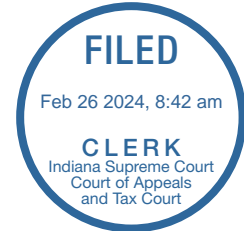


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

Roger L. Fogelsong,
Appellant-Respondent

v.

Lisa M. Fogelsong,
Appellee-Petitioner

February 26, 2024

Court of Appeals Case No.
23A-DC-1781

Appeal from the Cass Superior Court
The Honorable James K. Muehlhausen, Judge
Trial Court Cause No.
09D01-2209-DC-136

Memorandum Decision by Chief Judge Altice
Judges Weissmann and Kenworthy concur.

Altice, Chief Judge.

Case Summary

[1] Roger and Lisa Fogelsong filed cross petitions for dissolution of their thirty-two-year marriage. The trial court divided the marital estate equally but awarded Lisa, who is disabled, spousal maintenance in the amount of \$1,250 per month. On appeal, Roger argues that the trial court abused its discretion when valuing the marital residence and in awarding spousal maintenance. He also contends that the trial court improperly excluded or included certain items as assets of the marital estate.

[2] We affirm.

Facts & Procedural History

[3] Roger and Lisa married in May 1990 and later had two sons, who are now well into adulthood. Lisa began having health issues around 2006 and was eventually diagnosed with lupus and fibromyalgia. She had “three failed back surgeries” and continues to suffer from chronic pain, vision problems, migraines, and other health issues related to her diagnoses. *Transcript* at 18. Lisa has been receiving Social Security Disability Insurance payments (SSDI) since 2012 and stopped working around that time with Roger’s blessing. The only time she has worked since 2012 was a few times sporadically and part-time to substitute for her sister answering phones at a local business when her sister went on vacation or had a doctor appointment.

- [4] Roger moved out of the marital residence on August 2, 2022. On that same date, he withdrew \$7,943 from a savings account without informing Lisa because he “figured it was [his] money.” *Id.* at 73. The remaining balance in the account was \$10.
- [5] Lisa filed for dissolution of the marriage on September 22, 2022, and Roger followed with a cross-petition for dissolution. Lisa retained possession of the marital residence under an agreed provisional order, which also provided for the division of household expenses and mortgage payments between the parties. One of their adult sons remained living in the marital residence with Lisa, as he had been before separation.
- [6] On May 31, 2023, the evidentiary hearing was held with Lisa and Roger as the only witnesses. During Lisa’s testimony, a summary balance sheet of marital assets and liabilities was admitted into evidence (Exhibit 1) along with supporting exhibits. Exhibit 1 listed the marital residence as having a value of \$74,000, which was based on the 2022 assessed valuation for tax purposes.¹ Lisa acknowledged, however, that about two years before the hearing, the home had been appraised for \$100,000 when they were refinancing. She testified that she did not believe the home was currently worth this much due to unfinished remodeling projects resulting in the home being in disarray. She explained that there was exposed insulation around every window and that

¹ Cass County property valuation records were admitted into evidence as Exhibit 2, without objection from Roger.

flooring was needed in one of the bathrooms. Lisa testified that she felt a fair valuation of the marital residence would be the average between the assessed value and the appraised value.

[7] Additionally, as relevant for our purposes, Lisa testified about other items listed on Exhibit 1, including Roger's 2022 bonus (which Lisa explained he received in March 2023), his 401k balance as of December 2022, and the mortgage balance. As for the "fairly sizeable chunk of money" that Roger withdrew from a savings account the day they separated, Lisa explained that this account contained "money from the remodel." *Transcript* at 14. Lisa also testified about her health conditions and their effect on her ability to work, and she provided evidence related to her SSDI of \$1,239 per month, her average monthly expenses of \$2,269, and Roger's significantly higher income.

[8] On cross-examination, Lisa was asked about a bank account that she opened weeks after Roger moved out of the marital home. Roger's Exhibit A, a one-page history from this account, showed that on August 19, 2022, Lisa made a deposit in the amount of \$4,860.25. Both parties agree that this represented the rest of an existing construction loan tied to the mortgage and that the check was "cut to [Lisa] after [Roger] left" and at his direction. *Id.* at 34. There was no further testimony about how Lisa was to use this money, but Exhibit A shows that the balance in this account was less than \$300 at the time the dissolution petition was filed about a month later.

- [9] Unlike Lisa, Roger did not present the trial court with a proposed balance sheet of assets and liabilities. During his testimony, Roger argued that the value of the marital residence should be based on the appraisal from two years prior, but he did not submit the appraisal into evidence. Roger admitted to removing \$7,943 from the savings account without Lisa's knowledge on August 2, 2022. He stated that, sometime before this withdrawal, the account had included money from a bonus he received in March 2022 and from a home remodeling loan.
- [10] Regarding the issue of spousal maintenance, Roger testified that he could not afford to support Lisa, that he believed she could work a clerical job, and that their adult son, who still lived with Lisa, could help with the household bills. On cross-examination, Roger acknowledged that his own income is five to six times greater than Lisa's and that their son had not contributed to the household expenses before their separation.
- [11] At the end of the hearing, the trial court worked off Exhibit 1 and made certain modifications thereto. As summarized and relevant here, the court orally made these determinations:

Marital Residence - \$87,500 (representing the midpoint between the assessed value and the appraised value)

Roger's Bonus Income - \$10,150

Roger's 401k - \$63,274 (\$40,000 to Lisa and balance to Roger)

Money Roger Transferred out of Savings on Date of Separation - \$7,943 (not originally listed on Exhibit 1 but added by the trial court as an asset to Roger)

Mortgage Debt - \$75,515

The other assets and liabilities remained as listed on Exhibit 1 with the addition of a tax delinquency, which is not at issue. The trial court then made the following statements about Lisa's request for spousal maintenance:

Now, the obvious issue in this case is maintenance. I do find a disability. I mean, there's no question about that. And ... I'm convinced that it makes the prospect of her doing anymore than, you know, things here and there unlikely. And I look at her expenses and the disparity of income, I am going to award \$1,250.00 a month maintenance but I am going to go with a 50/50 split on property.

Transcript at 117. Upon further clarification, the trial court observed that the 50/50 split was exclusive of the division of the 401k because Lisa was receiving "a little bit extra" on that asset. *Id.* at 118. In response to the trial court's question of whether there were any other issues to address, the parties raised a couple of matters that are not relevant to this appeal.

[12] The trial court directed Lisa's attorney to "prepare the entry" and "run it by" Roger's attorney. *Id.* The court then indicated: "If it's submitted to me, I'll assume everybody's signed off it." *Id.*

[13] The next day, June 1, the trial court notified the parties that "all assets and liabilities, including the 401k, will be divided 50/50." *Appellant's Appendix* at 7.

The court also scheduled a telephonic attorney conference for June 30 “to discuss maintenance.” *Id.*

[14] On June 5, 2023, Lisa’s attorney emailed Roger’s attorney and attached a proposed dissolution decree and a modified version of Exhibit 1. The email provided:

In the interest of trying to get some closure here, I have attached a proposed decree with an attached asset/debt exhibit...as you know the judge’s staff recently communicated with us re a possible change(s) in the court’s order...therefore, I have left the equalization number (para 2) blank...I also adopted all of the court’s findings from the hearing and modified the spreadsheet to reflect a 50/50 division based on his numbers...looks like approx 34k out of the 401k would head in [Lisa’s] direction as opposed to the 40k referenced by the court...otherwise, I understand the court may not have time to address the changes until the end of the month...therefore, I cc’d the judge on this in an effort to possibly move things along...your feedback on the proposed order (subject to the court’s changes) is appreciated[.]

Appellant’s Appendix at 43 (ellipses in original).

[15] At the brief telephonic conference on June 30, the court discussed the maintenance issue with the attorneys. The court clarified that the maintenance award would be subject to modification upon proof of a substantial change of circumstances. The court also reiterated that it wanted “a straight 50/50” property division considering the maintenance order, which the court described as being “enough.” *Transcript* at 125. Finally, when the court asked Roger’s attorney if there were any issues with modified version of Exhibit 1, she

responded that she did not have the email in front of her. The court then explained: “I want you guys to talk about the Worksheet. If there’s an issue, let me know.” *Id.* at 124. Otherwise, the court directed Lisa’s attorney to “use the numbers on the Worksheet to go ahead and put together the Order.” *Id.*; *see also Appellant’s Appendix* at 7 (entry on the CCS stating: “Mr. Rozzi to submit the proposed order once Ms. Price approves the same”).

[16] On July 6, 2023, the trial court signed the dissolution decree, which included an “asset/debt worksheet” (the Final Worksheet). *Appellant’s Appendix* at 44.

Roger now appeals. Additional information will be provided below as needed.

Discussion & Decision

1. *Valuation of Marital Residence*

[17] Roger contends that the trial court improperly valued the marital residence. He claims that the \$100,000 appraisal reflected the fair market value of the residence and that the assessed tax value could not be used. Further, relying on his own testimony, he argues that the home was in the same condition at the time of the hearing as it was during the appraisal.

[18] A trial court has broad discretion in valuing an asset based on the evidence before it. *Baglan v. Baglan*, 137 N.E.3d 271, 277 (Ind. Ct. App. 2019). Thus, “so long as sufficient evidence and reasonable inferences support the valuation, the trial court has not abused its discretion.” *Id.* On review, we will not reweigh the evidence, and we will reverse the trial court’s valuation only if it is clearly against the logic and effect of the facts and circumstances before it. *Id.*

[19] Lisa presented evidence that the 2022 assessed tax value was \$74,900. While she acknowledged the property had been appraised at \$100,000 about two years earlier, Lisa testified that she did not believe it was worth that much in its current condition due to the unfinished remodeling projects. Lisa testified that she believed a fair value for the property would be an average of the assessed value and the prior appraised value. The trial court accepted Lisa’s proposed valuation, which was well within its discretion. We reject both Roger’s invitation to reweigh the evidence and his suggestion that a trial court cannot consider a property’s assessed value.²

2. Property Division

[20] Roger next challenges certain assets listed or excluded on the Final Worksheet. First, he contends that the trial court improperly “excluded the \$5,080 in cash assets that Lisa pocketed from the home construction loan.” *Appellant’s Brief* at 9. Second, he claims that the trial court “double-counted [his] bonus” because the Worksheet included as an asset both his \$10,150 bonus and the \$7,943 withdrawal he made from savings upon separation from Lisa.

² Roger’s reliance on *State Bd. of Tax Comm’rs v. Town of St. John*, 702 N.E.2d 1034, 1038 (Ind. 1998), a tax case, is misplaced. Aside from involving an entirely different context, that case does not stand for the proposition that a property’s “assessed value *is not* the property’s ‘fair market value.’” *Appellant’s Brief* at 12 (emphasis supplied). Rather, the Supreme Court simply held that “‘true tax value’ is not exclusively or necessarily identical to fair market value.” *Town of St. John*, 702 N.E.2d at 1038.

[21] It is well established that “an issue raised by an appellant for the first time on appeal is waived.” *See Israel v. Israel*, 189 N.E.3d 170, 177 (Ind. Ct. App. 2022), *trans. denied*. Here, Roger had multiple opportunities to make these arguments below but did not do so (nor did he present the trial court with a proposed balance sheet). Roger’s first opportunity came and went when the trial court discussed the marital assets at the end of the evidentiary hearing and sought input from the parties. Despite the trial court directly addressing the bonus income and Roger’s withdrawal of money from savings, Roger’s attorney did not argue that funds Lisa obtained after the separation should be included as an asset or argue that his bonus was being double counted.

[22] The trial court directed Lisa’s attorney to draft the proposed order and “run it by [Roger’s attorney].” *Transcript* at 118. Lisa’s attorney did so within the week. Then, Roger’s attorney again failed to raise the issues now asserted on appeal at the subsequent telephonic conference or before the draft order was filed with the trial court, even though the trial court directed Roger’s attorney to alert the court to any disputed issues. Roger’s attempt to raise these issues now on appeal is too late.³

³ Waiver notwithstanding, we observe that while Roger, by his own admission, pocketed cash without Lisa’s knowledge as he moved out, Lisa did not act in a similar manner. And Roger’s Exhibit A shows that Lisa’s bank account had a balance of less than \$300, not over \$5,000, when the dissolution petition was filed, with no indication that she misappropriated any funds. Further, the evidence regarding Roger’s bonus income was not entirely clear, as there was evidence that he received an annual bonus in March 2022 and March 2023, and the trial court was not required to believe Roger’s testimony that the money he withdrew in August 2022 represented his bonus income.

3. *Spousal Maintenance*

- [23] In a dissolution proceeding, a trial court may award incapacity maintenance if it finds a spouse “physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected.” Ind. Code § 31-15-7-2(1); *see also Bizik v. Bizik*, 753 N.E.2d 762, 768 (Ind. Ct. App. 2001) (“The trial court may make an award of spousal maintenance upon the finding that a spouse’s self-supporting ability is materially impaired.”), *trans. denied*. “Such an award is designed to help provide for a spouse’s sustenance and support; accordingly, the essential inquiry is whether the incapacitated spouse has the ability to support himself or herself.” *Alexander v. Alexander*, 980 N.E.2d 878, 881 (Ind. Ct. App. 2012).
- [24] We review a trial court’s determination regarding an award of maintenance for an abuse of discretion. *See Roetter v. Roetter*, 182 N.E.3d 221, 225 (Ind. 2022). “A trial court abuses its discretion if its decision stands clearly against the logic and effect of the facts or reasonable inferences, if it misinterprets the law, or if it overlooks evidence of applicable statutory factors.” *Id.*
- [25] In challenging the maintenance award, Roger does not dispute that Lisa is physically incapacitated, but he claims that she has the ability to support herself. That is, he contends that she can work a clerical job and their adult son, who resides with Lisa, could help with the mortgage and other household expenses.

[26] Roger’s arguments are no more than a request for us to reweigh the evidence. The evidence favorable to the maintenance award shows that Lisa suffers from chronic, debilitating pain, requiring her to stay in bed much of the day, and that she has been unable to work for more than a decade, except for a few times she filled in for her sister answering phones at a business while her sister was out. When directly asked if she “could work” at the time of the final hearing, Lisa responded: “No. No. I don’t know when my flares will flare. I could wake up tomorrow morning and have a flare. Added stress flares it.” *Transcript* at 44. Lisa also showed that her average monthly expenses far outweigh her income from SSDI.

[27] The trial court determined in its order that Lisa suffers from “a bona-fide disability,” that her “financial resources are not adequate to maintain a reasonable standard of living,” and that Roger’s “income, to the contrary, is adequate to support himself and to provide disability maintenance to [Lisa].” *Appellant’s Appendix* at 55. Additionally, at the telephonic conference, the trial court explained that it was evenly dividing the marital estate in light of the \$1,250 maintenance award. We cannot say that the trial court abused its discretion by awarding maintenance to Lisa.⁴

⁴ As a separate issue, Roger challenges the Qualified Domestic Relations Order (QDRO) issued by the trial court after the dissolution decree on August 22, 2023. What Roger ignores, however, in his exceedingly short argument, is that the QDRO was submitted to the trial court with his and his attorney’s signatures on it. Accordingly, he cannot be heard to complain on appeal.

[28] Judgment affirmed.

Weissmann, J. and Kenworthy, J., concur.

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