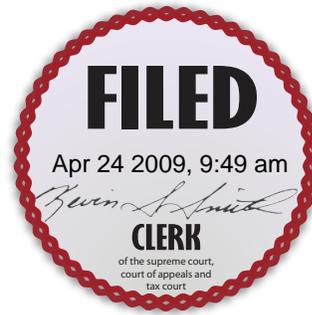


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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M.A., )  
)  
Appellant-Petitioner, )  
)  
vs. ) No. 49A04-0807-CV-417  
)  
J.A., )  
)  
Appellee-Respondent. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable S.K. Reid, Special Judge  
Cause No. 49D13-0609-DR-037359

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**April 24, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

M.A. (“Father”) appeals the dissolution court’s final decree granting physical custody of his three children to J.A. (“Mother”). Father presents the following issues for our review:

1. Whether the trial court abused its discretion when it awarded sole custody of the parties’ children to Mother.
2. Whether the trial court erred when it calculated Father’s child support obligation.
3. Whether the trial court erred when it awarded Mother one-half of Father’s military pension.
4. Whether the trial court abused its discretion when it ordered Father to pay Mother’s attorney’s fees.

We affirm in part, reverse in part, and remand with instructions.

## **FACTS AND PROCEDURAL HISTORY**

Father and Mother were married in 1993, and they have three minor children. On September 11, 2006, Father filed a petition for dissolution of marriage. The parties continued to live together and share custody of the children pending the dissolution proceedings. Mother filed a motion for a custody evaluation by the Domestic Relations Counseling Bureau (“DRCB”), which motion was granted. The DRCB report included references to Mother’s allegations that Father had been physically and verbally abusive to her, as well as Mother’s admitted extramarital affair with a convicted criminal. In addition, the DRCB report chronicled Father’s somewhat intermittent work history. In the end, the DRCB report recommended that the parties share joint physical custody of their three children.

Each party sought sole physical custody of the children. Following a hearing, the trial court awarded Mother sole custody of all three children and awarded Father parenting time in accordance with the Parenting Time Guidelines. The trial court ordered Father to pay \$301 weekly in child support and \$23,500 in Mother's attorney's fees. In addition, the trial court awarded Mother 50% of Father's military pension. This appeal ensued.

## **DISCUSSION AND DECISION**

### **Issue One: Custody**

Child custody determinations lie within the sound discretion of the trial court. Klotz v. Klotz, 747 N.E.2d 1187, 1189 (Ind. Ct. App. 2001). We will reverse the trial court's decision only if it manifestly abused its discretion. Id. An abuse of discretion occurred if the trial court's decision was clearly against the logic and effect of the facts and circumstances, or reasonable inferences therefrom, that were before the court. Id.

Father contends that the trial court abused its discretion when it awarded Mother custody of the children. In particular, Father maintains that the evidence shows that he should be awarded physical custody of the children. But Father's arguments on appeal amount to a request that we reweigh the evidence, which we will not do. Father has not demonstrated that the trial court abused its discretion.

Indiana Code Section 31-17-2-8 provides in relevant part:

The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:

- (1) The age and sex of the child.

- (2) The wishes of the child's parents or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
  - (A) the child's parent or parents;
  - (B) the child's sibling; and
  - (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's:
  - (A) home;
  - (B) school; and
  - (C) community.
- (6) The mental and physical health of all individuals involved. . . .

Father has not demonstrated that the trial court did not comply with the statute.<sup>1</sup> Father merely contends that the trial court should have weighed the evidence in his favor. For instance, Father points out that the DRCB report recommended joint custody. But there is evidence to support the trial court's custody determination. Therefore, under the abuse of discretion standard that controls our review in this appeal, we must affirm. Father has not demonstrated that the trial court abused its discretion when it awarded Wife custody of the parties' children.

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<sup>1</sup> Father contends that the trial court erred when it did not make a specific finding that awarding Mother custody of the children was in the children's best interests, but that contention is without merit. See, e.g., Reno v. Haler, 734 N.E.2d 1095, 1100 (Ind. Ct. App. 2000) (holding trial court need not make specific finding that custody is in child's best interests where evident that trial court reviewed terms of mediated custody agreement before approving it), trans. denied. The record is clear that the trial court considered evidence relative to the children's best interests, and, again, Father has not demonstrated an abuse of discretion.

## Issue Two: Child Support

Child support is calculated based on the income shares model provided by the Indiana Child Support Guidelines. McGill v. McGill, 801 N.E.2d 1249, 1251 (Ind. Ct. App. 2004). The Guidelines are founded on the premise that children should receive the same portion of parental income after a dissolution that they would have received if the family had remained intact. Id. Consistent with this principle, the cost of supporting children is apportioned between the parents according to their means. Id.

Our supreme court places a “strong emphasis” on trial court discretion in determining child support obligations, and we presume that a child support calculation determined pursuant to the Guidelines is valid. See Lea v. Lea, 691 N.E.2d 1214, 1217 (Ind. 1998). We will affirm a child support determination unless it is clearly against the logic and effect of the facts and circumstances that were before the trial court or if the court has misinterpreted the law. McGinley-Ellis v. Ellis, 638 N.E.2d 1249, 1252 (Ind. 1994); Thompson v. Thompson, 811 N.E.2d 888, 923 (Ind. Ct. App. 2004), trans. denied.

Here, Father’s entire argument on this issue consists of the following:

[I]t was [Father’s] uncontradicted testimony that he was to end the temporary Marine Corps assignment that brought him a substantial income for one month, and would begin a job at K-Mart in the following month that would bring him to substantial parity with [Mother’s] income. [Father] had also testified that in the preceding year he had made \$40,000. Under these circumstances, basing a support award on one month of temporary income that would not be repeated was clearly erroneous.

Brief of Appellant at 28-29. But Father does not direct us to any part of the record to substantiate his contentions with evidence. Mother, on the other hand, directs us to the

Child Support Obligation Worksheet that she had submitted to the trial court, which estimates Father's weekly obligation at \$429.54.<sup>2</sup> Father has not demonstrated that the trial court's order that he pay \$301 per week in child support is clearly erroneous.

### **Issue Three: Military Pension**

The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. Hendricks v. Hendricks, 784 N.E.2d 1024, 1027 (Ind. Ct. App. 2003). 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. 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.

Here, the parties' agreed entry regarding marital property states in relevant part that Mother would receive "one[-]half cove[r]ture balance" of the "United States Marine 13/20's if vested." Appellee's App. at 76. And in the "Stipulations" portion of the final dissolution decree, the trial court states in relevant part that "[t]he parties agree that Wife shall receive half of Husband's military pension, however Husband disagrees with the method in which her interest should be calculated and this issue shall be tried before and

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<sup>2</sup> We could not find Father's Worksheet in either Appendix submitted on appeal.

determined by the Judge.” Appellant’s App. at 7. Then, during the final hearing,

Husband testified as follows:

Q: Can you briefly explain to the Court how your military pension is calculated and what when [sic] we stipulated that Jackie would receive 50% of the value, what value should she be receiving?

[Husband]: The way it’s calculated there’s a formula but every day is a point and when you’re on active duty it’s 365 or 366 points depending upon the year. As a reservist it’s 1 point per day. So I was only on active duty married to Jackie for six years. The rest were reserve so I’m not making 365 points for 20 years, I’m making 365 points for 11 years, and six we were married and only anywhere from 50 to 100 on the other years. So if she were to get half of my full pension, it would be probably just way blown out of proportion. I’m sure there’s a way that the military can calculate it but the reservist time and pay is going to be a lot different than active duty pay.

Q: And I’m just going to clarify your testimony because it sounded to me like it was kind of the same calculation. So you’re saying on the active duty you earn 1 point per day but since it’s active duty you’re going to get 365 points per year, correct?

[Husband]: Yes.

Q: And as a reservist you only get 1 point per day that you’re actually on duty. So for example would it be fair to say that during this time in Chicago you’re receiving points?

[Husband]: Yes.

Q: And would it be fair to say that between September 2007 and February 2008 when you were unemployed and not in Chicago, you were not receiving points?

[Husband]: No, except the normal drills I was doing once a month, two days a month.

Q: Okay. So again would it be fair to say that the 50% that we agreed to would be 50% of the applicable points not 50% of the . . . .

[Husband]: The way it should be calculated is 50% of the points I earned while I was married to Jackie because I went on active duty in 1988, and so

I had seven years, maybe five years in [the] military before I met Jackie, and then I'm going to have probably another few years after Jackie and I separated that I don't think she's entitled to and that's not how they calculate it. It's [the] years that [she] and I were married that she gets half of.

Q: One of your prior answers, the military will tell us that.

[Husband]: I believe so because they'll have a date that we got married and a day that we separated. And I think I roughly added it up to 2800 points out of 55,200. So it would be half of the 2800 is what we had when we were married. Because if we didn't do it that way, then if I did another ten years she'd still be getting more of my retirement benefits and I wouldn't be getting hers.

Transcript at 59-61 (emphases added). Mother does not direct us to any evidence contradicting Father's testimony on this issue. Mother merely contends that Father has not demonstrated that the trial court's order with regard to the military pension is clearly erroneous.

Under the coverture fraction formula, the value of the pension is multiplied by a fraction, the numerator of which is the period of time during which the marriage existed (while pension rights were accruing) and the denominator is the total period of time during which pension rights accrued. Hendricks, 784 N.E.2d at 1026. Here, while Father might have presented more compelling evidence to support his argument on this issue to the trial court, it would be unjust to disregard the parties' stipulation, which clearly states that Mother is entitled to one-half of the pension using the coverture fraction, not one-half of Father's entire military pension. Accordingly, we remand to the trial court with instructions to amend the final dissolution decree to reflect an appropriate award consistent with the parties' stipulation. If the parties cannot agree on the amount, then the trial court shall conduct an evidentiary hearing for the sole purpose

of determining the amount of Mother's 50% interest in Father's military pension using the coverture fraction formula.

#### **Issue Four: Attorney's Fees**

Finally, Father contends that the trial court abused its discretion when it ordered him to pay \$23,500 in Mother's attorney's fees. The trial court has broad discretion in assessing attorney's fees in dissolution cases. In re Marriage of Lewis, 638 N.E.2d 859, 861 (Ind. Ct. App. 1994). When making an award of attorney's fees in a marriage dissolution case, the trial court must consider the resources of the parties, their economic condition, the ability of the parties to engage in gainful employment and to earn adequate income, and such other factors that bear on the reasonableness of the award. Id. Misconduct that directly results in additional litigation expenses may properly be taken into account in the trial court's decision to award attorney's fees in the context of a dissolution proceeding. Id.

Father maintains that Mother's attorney failed to provide the trial court with a "detailed[,] itemized bill" for her services and that Father's alleged non-compliance with discovery only accounted for a fraction of the total expenses. Brief of Appellant at 27. In addition, Father asserts that the evidence regarding his income did not take into account his alleged prospective reduction in salary.

But the record on appeal includes Mother's attorney's affidavit substantiating \$23,972.21 worth of fees, including a detailed summary of \$3,546.66 in fees incurred in counsel's efforts to obtain discovery responses from Father. And in the affidavit, Mother's attorney explains that Father was "generally unwilling[]" to cooperate on

numerous issues” throughout the proceedings and “failed to comply with the parties’ provisional agreements and mediation agreement[,]” which noncompliance “required legal attention” during the lengthy proceedings. Appellant’s App. at 70-71. Finally, with regard to Father’s income vis-à-vis Mother’s income, the trial court weighed the evidence and was not obligated to credit Father’s testimony that his income would be significantly less in the near future.

Father’s contentions on appeal amount to a request that we reweigh the evidence, which we will not do. The evidence supports the trial court’s award of attorney’s fees. Father has not demonstrated that the trial court abused its discretion on this issue. See Marriage of Lewis, 638 N.E.2d at 861 (holding no abuse of discretion where husband disputed trial court’s assessment of parties’ incomes and challenged amount of attorney’s fees owing due to husband’s alleged discovery noncompliance).

Affirmed in part, reversed in part, and remanded with instructions.

FRIEDLANDER, J., and VAIDIK, J., concur.