborne County, Kansas ("the Osborne County tracts"). Concluding that the trial court did not abuse its discretion, we affirm the trial court's judgment.

[2] We affirm.[1]

Issues

1. Whether the trial court abused its discretion when it determined that suspended passive activity losses generated from the parties' passive real estate holdings were too speculative and remote to be included in the marital pot.

[1] We held an oral argument in this appeal in the Court of Appeals Courtroom on June 28, 2022. We thank all counsel for their able advocacy.

2. Whether the trial court abused its discretion when it included in the marital pot the Smith County tract.

3. Whether the trial court abused its discretion in valuing the Osborne County tracts.

Facts

[3] Husband and Wife met in January 1987 in Boston. They married in June 1991 and moved to Kansas in September 1991 to pursue employment opportunities, Husband as a pediatric anesthesiologist and Wife as a general surgeon. While living in Kansas, Wife gave birth to the parties' three children in 1993, 1995, and 1997.

[4] When Husband became unhappy with his job in 2005, Husband, Wife, and their three children moved to Fort Wayne, Indiana. In June 2006, Husband and Wife purchased a home in St. Croix ("the St. Croix home"). At some point in 2007, Husband and Wife purchased the Osborne County tracts.

[5] In November 2007, Husband entered into an installment sales agreement ("the Agreement") with Stephen and Vicki Hutchings ("the Hutchings") to purchase the Smith County tract. (Ex. Vol. 7 at 72). The Agreement's introductory paragraph identifies Husband as the purchaser of this property.[2] Pursuant to the terms of the Agreement, Husband agreed to pay the Hutchings $92,000 plus interest over the course of twenty years. In addition, the Agreement provided

[2] Paragraph five of the Agreement also identifies Wife as a purchaser. However, Wife did not sign the Agreement.

that Husband was entitled to immediate possession of the Smith County tract. The Agreement designated the State Bank of Downs as the escrow agent to hold the deed, a copy of the Agreement, a commitment for title insurance, and other papers pending fulfillment of the Agreement. In addition, the Agreement provided that Husband did not have "the right to assign or transfer [the Agreement] or any interest therein, or interest in and to said real estate" without the Hutchings' written consent. (Ex. Vol. 7 at 73).[3] Lastly, the Agreement provided that it "constitute[d] the entire agreement of the parties." (Ex. Vol. 7 at 74).

[6] In addition, a December 2007 title insurance "Owner's Policy Schedule A" identified Husband as both the insured and the "[p]urchaser under contract[]" of the Smith County tract. (Ex. Vol. 7 at 71). The insurance policy further provided that "[t]itle to the estate or interest in the land [wa]s vested in . . . [t]he interest of [Husband] under that certain Agreement for Installment Sale of Real Estate[.]" (Ex. Vol. 7 at 71).

[7] In March 2017, Wife filed a petition for dissolution of marriage, and Husband filed a counter-petition for dissolution of marriage. The trial court held a three-day hearing on the petitions in March and April 2021.

[8] At the hearing, Wife testified that the St. Croix house was "rented and, in a good year, cover[ed] its own upkeep but d[id] not cover the mortgage or the

[3] The record contains no such written consent.

insurance." (Tr. Vol. 2 at 76). Wife acknowledged that there had been passive activity losses on the St. Croix house but did not know the value of those losses. Wife further testified that if the trial court awarded her the St. Croix house, Wife "hope[d] to be able to afford to keep it." (Tr. Vol. 4 at 17). Wife specifically testified that "once [her] finances settle[d] down, [her] plan [was] to look into putting it into a trust for [her] children to inherit." (Tr. Vol. 4 at 17). When asked whether she had any plans to sell the St. Croix house, Wife responded, "I hope not." (Tr. Vol. 4 at 17).

[9] In addition, during Wife's testimony, the trial court admitted into evidence the Agreement between Husband and the Hutchings for Husband's purchase of the Smith County tract. Also, during Wife's testimony, the trial court admitted into evidence appraisals of the individual Osborne County tracts completed by Chris Froetschner ("Froetschner"), a Kansas auctioneer and appraiser. (Ex. Vol. 6 at 25). Froetschner completed a twenty-seven-page report, which included comparable sales data, soil sample maps, and plat information. Froetschner's report appraised the value of Osborne County tract one ("Osborne County tract one") at $392,000, Osborne County tract two ("Osborne County tract two") at $273,800, and Osborn County tracts three and four ("Osborne County tracts three and four") at a combined value of $316,000, for a total appraised value for the Osborne County tracts at $981,800. In addition, Froetschner valued the Smith County tract at $224,000.

[10] During Husband's testimony, the trial court admitted into evidence a one-page letter valuing the Osborne County tracts. (Ex. Vol. 7 at 65). This valuation

letter was from C.W. Remus ("Remus"), who is a Kansas real estate broker at Remus Real Estate. His letter explained that Ross Heinen ("Heinen"), a friend of Husband's, had asked Remus to give "an estimate of value" of the Osborne County tracts. (Ex. Vol. 7 at 65). The letter further identified three tracts.[4] Osborne County tract one is identified as comprising approximately 160 acres, Osborne County tract two is identified as comprising approximately 160 acres, including seventy-two acres of farmland and seventy-eight acres of pasture, river, and trees, and Osborne County tracts three and four are identified as comprising approximately 160 acres, including eighty-eight acres of farmland and seventy-two acres of pasture, creek, and trees. In the letter, Remus state[d] that "[a]fter reviewing the property and taking into consideration land sold th[at] past year[,]" Remus valued Osborne County tract one at $298,000, Osborne County tract two at $236,400, and Osborne County tracts three and four at $265,600. Remus' total valuation for the Osborne County tracts is $800,000.

[11] Husband testified that he believed that the values in Remus' letter reflected the fair market value of the Osborne County tracts. When Husband's counsel asked Husband why he believed that Remus' valuations were more accurate than Froetschner's valuations, Mother's counsel objected to the question based on a lack of foundation and hearsay. Mother's counsel clarified that where Remus' letter had already been admitted into evidence, it was simply not

[4] It appears that Remus combined tracts three and four into his tract three valuation.

relevant why Husband thought Remus was the more accurate appraiser. In addition, Mother's counsel acknowledged that the parties had agreed that Froetschner's report and Remus' letter would "come in without the sponsors" testifying. (Tr. Vol. 3 at 83). Mother's counsel further clarified that "the Court c[ould] weigh the exhibits that [were] in evidence and make its determination as to whether it f[ound] the exhibits to be credible or more, one to be more credible." (Tr. Vol. 3 at 78). Wife's counsel subsequently stipulated "that the numbers on the balance sheet [were] what [Husband] believe[d], from his opinion, [were] the correct fair market values of the [Osborne County tracts]." (Tr. Vol. 3 at 88). Wife's counsel further stated that "[o]bviously, there [was] a disagreement between the parties but if that [was] what [Husband's counsel] [was] trying to elicit from [Husband], we'll agree that that is what his opinion is." (Tr. Vol 3 at 88).

[12] Husband further testified that, in 2007, his friend, Heinen, wanted to purchase the Smith County tract from the Hutchings. However, according to Husband, the bank would not extend credit to Heinen for the purchase. Husband explained that, as he and Heinen were sitting in the banker's office, Husband told the banker to "just put [the Smith County tract] in [Husband's] name." (Tr. Vol. 3 at 91). According to Husband, he and Heinen had agreed that Heinen would farm the land and "would . . . pay the note on the property and that once the note was paid off, . . . [Husband] would sign the property over to [Heinen]." (Tr. Vol. 3 at 91). Husband testified that the only benefit that he had obtained in the transaction was Heinen's "friendship." (Tr. Vol. 2 at 93).

Husband further testified that Heinen had made all note and tax payments on the Smith County tract and that Husband had "no monetary interest in that piece of property whatsoever." (Tr. Vol. 2 at 93).

[13] Heinen testified that "[f]or all intents and purposes, [he] own[ed] [the Smith County tract]." (Tr. Vol. 3 at 103). Heinen explained that he had paid all payments on the installment contract as well as all tax payments on the property. The trial court admitted into evidence copies of Heinen's checks for the installment contract and tax payments. Heinen acknowledged during cross-examination that the deed to the Smith County tract and the title insurance to the property were both in Husband's name. Heinen further acknowledged that if he were to pass away, the title to the property would remain in Husband's name.

[14] Also at the hearing, Wife's counsel stipulated that Husband's witness, Certified Public Accountant Gregory Green ("Green"), was "an expert with tax matters." (Tr. Vol. 2 at 243). Green testified about the suspended passive activity losses that had been generated from the parties' passive real estate holdings. Green specifically explained that one category of passive activity "is essentially any type of an activity that a person, a business activity that a person would undertake if they do not materially participate in the operation of the activity." (Tr. Vol. 2 at 248). Green further explained that a second category of passive activity is a rental activity, such as the St. Croix house. According to Green, a person engaged in a rental activity cannot deduct, in any given tax year, the property's passive losses that exceed the property's passive income.

Green further explained that passive losses that exceed the passive income in any given tax year are suspended and can be carried forward to the next tax year and each succeeding tax year. Green also explained that those losses can be used in the future if the passive activity generates a passive income. Those losses may also be used when the passive activity is sold. According to Green, "if the taxpayer cashes out on that passive activity, any of those suspended losses can be absorbed and used to reduce the taxable income and hence taxes." (Tr. Vol. 2 at 249).

[15] Green further testified that he had "prepare[d] an analysis of suspended passive activity losses" on three of the parties' properties, including the St. Croix house, Tallgrass Prairie ("Tallgrass Prairie"), a professional practice real estate investment, and property in Osage County, Kansas ("the Osage County property"). (Tr. Vol. 2 at 243). Green further testified that he had reviewed the parties' tax returns from 1993 through 2019 and identified $674,679 of suspended passive activity loss for the St. Croix house, $65,078 of suspended passive activity loss for Tallgrass Prairie, and $53,372 of suspended passive activity loss for the Osage County property. Green explained that quantifying the value of these suspended passive activity losses "c[a]me down to determining the dollar amount of the tax savings that resulted from being able to use or absorb those . . . suspended passive activity losses." (Tr. Vol. 3 at 5). Green further testified that, based on a 30% tax rate, Green had calculated that Wife had $295,903 of suspended passive activity losses attributable to the St.

Croix house and Tallgrass Prairie and that Husband had $21,349 of suspended passive activity losses attributable to the Osage County property.

[16] Green acknowledged that his calculation of available suspended passive activity losses did not mean that the suspended passive activity losses could be used and that it was possible that "in future years, one may never . . . meet the requirements to be able to take the deductions[]" for the suspended passive activity losses. (Tr. Vol. 3 at 27). For example, Green agreed that if a party "has no rental income for a property . . . then he or she would [not] be able to use the passive activity losses in that particular year[.]" (Tr. Vol. 3 at 27). Green further agreed that the parties had not been able to use suspended passive activity losses in the St. Croix house in 2010, 2011, 2012, 2014, 2018, and 2019. In addition, according to Green, if a party died before he or she had absorbed the suspended passive activity losses, the party would not be able to use those losses. Green was unsure whether a suspended passive activity loss would transfer to a decedent's estate.

[17] After hearing the testimony, in June 2021, the trial court issued a detailed forty-seven-page order with, as requested by both Husband and Wife, findings of fact and conclusions of law. (App. Vol. 2 at 32). The trial court's order specifically provides, in relevant part, as follows:

> 33. The first line item that contains materially different values relates to real estate in Osborne County, Kansas that consists of four tracts of real estate for tax purposes but are also described colloquially as three tracts, and one tract of real estate in Smith County, Kansas. [Wife] had these

parcels appraised by Chris Froetschner, an auctioneer and appraiser at Carr Auction & Real Estate, Inc. ([Wife]'s Exhibit 5, Tab 2). Mr. Froetschner's appraisals are made by a real estate auctioneer/appraiser in Larned, Kansas and contain comparable sales data, platting and sales history. Mr. Froetschner valued Osborne County Tract #1 at $392,000.00, Osborne County Tract #2 at $273,800.00, Osborne County Tract #3 and #4 valued together at $316,000.000 (hereinafter "Tract #3") and Smith County Tract #5 at $224,000.00.

34. [Husband] had the real estate appraised by C.W. Remus of Remus Real Estate. Mr. Remus is a real estate broker . . . who sells real estate in both Osborne and Smith County, Kansas. Mr. Remus valued Tract #1 at $298,000.00, Tract #2 at $236,500.00,[5] and Tract #3 at $265,600.00. Mr. Remus did not appraise Tract #5 in Smith County, Kansas. See Exhibits F, G, and H.

35. Both values submitted by the parties were dated to represent values at or around the date of filing.

36. From the evidence submitted, the Court finds the fair and reasonable value for Osborne County Tract #1 to be $345,000.00 and awards the acreage at the value of $345,000.00 to [Husband].

* * *

38. From the evidence submitted, the Court finds the fair and reasonable value for Osborne County Tract 2 to be $255,100.00 and awards the acreage at the value of $255,100.00 to [Husband].

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[5] Remus valuation of Osborne County tract two was $236,400. This is a clerical error in the trial court's order.

39. From the evidence submitted, the Court finds the fair and reasonable value for Osborne County Tract 3 to be $290,800.00 and awards the acreage at the value of $290,800.00 to [Husband].

40. There also is a disputed tract of real estate in Smith County, Kansas[.] [Husband] is purchasing this parcel of real estate pursuant to an Agreement for Sale of Real Estate ([Wife]'s Exhibit 1). That agreement lists [Husband] as the sole buyer and provides that the seller was to provide [Husband] with a title insurance policy to the real estate in favor of [Husband] and [Wife] as title purchasers under the agreement. That title insurance policy was issued to [Husband] as insured and states fee simple title is vested in [Husband] under the Agreement. See Exhibit I. [Husband] claims that . . . Ross Heinen is the owner of the real estate and [Husband] . . . merely obtained the financing for Mr. Heinen. Mr. Heinen testified that he has made all payments on this real estate and has an undocumented "deal" with [Husband] to receive this real estate upon payment in full. [Wife] and [Husband] both testified that [Wife] was unaware when [Husband] and Mr. Heinen made this alleged "deal."

41. Neither [Husband] nor [Wife] presented any evidence that either of them made any monetary contribution toward this property. The Court has thoroughly considered the evidence presented from [Wife], [Husband], and Ross Heinen. The Court has reviewed the Installment Contract (Exhibit I) and the cashed checks of Ross Heinen (Exhibit I). There is no evidence that [Husband] used any marital money, at any time, for the purchase of the Smith County land.

42. Whether or not [Husband] and Mr. Heinen have a "deal" is immaterial. [Husband] has a contractual right to the Smith County real estate. Even Mr. Heinen confirmed that [Husband] has a contractual right to the property.

Mr. Heinen testified that if he died before the installment contract was paid in full, then the real estate would go to [Husband]. This "deal" appears more like a lease wherein Mr. Heinen leases the land from [Husband] for the amount equal to the mortgage and farms the ground, rather than a land contract which would transfer the ownership to Mr. Heinen.

43. The Court finds that [Husband] has a contractual interest in the Smith County Tract #5 and said interest is part of the marital estate. *See Henderson v. Henderson*, 139 N.E.3d 227, 233 (Ind. Ct. App. 2019). The Court further finds from the evidence submitted to the Court the fair and reasonable value for Smith County Tract 5 to be $224,000.00 and awards the acreage at the value of $224,000.00 to [Husband][.]

* * *

57. [Husband]'s Exhibit A through Z-l also contained a line item for "Tax Savings on Suspended Passive Activity losses." Mr. Green testified that these calculations were based on his review of the parties' tax returns and related to the Kansas and St. Croix real estate. [Wife] testified that she has no intention of selling the St. Croix real estate and that she was hopeful to preserve that real estate for the children. Likewise, [Wife] testified that in retirement she may live in the St. Croix real estate. The parties' abilities to use suspended passive activity losses are remote and speculative, especially as to the St. Croix real estate where there have been several years when no passive activity losses have been used or deducted. See [Husband]'s Exhibit D-2. These suspended passive activity losses are too remote and speculative to be considered part of the parties' marital estate and placed on their marital estate balance sheet. *See Harlan v. Harlan*. 544 N.E.2d 553, 553 (Ind. Ct. App. 1989), *aff'd*, 560 N.E.2d 1246 (Ind. 1990).

> 58. Gregory Green testified at length concerning the Passive Activity Loss (PAL) which are losses that have accrued on the parties' investment properties during their marriage. Mr. Green reported that assets requested by [Wife] to be set over to her (St. Croix house) will have a PAL for future use of $739,757.00, which as of the date of trial, when quantified to dollars at [Wife]'s marginal tax rate is $295,902.00. Mr. Green testified that [Husband] will have a PAL for future use on the assets requested by [Husband] to be set over to him (Kansas farm property) of $53,372.00 which as of the date of trial, when quantified to dollars at [Husband]'s marginal tax rate is $21,349.00. This asset, while presently vested in the parties for use with the property to be set over to them, is speculative in nature and the possibility of divestiture upon presently unknown future events such as whether the asset can pass to a subsequent owner or death of the parties, and unknown passive activity gains, precludes this Court from finding this to be a marital asset. The PAL is too remote and speculative to be included as a martial asset for either party. No passive activity loss is assigned to either party.

(App. Vol. 2 at 40-50).

[18] In July 2021, Husband filed a motion to correct error, wherein he argued that "[t]he [trial] [c]ourt erred in excluding from the marital assets the parties' Suspended Passive Activity Losses generated by the marital real estate investments." (App. Vol. 2 at 233) In support of his argument, Husband directed the trial court to *Magee v. Garry-Magee*, 833 N.E.2d 1083 (Ind. Ct. App. 2005). According to Husband, *Magee* "suggest[ed] that Indiana courts treat carry-overs as marital assets to be valued and divided." (App. Vol. 2 at 235). Husband also argued that the trial court erred in including the Smith County

tract in the marital estate. According to Husband, although he had "a contractual interest in the [Smith County tract], that interest ha[d] no value because it [was] subordinate to the agreement with Heinen and to Heinen's equitable and legal interest in the property." (App. Vol. 2 at 226).

[19] At the September 2021 hearing on Husband's motion, Husband's counsel suggested that if Wife loved St. Croix, Wife could sell the St. Croix house, absorb the suspended passive activity losses, and purchase another home. Following the hearing, the trial court entered an order denying Husband's motion to correct error. That order provides, in relevant part, as follows:

> 3. The Court, having heard evidence as it relates to [Husband]'s Motion to Correct Errors now DENIES [Husband]'s Motion to Correct Error for the following reasons.
>
> 4. As it relates to the [Smith County tract], the Court found that [Husband] has a contractual interest in the [Smith County tract]. Having considered the underlying arrangement - that both [Husband] and Mr. Heinen testified to, the Court still finds that the contractual interest in the [Smith County tract] remains a marital asset awarded to [Husband].
>
> 5. Further, the Court is not persuaded by [Husband]'s valuation of the property at zero, as the real estate has been appraised and the valuation by the appraiser was $224,000.00. The arrangement with Mr. Heinen does not change the value of the [Smith County tract]. As such, [Husband's]'s Motion to Correct Error as it relates to the [Smith County tract] is DENIED.

6. As it relates to the suspended passive activity loss carryover from the St. Croix and Kansas properties, the Court finds that the tax consequences for the passive activity loss carryover are too speculative and remote to be included as a marital asset on the Marital Balance Sheet.

7. Further, Mr. Green, provided evidence to the Court that the passive activity loss carryover on the St. Croix property was $739,757.00. [Husband] has attempted to place a value on that passive loss carryover activity by using the marginal tax rate of [Wife] as if that asset was immediately available to [Wife]. While the passive activity loss carryover can be used each year by the owner of the property, the exact amount of benefit that each party would receive, either from the St. Croix property or the Kansas property, is too speculative in nature for the Court to set a specific dollar value on the passive activity loss carryover for either property.

8. The Court is not persuaded by the *Magee v. Garrv-Magee* case cited by [Husband] to hold that tax loss on carryover is a marital asset. 833 N.E.2d 1083 (Ind. Ct. App. 2005). The Court addresses tax loss carry over from a stock sold during the marriage. The tax loss in th[at] case was a stock that can be immediately sold and loss realized by the parties. While the passive activity loss carryover may be known to the parties, the value of that tax benefit is speculative as it is unknown whether the full passive loss carryover will ever be fully used by either party. The passive activity loss carryover cannot be reduced to a specific dollar amount as [Husband] proposes to do, with any certainty, and the entire passive activity loss carryover is not available for immediate use by the parties. The Court assigns the passive activity loss carry over for the St. Croix property to [Wife] as the real estate was awarded to [Wife], and the passive activity loss for the Kansas property to [Husband] in the same manner the Court of

Appeals affirmed the trial court in *Smith v. Smith*, 136 N.E.3d 275, 283-284 (Ind. Ct. App. 2019).

9. As such, the Court now DENIES [Husband]'s Motion to Correct Error as it relates to the passive activity loss.

(App. Vol. 2 at 30-31).

[20] Husband now appeals the denial of his motion to correct error as it relates to the distribution of the marital assets. Wife cross-appeals the trial court's valuation of the Osborne County tracts.

Decision

[21] Husband appeals the trial court's denial of his motion to correct error. Our standard of review in such cases is well-established. We review a trial court's ruling on a motion to correct error for an abuse of discretion. *Old Utica School Preservation, Inc. v. Utica Township*, 7 N.E.3d 327, 330 (Ind. Ct. App. 2014), *trans. denied.*

[22] Husband specifically argues that the trial court abused its discretion when it: (1) determined that suspended passive activity losses generated from the parties' passive real estate holdings were too speculative and remote to be included in the marital pot; and (2) included in the marital pot the Smith County tract. On cross-appeal, Wife argues that the trial court abused its discretion in valuing the Osborne County tracts.

[23] The division and valuation of marital assets is a matter within the discretion of the trial court. *England v. England*, 865 N.E.2d 644, 648 (Ind. Ct. App. 2007),

trans. denied. It is also within the trial court's discretion to determine whether an asset is a marital asset. *Harrison v. Harrison*, 88 N.E.3d 232, 234, (Ind. Ct. App. 2017), *trans. denied*. This Court will reverse the trial court's determination only if that discretion is abused. *Id*. We have previously explained that an abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. "The 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." *Roetter v. Roetter*, 182 N.E.3d 221, 225 (Ind. 2022) (citation and internal quotation marks omitted). This presumption is one of the strongest presumptions applicable to our consideration on appeal. *Bringle v. Bringle*, 150 N.E.3d 1060, 1073 (Ind. Ct. App. 2020), *trans. denied*.

[24] In reviewing a trial court's disposition of the marital assets, we focus on what the trial court did and not what it could have done. *Id*. We may not reweigh the evidence or assess the credibility of witnesses, and we will consider only the evidence most favorable to the trial court's disposition of the marital property. *Id*. Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the trial court. *Id*.

[25] We further note that both Husband and Wife requested specific findings and conclusions pursuant to Indiana Trial Rule 52(A). The purpose of Trial Rule 52(A) is to provide the parties and the reviewing court with the theory upon which the trial court decided the case in order that the right of review for error may be effectively preserved. *In re Paternity of S.A.M.*, 85 N.E.3d 879, 885 (Ind.

Ct. App. 2017). When a trial court enters findings of fact and conclusions of law pursuant to Trial Rule 52, we apply the following two-tiered standard of review: (1) whether the evidence supports the findings; and (2) whether the findings support the judgment. *Hazelett v. Hazelett*, 119 N.E.3d 153, 157 (Ind. Ct. App. 2019). 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 the judgment. *Id*. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id*.

[26] In conjunction with the Trial Rule 52 standard, there is a longstanding policy that appellate courts should defer to the determination of trial courts in family law matters. *Gold v. Weather*, 14 N.E.3d 836, 841 (Ind. Ct. App. 2014), *trans. denied*. We accord this deference because the trial court, who saw and interacted with the witnesses, is in the best position to assess credibility and character. *Id*. We now turn to the parties' specific arguments.

1. Suspended Passive Activity Losses

[27] Husband first argues that the trial court abused its discretion when it determined that suspended passive activity losses generated from the parties' passive real estate holdings were too speculative and remote to be included in the marital pot.

[28] It is well-settled that in a dissolution action, all marital property goes into the marital pot for division, whether it was owned by either spouse before the marriage, acquired by either spouse after the marriage and before the final

separation of the parties, or acquired by their joint efforts. IND. CODE § 31-15-7-4(a); *Falatovics v. Falatovics*, 15 N.E.3d 108, 110 (Ind. Ct. App. 2014). For purposes of dissolution, property means "all the assets of either party or both parties." I.C. § 31-9-2-98. "The requirement that all marital assets be placed in the marital pot is meant to insure that the trial court first determines that value before endeavoring to divide property." *Montgomery v. Faust*, 910 N.E.2d 234, 238 (Ind. Ct. App. 2009). "Indiana's 'one pot' theory prohibits the exclusion of any asset in which a party has a vested interest from the scope of the trial court's power to divide and award." *Wanner v. Hutchcroft*, 888 N.E.2d 260, 263 (Ind. Ct. App. 2008). While the trial court may decide to award a particular asset solely to one spouse as part of its just and reasonable property division, it must first include the asset in its consideration of the marital estate to be divided. *Hill v. Hill*, 863 N.E.2d 456, 460 (Ind. Ct. App. 2007). The systematic exclusion of any marital asset from the marital pot is erroneous. *Wilson v. Wilson*, 409 N.E.2d 1169, 1173 (Ind. Ct. App. 1980). Despite this broad definition of property for the purposes of the dissolution statutes, some property interests are still considered too remote to be assets capable of division. *Fiste v. Fiste*, 627 N.E.2d 1368, 1372 (Ind. Ct. App. 1994), *disapproved of on other grounds by Moyars v. Moyars*, 717 N.E.2d 976, 979 n.2 (Ind. Ct. App. 1999).

[29] Further, INDIANA CODE § 31-15-7-7 provides that, "[t]he 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." "This statute,

however, requires the trial court to consider only the direct or inherent and necessarily incurred tax consequences of the property division." *Priore v. Priore*, 65 N.E.3d 1065, 1077 (Ind. Ct. App. 2016), *trans. denied*. "A taxable event must occur as a direct result of the court-ordered disposition of the marital estate for the resulting tax to reduce the value of the marital estate." *Granger v. Granger*, 579 N.E.2d 1319, 1321 (Ind. Ct. App. 1991), *trans. denied*.

[30] Here, the trial court cited *Harlan v. Harlan*, 544 N.E.2d 553 (Ind. Ct. App. 1989), in support of its conclusion that the suspended passive activity losses generated from the parties' passive real estate holdings were too speculative and remote to be included in the marital pot. In the *Harlan* case, the trial court deducted from the marital estate the possible tax liability that would be incurred if the husband sold one of his businesses. On appeal, the wife argued that the trial court had abused its discretion when it had subtracted the value of the possible tax liability from the value of the business.

[31] We set forth the predecessor to INDIANA CODE § 31-15-7-7, reviewed cases which had been decided before the 1985 enactment of the statute where this Court had affirmed the trial court's consideration of the tax consequences of the property distribution, and concluded as follows:

> The thrust of the Statute is to recognize that there may be in the plan of division of marital property certain tax consequences which should be taken into account. The clear inference is that *only* tax consequences necessarily arising from the plan of distribution are to be taken into account, not speculative

> possibilities. The Statute specifically limits the trial court to consider only the tax consequences '*of the property disposition*.'

Harlan, 544 N.E.2d at 555 (emphases in the original). Thereafter, we reviewed the facts in *Harlan* and determined that "[t]here were no inherent, necessarily incurred tax consequences to be taken into account in th[at] case." *Id*. We specifically found that there was no evidence in the record of expected tax consequences from the trial court's division of the marital assets. *Id*. Under these circumstances, we concluded that "there [was] no ominous specter of an IRS agent lurking in the shadows waiting to pounce on this plan of distribution[]" and, therefore, concluded that the trial court had abused its discretion in distributing the marital assets. *Id*. at 556. *See also Hardin v. Hardin*, 964 N.E.2d 247, 254 (Ind. Ct. App. 2012) (concluding that the trial court did not abuse its discretion in failing to consider tax consequences where "no evidence was presented as to the potential tax consequences *that would result from the property disposition* of awarding to Husband the individual retirement account and personal savings plan.") (emphasis added); *Granger*, 579 N.E.2d at 1321 (explaining that where the record did not establish that the sale of two laundromats was an immediate consequence of the property disposition, the trial court erred in considering the possible tax consequences from the sale of the laundromats when assessing the value of the marital estate).

[32] Here, as in *Harlan*, *Hardin*, and *Granger*, there are simply no inherent, necessarily incurred tax consequences resulting from the trial court's property distribution order, and no taxable event has occurred as a direct result of the

court-ordered disposition of the marital estate. Indeed, Husband's witness, tax expert Green, acknowledged the possibility that the requirements to take the deductions for the suspended passive activity losses might never be met. Accordingly, the trial court did not abuse its discretion when it determined that suspended passive activity losses generated from the parties' passive real estate holdings were too speculative and remote to be included in the marital pot. We find no error.[6]

2. The Smith County Tract

[33] Husband also argues that the trial court abused its discretion in including the Smith County tract in the marital pot because he contends that the parties do not own it. Specifically, according to Husband, he has no monetary interest in that property. Rather, Husband points out that it is Heinen who has made all note and tax payments on the Smith County tract.

[34] The trial court cited *Henderson v. Henderson*, 139 N.E.3d 227, 233 (Ind. Ct. App. 2019) in support of its conclusion that Husband had a contractual interest in the Smith County tract and this interest was part of the marital estate. In the *Henderson* case, the husband had entered into a contract with the sellers to purchase property in March 2010. The contract required the husband to make

[6] We further note that Husband's reliance on *Magee*, 833 N.E.2d at 1083 is misplaced because the facts in *Magee* are distinguishable from those before us. Specifically, *Magee* was a contract construction case, which involved tax loss carryovers from the sale of stock during the parties' marriage. The parties' tax loss was immediate and their tax loss carryovers were not restricted in use.

annual payments for twenty years. On the date that the contract was executed, the husband took possession of the real estate. In addition, the contract prohibited the husband from renting or leasing the property to another person and from selling or assigning his interests in the property without the sellers' written consent. The contract also provided that when the husband had paid all sums due under the contract, the sellers would convey the warranty deed to the husband. In the 2017 dissolution proceedings, the trial court included the property in the marital estate. On appeal of the trial court's property distribution, the husband argued that the property was not a divisible marital asset. The husband specifically argued that the sellers had title to the property, the husband was merely a conditional purchaser who might eventually receive title to the property, and the trial court did not have the authority to distribute his mere equitable interest in the property.

[35] This Court determined that the husband had a vested interest in the contract, and his equitable interest in the property was not indeterminate but derived from the contract. *Id*. at 234. We further noted that our supreme court's discussion in *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), regarding the ownership of property purchased via a land contract supported our determination. *Id*. In *Skendzel*, our supreme court held as follows:

> Under a typical conditional land contract, the vendor retains legal title until the total contract price is paid by the vendee. Payments are generally made in periodic installments. Legal title does not vest in the vendee until the contract terms are satisfied, but equitable title vests in the vendee at the time the contract is consummated. When the parties enter into the contract, all

> incidents of ownership accrue to the vendee. The vendee assumes the risk of loss and is the recipient of all appreciation in value. The vendee, as equitable owner, is responsible for taxes. The vendee has a sufficient interest in land so that upon sale of that interest, he holds a vendor's lien.
>
> This Court has held, consistent with the above notions of equitable ownership, that a land contract, once consummated constitutes a present sale and purchase. The vendor has, in effect, exchanged his property for the unconditional obligation of the vendee, the performance of which is secured by the retention of the title by the vendor. Conceptually, therefore, the retention of the title by the vendor is the same as reserving a lien or mortgage. Realistically, vendor-vendee should be viewed as a mortgagee-mortgagor. To conceive of the relationship in different terms is to pay homage to form over substance.

Henderson, 139 N.E.3d at 234-35 (quoting *Skendzel*, 301 N.E.2d at 646 (citations and quotation marks omitted)).

[36] In *Henderson*, we noted that, pursuant to the contract, the husband enjoyed full use and occupancy of the real estate, paid taxes on it, and maintained the insurance. *Id*. at 235. We further noted that the husband, not the sellers, bore the risk of loss and would benefit from any appreciation in value of the real estate. *Id*. In addition, upon the husband's full performance and payment of all sums due under the contract, the sellers were obligated to convey to the husband the real estate by warranty deed. *Id*. We noted that the sellers' retention of the legal title to the property was akin to a mortgage on the property and concluded that the trial court had not abused its discretion when it

included the husband's contractual interest in the property in the marital estate. *Id*.

[37] Here, the facts before us are substantially similar to those in *Henderson*. Specifically, the Agreement identified Husband as the purchaser, who agreed to pay the Hutchings $92,000 plus interest over the course of twenty years and who was entitled to immediate possession of the Smith Country tract. Additionally, Husband did not have the right to assign or transfer the Agreement, any interest therein, or any interest in the real estate without the Hutchings' written consent. Husband offered no such consent. We further note that the title insurance policy identified Husband as both the insured and the purchaser of the property. In addition, Heinen acknowledged that if he were to pass away, the title to the property would remain in Husband's name. Because the trial court's decision to include the Smith County tract in the marital pot is not clearly against the logic and effect of the facts and circumstances before the court, we find no abuse of the trial court's discretion.

3. The Osborne County Tracts

[38] On cross-appeal, Wife argues that the trial court abused its discretion in valuing the Osborne County tracts. As previously stated, "[w]e review a trial court's decision in ascertaining the value of property in a dissolution action for an abuse of discretion." *Henderson*, 139 N.E.3d at 235 (citation and internal quotation marks omitted). Generally, a trial court does not abuse its discretion if its chosen valuation is within the range of values supported by the evidence.

Id. "The burden of producing evidence as to the value of the marital property rests squarely on the shoulders of the parties and their attorneys." *Id*. (citations and internal quotation marks omitted). Further, "[t]he owner of real estate is assumed to possess sufficient acquaintance with it to estimate the value of the property although his knowledge of the subject matter would not qualify him if he were not the owner." *Jordan v. Talaga*, 532 N.E.2d 1174, 1188 (Ind. Ct. App 1989), *trans. denied*. "If the trial court's 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*.

[39] Here, Froetschner's report appraised the value of Osborne County tract one at $392,000, Osborne County tract two at $273,800, and Osborn County tracts three and four at a combined value of $316,000, for a total appraised value for the Osborne County tracts at $981,800. Husband submitted a letter from real estate broker Remus, who valued Osborne County tract one at $298,000, Osborne County tract two at $236,400, and Osborn County tracts three and four at a combined value of $265,600, for a total appraised value for the Osborne County tracts at $800,000. Husband testified that he believed that the values in Remus' letter reflected the correct fair market value of the Osborne County tracts. The trial court averaged Froetschner's values and Remus' values and valued Osborne County tract one at $345,000, Osborne County tract two at $255,100, and Osborne County tracts three and four at $290,800, for a total appraised value of the Osborne tracts at $890,900.

[40] On cross-appeal, Wife argues that "[t]he trial court abused its discretion and erred in averaging the values presented for three Osborne County, Kansas tracts of real estate." (Wife's Appellee/Cross-Appellant Br. 28). However, because the trial court's valuation of the Osborne County tracts was within the range of values supported by the evidence, we find no abuse of the trial court's discretion. *See Campbell*, 118 N.E.3d at 821. [7]

[41] Affirmed.

Robb, J., and Weissmann, J., concur.

[7] To the extent Wife now argues that "[t]he 'estimate of value' submitted by [Husband] lacks foundation, is not credible, and should be disregarded.[,]" (Wife's Appellee/Cross-Appellant Br. 29), we note that Wife agreed at the hearing that both Froetschner's and Remus' valuations would be admitted into evidence, and the trial court would determine which valuation it found to be more credible. The trial court simply averaged the two valuations.