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.

FILED
Jul 06 2009, 8:40 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

RICHARD D. MARTIN
Martin, Stuard & Douglas
Frankfort, Indiana

ATTORNEY FOR APPELLEE:

DANIEL J. MOORE
Lasynski & Moore
Lafayette, Indiana

IN THE
COURT OF APPEALS OF INDIANA

EMILY JO CORYELL,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 79A02-0810-CV-943
	)	
BRETT CORYELL	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79D01-0710-DR-152

July 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Emily Jo Coryell (Wife) appeals the trial court's dissolution decree dissolving her ten-year marriage to Brett Coryell (Husband). Wife presents the following issues for our review:

1. Did the trial court err in adopting, virtually verbatim, Husband's proposed findings of fact and conclusions of law?

2. Did the trial court abuse its discretion in dividing the marital estate?

3. Did the trial court abuse its discretion in awarding physical custody of the parties' minor children to Husband?

4. Does Indiana's relocation statute violate the Equal Protection Clauses of the United States and Indiana Constitutions?

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

Husband and Wife were married on December 31, 1999. At the time of their marriage, their eldest daughter, E.C., born April 4, 1998, was nearly twenty-one months old. Husband and Wife purchased their first home in Chicago, Illinois, where Husband was employed by Sprint and Wife was a stay-at-home mom. Husband eventually accepted a promotion with Sprint, which required the family to move to Houston, Texas. While living in Houston, a second child, H.C., was born on August 2, 2001. After the birth of H.C., Wife began nursing school. Within three years of moving to Houston, Husband's position with Sprint was eliminated. Husband thereafter obtained employment with Purdue University in Lafayette, Indiana. In June 2004, Husband relocated to Lafayette, while Wife stayed in Houston with the children to sell the house and finish out the 2004-2005 school year. The family eventually purchased a home in Lafayette and enrolled their children in a four-star

school system.[1]

Within three years of moving to Lafayette, Husband became dissatisfied with his employment at Purdue and started applying for jobs in other states. In January 2007, Father was contacted by Emory University in Atlanta, Georgia, and ultimately accepted an IT position with an annual salary of $205,000. Wife, although reluctant, agreed to move to Atlanta. In July 2007, Husband moved into an apartment in Atlanta, while Wife and the children remained in Lafayette to sell the family home. Wife and the children, however, never joined Husband in Atlanta.

On October 3, 2007, Husband filed a petition for dissolution of marriage, seeking an equal division of marital property and physical custody of the parties' two minor children. Wife filed a counter-petition for dissolution of marriage on October 11, 2007, in which she requested physical custody of the minor children. A provisional order, agreed to by the parties, was entered by the court on November 15, 2007 and awarded Wife temporary physical custody of the minor children. In December 2007, Wife and Husband completed a court-ordered custody evaluation with Dr. Richard Lawlor. Dr. Lawlor filed his report with the court in January 2008. The final hearing was held over the course of two days, May 22 and July 17, 2008. Immediately at the conclusion of the evidence, the trial court announced its intention to award physical custody of the minor children to Husband. The court also requested the parties submit proposed findings of fact and conclusions of law. On September

[1] E.S. was placed in a gifted and talented class.

22, 2008, the trial court issued a decree of dissolution in which the court adopted, almost verbatim, Husband's proposed decree.

1.

Wife contends that the trial court erred when it adopted, virtually verbatim, Husband's proposed findings of fact and conclusions of law. As we have before noted:

> Trial Rule 52(C) encourages trial courts to request that parties submit proposed findings of fact and conclusions of law and it is not uncommon or per se improper for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party. *Clark v. Crowe*, 778 N.E.2d 835, 841 n. 3 (Ind. Ct. App. 2002) (citing *A.F. v. Marion County Office of Family and Children*, 762 N.E.2d 1244, 1249 (Ind. Ct. App. 2002), *trans. denied*). When a party prepares proposed findings, they "should take great care to insure that the findings are sufficient to form a proper factual basis for the ultimate conclusions of the trial court." *Marathon Oil Co. v. Collins*, 744 N.E.2d 474, 477 n. 2 (Ind. Ct. App. 2001) (citing *Maloblocki v. Maloblocki*, 646 N.E.2d 358, 361 (Ind. Ct. App. 1995)). Moreover, "the trial court should remember that when it signs one party's findings, it is ultimately responsible for their correctness." *Id*. As noted by this court in Clark, we urge trial courts to scrutinize parties' submissions for mischaracterized testimony and legal argument rather than the findings of fact and conclusions of law as contemplated by the rule. 778 N.E.2d at 841 n.3.
>
> We encourage such scrutiny for good reason. As our supreme court has observed, the practice of accepting verbatim a party's proposed findings of fact "weakens our confidence as an appellate court that the findings are the result of considered judgment by the trial court." *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 273 n.1 (Ind. 2003) (citing *Prowell v. State*, 741 N.E.2d 704, 708-09 (Ind. 2001)). However, as the court also noted, verbatim reproductions of a party's submissions are not uncommon, as "[t]he trial courts of this state are faced with an enormous volume of cases and few have the law clerks and other resources that would be available in a more perfect world to help craft more elegant trial court findings and legal reasoning." *Prowell*, 741 N.E.2d at 708. The need to keep the docket moving is properly a high priority for our trial bench. *Id*. at 709. For this reason, the practice of adopting a party's proposed findings is not prohibited. *Id*.

Nickels v. Nickels, 834 N.E.2d 1091, 1095-96 (Ind. Ct. App. 2005).

Here, the parties complied with the trial court's request to submit proposed decrees, including findings of fact and conclusions of law. Although the trial court adopted the lion's share of Husband's proposed decree, the trial court made several substantive changes as well as a few grammatical changes. For instance, the trial court declined Husband's proposal that Wife be solely responsible for transportation costs when she exercises her parenting time, including transportation costs for returning the children to Husband's care. Instead, the trial court included a provision in the decree stating that "[e]ach party to pay to [sic] half of the costs of transportation for parenting time." *Appellant's Brief* at 59.[2] The trial court also omitted from its decree Husband's proposed finding that the parties' retirement funds should be reduced by thirty percent to convert those funds to current dollar amounts. Additionally, the trial court adjusted the Husband's proposed payment to Wife to equalize the division of marital property from $20,260.50 to $36,753. Aside from these substantive changes, the trial court also corrected a spelling error and modified the wording of the opening paragraph.

The changes made by the trial court to Husband's proposed findings and conclusions demonstrate that the trial court scrutinized each of Husband's findings and conclusions prior to adopting them as the findings and conclusions of the court. We find no error in the trial court's near verbatim adoption of the majority of Husband's proposed findings of fact and conclusions of law. The issue thus becomes whether the findings, as adopted by the court,

[2] This information is taken from the dissolution decree entered by the trial court, the only copy of which in the record is found in the Appellant's Brief. Thus, citations to the trial court's dissolution decree will necessarily refer to the Appellant's Brief.

are clearly erroneous. *See Nickels v. Nickels*, 834 N.E.2d 1096. We now turn to Wife's arguments in this regard.

2.

Wife contends the trial court erred in dividing the marital estate. Specifically, Wife argues the trial court improperly excluded certain items from the marital pot, abused its discretion in equally dividing the marital estate, improperly valued marital property, and abused its discretion in admitting certain evidence.

We review a trial court's division of a marital estate for an abuse of discretion. *J.M. v. N.M.*, 844 N.E.2d 590 (Ind. Ct. App. 2006), *trans. denied*. An abuse of discretion occurs when a trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id*. In reviewing a trial court's division of a marital estate, we consider only the evidence most favorable to the trial court, and we may not reweigh the evidence or reassess the credibility of witnesses. *Id*. A trial court's discretion in dividing marital property is to be reviewed by considering the division as a whole, not item by item. *Fobar v. Vonderahe*, 771 N.E.2d 57 (Ind. 2002). The party challenging the trial court's division of the marital estate must overcome a strong presumption that the trial court considered and complied with the applicable statute. *Frazier v. Frazier*, 737 N.E.2d 1220 (Ind. Ct. App. 2000).

Where, as here, the trial court enters findings of fact and conclusions of law pursuant to a request by one of the parties,[3] we apply a two-tiered standard of review:

[3] Wife requested that the trial court issue special findings of fact and conclusions of law.

> We first determine whether the record supports the findings and, second, whether the findings support the judgment. The judgment will only be reversed when clearly erroneous, i.e. when the judgment is unsupported by the findings of fact and the conclusions entered upon the findings. Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility.

Thompson v. Thompson, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004) (quoting *Wyzard v. Wyzard*, 771 N.E.2d 754, 756-57 (Ind. Ct. App. 2002)), *trans. denied*.

"The division of marital property in Indiana is a two-step process." *Thompson v. Thompson*, 811 N.E.2d at 912. First, the trial court determines what property must be included in the marital estate. *Thompson v. Thompson*, 811 N.E.2d 888. Ind. Code Ann. § 31-15-7-4(a) (West, Premise through 2008 2nd Regular Sess.) provides as follows:

> In an action for dissolution of marriage under IC 31-15-2-2, the court shall divide the property of the parties, whether:
> (1) owned by either spouse before the marriage;
> (2) acquired by either spouse in his or her own right:
> (A) after the marriage; and
> (B) before final separation of the parties; or
> (3) acquired by their joint efforts.

Thus, all marital property, including property owned by either spouse prior to marriage, "goes into the marital pot for division[.]" *Hill v. Hill*, 863 N.E.2d 456, 460 (Ind. Ct. App. 2007). This "one-pot" theory insures that all assets are subject to the trial court's power to divide and award. *Id*. Although the trial court may ultimately determine that a particular asset should be awarded solely to one spouse, it must first include the asset in its consideration of the marital estate to be divided. *Id*. This court has recently held, however:

> [W]here the parties divide between themselves a part of the marital estate and leave the division of the balance to the discretion of the trial court, the trial court should assume that the property that the parties have already divided was divided justly and reasonably and shall divide the remainder of the assets and liabilities of the parties as if they were the entirety of the marital estate.

Nornes v. Nornes, 884 N.E.2d 886, 889 (Ind. Ct. App. 2008).

Wife argues that the trial court erred in excluding certain items from the marital pot. Specifically, Wife contends that the trial court improperly excluded from the marital pot the sale proceeds from the marital residence totaling $22,455.56, an emergency fund containing $12,778.92 at the time of separation ($8000 of which was excluded from the marital pot), a vacation fund containing $1926.28, and a tax refund of $1406 that was divided between the parties based on a ratio of their respective incomes. Wife maintains that by including these items as assets of the marital estate, her share of the total marital estate, after the trial court's division of assets/liabilities and order of Husband's cash payment to Wife, amounts to 31.5%.

With regard to the proceeds of the marital residence, the trial court found that Husband and Wife had agreed upon and already divided the net proceeds and therefore, excluded the division of such proceeds from the marital estate. According to their agreement, of the $22,455.56 in proceeds, Wife retained $5,000 and Husband retained the balance of $17,455.56. Wife does not dispute that this was the agreement of the parties; rather, Wife argues that she agreed to let Husband retain all but $5,000 of the proceeds because Husband had her "over a barrel". *Appellant's Brief* at 35. Specifically, Wife

maintains that she had to enter into the agreement with Husband so that Husband would move forward with the sale of the marital residence.

Under the authority of *Nornes*, we will neither interfere with the parties' right to enter into agreements nor second guess the wisdom of the parties in entering into agreements on how to divide marital property. Rather, we will assume that the property that the parties have already divided was divided justly and reasonably. *See Nornes v. Nornes*, 884 N.E.2d 886. We therefore conclude that, given the agreement of the parties as to the division of the proceeds from the sale of the martial residence, the trial court properly excluded such proceeds from its division of the balance of the marital estate. *See id*.

As to the amounts in the emergency fund and vacation fund at the time of separation, the trial court excluded such monies from the marital pot on the basis that such funds had been spent for marital purposes. Specifically, the court noted that the vacation fund, along with additional funds expended by Husband, was used by Husband to take the parties' children to Disney World, a vacation on which Wife was invited but chose not to attend. The trial court also excluded $8000 of the emergency fund from the marital pot,[4] finding that such was spent on legitimate marital obligations. In explaining its exclusion of this amount from

[4] The trial court included in the marital estate an account identified as "Husband's Brokerage Acct." with a value of $4799, and subjected that value to the equal division of the marital estate. *Appellant's Brief* at 62. Wife asserts that she is unaware of any brokerage account held by Husband with that balance and, in her brief, assumes that "Husband's Brokerage Acct." is intended to represent the balance in the emergency fund after Husband's withdrawal of $8000. Indeed, after deducting $8000 from the $12,778.92 in the emergency fund, the remaining balance in the emergency fund would be $4779, close to the value of "Husband's Brokerage Acct." value of $4799 (note the $20 difference). Husband does not dispute this assumption in his brief. We will therefore proceed under the assumption that the trial court excluded only $8000 of the emergency fund from the martial pot. As to the funds remaining in the emergency account at the time of dissolution, the trial court included those funds in the marital estate (as represented by "Husband's Brokerage Acct.") and divided them accordingly.

the marital pot, the court noted in the same paragraph that Husband had been solely responsible for the payments on the first and second mortgages on the marital residence in the amount of $2763.85 per month since the time of separation.[5] Under these circumstances, the court found exclusion of the vacation fund and emergency fund was justified.

With regard to the vacation fund, it would seem from the record that Husband withdrew all of the funds in that account to help pay for the trip to Disney, and therefore, there were no funds remaining in that account to have been included in the marital pot. Likewise, there was no evidence that the funds Husband withdrew from the emergency account were still in his possession and capable of being included in the marital estate and divided accordingly. The funds that were once in these accounts are therefore not subject to a claim of improper division of marital assets. *See Thompson v. Thompson*, 811 N.E.2d 888. Wife's argument with regard to the entirety of the funds in the vacation account and the $8000 withdrawn by Husband from the emergency account amounts to a claim that Husband dissipated the assets. *See id*.

Dissipation of marital assets involves the frivolous and unjustified spending of marital assets. *Goodman v. Goodman*, 754 N.E.2d 595 (Ind. Ct. App. 2001) (citing *In re the Marriage of Coyle*, 671 N.E.2d 938 (Ind. Ct. App. 1996)). The test to determine whether marital assets have been dissipated is to determine whether the assets in question were actually wasted or misused. *Id*. Factors to be considered in determining whether dissipation has occurred include: (1) whether the expenditure benefited the marriage or was made for a

[5] We acknowledge Husband's testimony that he withdrew $8,000 therefrom to pay legal expenses and to

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 assets. *Id.*; *see also Pitman v. Pitman*, 721 N.E.2d 260 (Ind. Ct. App. 1999), *trans. denied*.

Here, the trial court concluded that Husband's use of the vacation funds for the very purpose for which they were designated was not a misuse of the marital assets. There is nothing in the record that suggests that Husband was trying to deplete the marital estate or otherwise divert funds therefrom or that the funds were not used for that purpose. Husband simply used the funds to take the parties' children on a promised vacation to Disney. Nor do we consider the expenditure of nearly $2000 excessive in light of the size of the marital estate.[6] Based on the record, we cannot say that the trial court abused its discretion in concluding that Husband's expenditure of the funds in the vacation account to take the parties' children on vacation was a valid expenditure on a marital purpose and not a dissipation of assets.

As to the funds in the emergency account, we note that, despite Husband's testimony that he withdrew the funds to pay legal expenses associated with the divorce and to help him establish himself upon his move to Atlanta, the trial court found that such funds were properly used to pay the mortgage obligation on the marital residence. Indeed, the record demonstrates that Husband paid approximately $2750 a month during the pendency of this

---

establish himself upon his move to Atlanta.

[6] We further note Husband's testimony that he spent an additional $2000 of his own money to pay for the vacation.

action[7] to cover the first and second mortgages on the marital residence. Husband testified that he had paid down the principal on the mortgages by nearly eleven thousand dollars during the pendency of the action. The trial court did not abuse its discretion in concluding that Husband's use of the funds in this regard was not a dissipation of assets.

The trial court also did not include in the marital pot the 2007 tax refund ($1406) received by the parties, finding that such had "already been equitably divided based upon a ratio of incomes." *Appellant's Brief* at 61. Husband proposed that Wife receive fifteen percent (or $215.25) of the parties' 2007 tax refund based upon his calculation that her withholdings amounted to fifteen percent of the total taxes paid. Husband wrote Wife a check for this amount and retained the balance of the tax refund.

Wife is correct that the trial court should have included the parties' 2007 tax refund check in the marital pot. There is no evidence that the parties agreed to how those monies would be divided. In fact, Wife has opposed Husband's calculation and has even refused to cash the check Husband presented to her as her share of the 2007 tax refund. The trial court abused its discretion in failing to include this sum in the marital pot.

We further agree with Wife that Husband's proposed calculation on how to divide the 2007 tax refund check based upon their respective incomes for 2007 was improper. We have routinely held that division of marital assets should not be based solely upon monetary contributions. *See Maloblocki v. Maloblocki*, 646 N.E.2d 358 (Ind. Ct. App. 1995). Indeed, "[t]he income-producing efforts and intangible contributions of both spouses unite to

[7] This action commenced on October 3, 2007, and the marital residence was sold on June 11, 2008.

facilitate the acquisition of marital property." *Id*. at 363; *see also* I.C. § 31-15-7-5(1) (West, Premise through 2008 2nd Regular Sess.) (when determining whether the marital property should be distributed unequally, the court should "consider the contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing"). Accordingly, courts are not limited to assessing the financial contributions made by each spouse during the course of the marriage but can, and *should*, consider non-income producing contributions as well. *See Seslar v. Seslar*, 569 N.E.2d 380, 382-83 (Ind. Ct. App. 1991) (holding that "marriage is to be considered as a partnership—where profits are presumed to be shared equally—even though one partner contributes more in income[;][t]his is justified by consideration of the other partner's less tangible—but equally valuable—contributions to the relationship and marriage").

The record demonstrates that Wife worked two twelve-hour shifts on the weekends so she would be available to care for the children during the week. Wife's contribution in this regard is to be regarded equally to Husband's with respect to the parties' combined income for the 2007 tax year. Because we conclude, *infra*, that the trial court did not err in determining that the marital estate should be equally divided, this asset should be divided between the parties on an equal basis. We therefore remand to the trial court to adjust its division of the marital estate accordingly.

We turn now to the second step in the division of marital property, which involves the trial court's determination of how to divide the marital property under the statutory presumption that an equal division of marital property is just and reasonable. *Thompson v.*

Thompson, 811 N.E.2d 888. The presumption of an equal division of property may be rebutted by a party who presents evidence demonstrating that an equal division would not be just and reasonable. Factors to be considered include:

> (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
> (2) The extent to which the property was acquired by each spouse:
> (A) before the marriage; or
> (B) through inheritance or gift.
> (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
> (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
> (5) The earnings or earning ability of the parties as related to:
> (A) a final division of property; and
> (B) a final determination of the property rights of the parties.

I.C. § 31-15-7-5.

In addition to the makeup of the marital pot, Wife contends the trial court misinterpreted the law and disregarded evidence of factors listed in I.C. § 31-15-7-5 in determining that an equal division of property between the parties was just and reasonable. Wife claims that she should have received a higher percentage of the marital estate. Indeed, Wife sought a 60% - 40% distribution of the marital estate, excluding the proceeds from the sale of the marital residence. In support of her argument, Wife focuses on the disparity in income level and earning ability of the parties. The trial court rejected Wife's request, finding that she had failed to rebut the presumption that an equal division of property was just and reasonable. The court noted that "even though the Husband currently has a larger income than the Wife, the Wife is substantially younger than the Husband and could easily

have at least ten (10) more years in the workforce than the Husband." *Appellant's Brief* at 59-60. Without citation to authority, Wife claims that this is an improper consideration.

In evaluating the economic circumstances of the parties, the trial court was entitled to consider the parties' respective ages and work life. The trial court's findings confirm that the trial court was well aware of the disparity in income between the parties. The trial court, however, considered the fact that Wife currently works two twelve-hour shifts as a nurse and earns nearly $50,000. In light of the fact that the children are in the physical custody of Husband in Atlanta, the court noted that Wife could increase her hours. Further, we note that Wife does not have physical custody of the children and she is currently not required to pay child support to Husband. These are all proper considerations in deciding an appropriate division of the marital estate. On balance, we do not find the trial court's determination that the marital pot be divided equally to be an abuse of discretion.

Wife also argues that the trial court abused its discretion in accepting Husband's valuation of the personal property (i.e., household goods and furnishings) retained by the parties. Specifically, Wife contends that the value provided by Husband does not represent the fair market value of the personal property. Husband valued the personal property retained by him at $2,775 and valued the personal property retained by Wife at $26,380. Wife maintains that she assigned more reasonable values to the personal property, valuing the total of the personal property at $4,765, with Wife retaining $3,620 and Husband retaining $1,145.

"The trial court has broad discretion in determining the value of property in a dissolution action, and its valuation will not be disturbed absent an abuse of that discretion." *England v. England*, 865 N.E.2d 644, 650-51 (Ind. Ct. App. 2007), *trans. denied*. "The trial court's discretion is not abused if there is sufficient evidence and reasonable inferences therefrom to support the result." *Id*. at 651. "Fair market value is the price at which property would change hands between a willing buyer and seller, neither being under any compulsion to consummate the sale." *City of Carmel v. Leeper Elec. Services, Inc.*, 805 N.E.2d 389, 395 (Ind. Ct. App. 2004), *trans. denied*.

Wife's argument that the trial court abused its discretion in adopting Husband's values relating to the personal property is simply an invitation for this court to reweigh the evidence. During the final hearing Husband testified that his values were based upon the purchase price of the items and/or the cost of replacing the items with comparable new items. Husband also indicated that his values accounted for depreciation if he felt that there would be substantial depreciation with respect to any particular item. On cross-examination, Husband explained that he believed his values represented fair market value and not a value as may be determined at a yard sale. Other than her own opinion as to the value of the personal property, Wife presented no evidentiary support that her values more accurately reflected the fair market value of the listed items than Husband's. We find no abuse of discretion in the trial court's finding that values Husband attributed to the personal property retained by Husband and Wife, respectively, reflected the fair market value of such personal property.

Wife maintains that the trial court abused its discretion in admitting Husband's Exhibit F, a spreadsheet maintained by Husband that was used to establish Husband's pre-marital contributions into his retirement account, which funds were ultimately set-off to Husband prior to division of the marital estate.[8] Admission of evidence rests within the discretion of the trial court. *Matzat v. Matzat*, 854 N.E.2d 918 (Ind. Ct. App. 2006). We will only reverse if there is a manifest abuse of that discretion. *Id*. "An abuse of discretion in this context occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law." *Carpenter v. State*, 786 N.E.2d 696, 702-03 (Ind. 2003).

Husband requested the trial court set off to him retirement funds he had accumulated prior to the marriage. In support of his request, Husband sought to introduce Exhibit F. Husband testified that the amounts in Exhibit F were based on his tracking of information related to his IRA and 401K accounts and Wife's IRA account. Husband explained that he compiled the data in real time over the years shown and that the amounts were based on actual account statements and records the parties had received. With regard to the actual documents underlying the figures in his spreadsheet, Husband testified that, if they still existed, they were in the possession of Wife. As of the second hearing, Husband, although he claimed to have requested the documents from the respective companies, had not received statements related to the accounts he was tracking in Exhibit F.

[8] The trial court found that Husband had accumulated $83,343 prior to the marriage and set off that amount to him. Husband concedes that the amount is actually $82,343, and asserts that the $83,343 figure is a scrivener's error. On remand, we direct the trial court to correct this error and adjust the property division accordingly.

On appeal, Wife asserts that Exhibit F is a recorded recollection, *see* Ind. Evidence Rule 803(5),[9] and was therefore not admissible unless offered by Wife. This is not, however, the basis upon which Wife objected during the hearing. Wife objected to admission of Exhibit F primarily on grounds that the document had not been produced to her during discovery. In passing, Wife noted "it's a hearsay document based upon other documents. It's not the best evidence of other documents and it could be—it's self serving statement prepared by him." *Transcript* at 89. Wife then continued with her argument that it should have been produced during discovery and not for the first time during the hearing. After a brief explanation from Husband's counsel and the trial court's statement of concern about providing proper discovery in a timely fashion, the trial court admitted Husband's Exhibit F over Wife's objection.

It is well-settled that "[a] party may not object on one ground at trial and raise a different ground on appeal." *Collins v. State*, 835 N.E.2d 1010, 1016 (Ind. Ct. App. 2005), *trans. denied*. Here, Wife did not specifically object on grounds she asserts on appeal. Wife has therefore waived the issue for review.

---

[9] Evid. R. 803(5) provides as follows:

> Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

"[B]efore a statement can be admitted under the recorded recollection hearsay exception, certain foundational requirements must be met, including some acknowledgment that the statement was accurate when it was made." *Williams v. State*, 698 N.E.2d 848, 850 n.4 (Ind. Ct. App. 1998), *trans. denied; see also Kubsch v. State*, 866 N.E.2d 726, 734 (Ind. 2007) (witness must be able to "vouch" for the accuracy of the prior statement).

3.

Wife argues that the trial court erred in awarding physical custody of the parties' minor children to Husband. Wife maintains that the trial court disregarded evidence related to factors set forth for custody determinations.

Before we address the merits of Wife's argument regarding the trial court's physical custody determination, we must address Mother's argument that her due process rights were violated when Dr. Lawlor was permitted to testify telephonically. The record reveals that there was a misunderstanding between the attorneys about whether Dr. Lawlor's presence was needed at the final hearing. A few days prior to the May 22 hearing, Dr. Lawlor faxed counsel for both parties informing them that he would be present. Husband's attorney did not receive the fax. Husband's attorney, believing that Dr. Lawlor's presence was not needed for the hearing, called Dr. Lawlor and informed him that he need not appear. Upon learning that Wife's attorney wanted Dr. Lawlor to appear at the hearing, Husband's attorney made arrangements for Dr. Lawlor to testify telephonically. At the start of the hearing, the trial court expressed its frustration with testimony provided telephonically, but nevertheless permitted Dr. Lawlor to testify. Wife never objected to the procedure used to obtain Dr. Lawlor's testimony. Wife has therefore waived any argument that her due process rights were violated in this regard. *See Raess v. Doescher*, 883 N.E.2d 790 (Ind. 2008) (failure to object at trial results in waiver of the alleged error). In any event, we note that Wife cross-examined Dr. Lawlor at length concerning the findings in his report. Further, we note that

Wife did not call Dr. Lawlor to testify in person at the second hearing, which was held two months after his testimony was provided by telephone.

Mother also argues that Dr. Lawlor's report was inadmissible. In support of her argument, Mother maintains that Ind. Code Ann. § 31-17-2-12 (West, Premise through 2008 2nd Regular Sess.) "should have been strictly construed in order to allow for the effective cross-examination of Dr. Lawlor." *Appellant's Brief* at 40.

I.C. § 31-17-2-12 provides that an investigator's report concerning custodial arrangements may be received into evidence at the final hearing and may not be excluded on the grounds that the report is hearsay or otherwise incompetent if the following requirements are fulfilled:

> (c) The court shall mail the investigators report to counsel and to any party not represented by counsel at least ten (10) days before the hearing. The investigator shall make the following available to counsel and to any party not represented by counsel:
>
> (1) The investigator's file of underlying data and reports.
> (2) Complete texts of diagnostic reports made to the investigator under subsection (b).
> (3) The names and addresses of all persons whom the investigator has consulted.

I.C. § 31-17-2-12. Mother maintains that data and reports underlying Dr. Lawlor's custody determination were not made available to her, and thus, Dr. Lawlor's report was not admissible.

Wife misreads the statute. Wife's argument implies that it was Dr. Lawlor's responsibility to provide the information even though she never requested the same. I.C. § 31-17-2-12 requires that the investigator make the specified information available to counsel

and any party not represented by counsel. The statute does not require the investigator provide his file and all data and reports underlying a custody evaluation absent a request.

Here, on cross-examination, Dr. Lawlor stated that his file and the underlying data and reports were available if they had been requested. Moreover, we note that over four months elapsed between the time Dr. Lawlor submitted his report to the court in January 2008 and the first hearing on May 22, 2008, and at no time did Wife request to see Dr. Lawlor's file. Further, in the two months between the hearings, Wife did not request to see Dr. Lawlor's file. Wife has failed to establish that the information underlying Dr. Lawlor's report was not available for her review. As such, we conclude Dr. Lawlor's report was admissible.

We turn now to the merits of Wife's custody argument. We initially observe that, in custody disputes, the trial court is often called upon to make Solomon-like decisions in complex and sensitive matters. *Sebastian v. Sebastian*, 524 N.E.2d 29 (Ind. Ct. App. 1988). "As the trial court is in a position to see the parties, observe their conduct and demeanor, and hear their testimony, its decision receives considerable deference in an appellate court." *Id.* at 32. On review, we cannot reweigh the evidence, adjudge the credibility of the witnesses, or substitute our judgment for that of the trial court. *Clark v. Clark*, 726 N.E.2d 854 (Ind. Ct. App. 2000), *trans. denied*. We will not reverse the trial court's custody determination unless it is clearly against the logic and effect of the facts and circumstances before the court or the reasonable inferences drawn therefrom. *Klotz v. Klotz*, 747 N.E.2d 1187 (Ind. Ct. App. 2001).

I.C. § 31-17-2-8 (West, Premise through 2008 2nd Regular Sess.) sets forth the relevant factors to be considered when making a custody determination. It provides as follows:

> 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 parent 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.
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

In the court's dissolution decree the trial court clearly considered the evidence as it related to the factors set forth in I.C. § 31-17-2-8 and made its findings and conclusions thereon. On appeal, Wife claims that the trial court ignored certain evidence and that its findings were not supported by the record. Mother first argues that the trial court failed to consider the fact that the parties' children are adjusted to life in Lafayette. Contrary to Wife's claim, Dr. Lawlor testified and the trial court found that, although the children are

adjusted to their home, school, and community in Lafayette, they would have no problem making a successful transition and adjustment to Atlanta. Dr. Lawlor also specifically rejected Wife's claim on appeal that Husband engaged in a pattern of abuse, noting a few isolated incidents did not create a pattern of domestic abuse. Wife's argument that the trial court ignored this evidence is simply a request that we reweigh the evidence. Wife also argues that the trial court, while considering her mental health history, ignored Husband's mental health history. Again, to accept Wife's argument, we would have to reweigh the evidence, specifically Dr. Lawlor's testimony that discounted Wife's claim that Husband has mental health problems. As the above demonstrates, Wife's arguments on appeal are merely requests that this court reweigh the evidence and assess the credibility of the witnesses. This we will not do.

In the dissolution decree, the trial court entered findings on all of the factors listed in I.C. § 31-17-2-8 and these findings are supported by the record and consistent with Dr. Lawlor's evaluation. In this case, the trial court was faced with the difficult task of deciding between two capable and loving parents. The court commented at the end of the final hearing:

> [E.C.] and [H.C.] are extraordinary young women and lucky young women. They've got two really good parents. Dr. Lawlor confirms that, it's clear to me listening to both of you. You're both good parents, above average people in lots of ways. . . . Either of you is well qualified to be a good parent. And it's clear that you both love the children very much and I know that it makes this very difficult. But based on the evidence that I've heard I think that it's in the best interest of the children to continue to be in the joint custody of the parties but primary physical possession be with the father."

Transcript at 331. Wife has not demonstrated that the trial court's determination that Husband have sole physical custody of the children was an abuse of discretion.

IV

As an alternative argument, Wife contends that Indiana's relocation statute violates the Equal Protection Clauses of the federal and state constitutions. Wife's argument in this regard is that the relocation statute creates two classes of parents, i.e., parents involved in an initial custody determination and parents involved in a modification proceeding.

The relocation statute provides that a trial court "*shall* take into account" the following in determining whether to modify custody in light of a parties' intended relocation:

> (1) The distance involved in the proposed change of residence.
> (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation.
> (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.
> (4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual's contact with the child.
> (5) The reasons provided by the:
> (A) relocating individual for seeking relocation; and
> (B) nonrelocating parent for opposing the relocation of the child.
> (6) Other factors affecting the best interest of the child.

I.C. § 31-17-2.2-1 (West, Premise through 2008 2nd Regular Sess.) (emphasis supplied).

As Wife acknowledges, I.C. § 31-17-2.2-2(a) (West, Premise through 2008 2nd Regular Sess.) provides that "[i]f a party provides notice of relocation at an initial hearing to determine custody, the court *may* consider the factors set forth in [I.C. § 31-17-2.2-1, *supra*,] in the court's initial custody determination." (Emphasis supplied). Wife's equal protection

argument is based on the fact that the trial court is not required to consider the factors outlined in the relocation statute in an initial custody determination. In custody modification proceedings, however, where relocation is the issue, the trial court is required to consider the factors in the relocation statute.

Other than providing us with a standard of review, Wife cites no authority and makes no cogent argument in support of her claim. *See* Ind. Appellate Rule 46(A)(8)(a). Wife also does not properly identify the different standards of review for claims brought under the federal constitution as opposed to the state constitution. *See Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). For the foregoing reasons, Wife has waived her equal protection argument for review. *See Davis v. State*, 835 N.E.2d 1102 (Ind. Ct. App. 2005) (noting that the failure to present a cogent argument or citation to authority constitutes waiver of the issue for appellate review), *trans. denied*.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions for the trial court to include the tax refund as an asset of the marital pot, and correct typographical errors in the amount of "Husband's Brokerage Acct." (i.e., change the figure to $4779 from $4799 – *see* footnote 4, *supra*), and the amount of Husband's pre-marital contribution to show a set-off of $82,343 (rather than $83,343 – *see* footnote 8, *supra*). The trial court must then recalculate the division of the marital estate.

Judgment affirmed in part, reversed in part, and remanded.

NAJAM, J., and VAIDIK, J., concur.