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IN THE INDIANA COURT OF APPEALS
CAUSE NO. 21A-DC-01063

JAMIE ISRAEL,	**) Appeal from Marion Superior Court 6**
Appellant,	**)**
	)
vs.	**) Trial Ct Cause No. 49D06-1901-DC-000429**
	)
	)
YAIMA ISRAEL,	**) Hon. Kurt Eisgruber, Judge**
Appellee.	**) Hon. Christopher Haile, Magistrate**

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

I. Nature of the Case.

The nature of this case relates to the Appellant's, Jamie G. Israel (hereafter, "Father"), appeal of the trial court's Findings of Fact, Conclusions of Law, Decree of Dissolution of Marriage ("Findings") entered relating to the parties' dissolution of marriage. Appellant's App. Vol. II, pp. 21-35.

II. Course of Proceedings.

On or about January 4, 2019, Appellee, Yaima Israel (hereafter, "Mother"), filed her Verified Petition for Dissolution of Marriage, For Preliminary Orders and Request for Preliminary Hearing. Appellant's App. Vol. II, pp. 38. On or about April 22, 2019, Mother filed her Verified Petition for Trial Rule 35 Child Custody and Psychological Evaluation. Appellant's App. Vol. II, pp. 5. On or about May 1, 2019, the trial court issued its Order for Trial Rule 35 Child Custody and Psychological Evaluation, thereby granting Mother's request for an evaluation. Appellant's App. Vol. II, pp. 40.

On or about May 9, 2019, Father filed his Verified Counter Petition for Provisional and Permanent Orders for De Facto Custody of Step-Child; For Legal Custody of Biological Child; To Set Parenting Time for Petitioner; For Child Support; For Contribution to Marital Debts; For Possession of Marital Residence; and Attorney's Fees. Appellant's App. Vol. II, pp. 42. On or about May 9, 2019, Father also filed his Motion to Amend the Court's Order for Trial Rule 35 Child Custody and Psychological Evaluation to Include Consideration of Father's Counter-Petition for De Facto Custody of Step-Child. Appellant's App. Vol. II, pp. 50.

On or about May 10, 2019, the trial court held a hearing on the Parties' respective Motions for Provisional Orders. Appellant's App. Vol. II, pp. 6. On or about May 13, 2019, the trial court

issued its Preliminary Orders. Appellant's App. Vol. II, pp. 56. This Preliminary Order controlled through the final hearings until the Findings were issued. Appellant's App. Vol. II, pp. 23. On or about May 13, 2019, the trial court also issued an Order denying Father's request to amend the order for trial rule 35 child custody and psychological evaluation. Appellant's App. Vol. II, pp. 54.

On or about July 29, 2020, Mother filed her Verified Petition for Appointment of Parenting Coordinator. Appellant's App. Vol. II, pp. 59. On or about July 29, 2020, the trial court issued its Order Appointing Level II/III Parenting Coordinator. Appellant's App. Vol. II, pp. 63. On or about August 3, 2020, Father filed his Combined: Objection to Appointment of Parenting Coordinator and Motion to Reconsider Appointing Same; And Request for Hearing, or Referral of Issue to Mediation. Appellant's App. Vol. II, pp. 70.

On or about September 21, 2020, the trial court held a hearing on several pending motions of the Parties. Appellant's App. Vol. II, pp. 12. On or about September 23, 2020, the trial court issued its Order on Pending Motions. Appellant's App. Vol. II, pp. 75. The trial court further set the matter for final hearings on January 25, 2021 and February 1, 2021. Appellant's App. Vol. II, pp. 75-76. On or about October 29, 2020, the trial court issued an Order Appointing Parenting Coordinator. Appellant's App. Vol. II, pp. 77.

On or about January 1, 2021, Father filed his Request for Findings of Facts and Conclusions of Law. Appellant's App. Vol. II, pp. 87. On or about January 22, 2021, the Parties filed their Stipulations as to Assets and Liabilities and Child Support Components. Appellant's App. Vol. II, pp. 89. The Parties filed two (2) Exhibits with their Stipulations. Appellant's App. Vol. II, pp. 89-92.

III. Disposition of the Issues.

Final hearings were held in this matter on January 25, 2021, February 1, 2021, and March 29, 2021. Appellant's App. Vol. II, pp. 14-17. Following the conclusion of the final hearings, the trial court issued its Findings. Appellant's App. Vol. II, pp. 21-35. The trial court's Findings, in relevant part: divided the marital estate in what the trial court claimed to be a 56/44 division in favor of Father; awarded Mother the marital residence; awarded Mother sole legal custody; denied Father's request for attorney's fees; and prohibited the Parties from making disparaging comments about the other party. Appellant's App. Vol. II, 21-35.

STATEMENT OF THE FACTS

Father and Mother (collectively, the "Parties") met in 2006 while Mother was attending Florida Atlantic University. Tr. Vol. II, pp. 4. At the time the Parties met, Father was working as a business law professor. Tr. Vol. II, pp. 4. In 2010, the Parties moved to Indianapolis together as a result of Father accepting a job for the NCAA. Appellant's App. Vol. II, pp. 22-23; Tr. Vol. II, pp. 4-5.

The Parties were married on July 1, 2012. Appellant's App. Vol. II, pp. 22. During the marriage, the Parties had one (1) child, namely, J.I. (hereafter, "Minor Child"), who was approximately seven (7) at the time of the final hearings. Appellant's App. Vol. II, pp. 21. Mother also had one (1) prior born child who lived with the Parties during the course of the marriage. Tr. Vol. II, pp. 5.

Mother earned her bachelor's degree from Florida International University, and during the course of the marriage, Mother earned a master's degree in accounting from the Indiana University Kelly School of Business. Appellant's App. Vol. II, pp. 22-23. Father worked for the NCAA until 2018, at which time Father was terminated from his employment. Appellant's App. Vol. II, pp. 22-23.

At the time of the final hearing, Mother was working for Oak Street Funding, and was making a base salary of approximately $116,000.00. Tr. Vol. II, pp. 186. Mother additionally earns bonuses as part of her employment. Appellant's App. Vol. II, pp. 22-35. Father, at the time of the final hearings, was working at KAR Global, and making approximately $100,000.00 per year. Appellant's App. Vol. II, 23.

During the pendency of this matter, the trial court entered its Preliminary Orders. Appellant's App. Vol. II, pp. 56-58. Pursuant to the trial court's Preliminary Orders, the Parties

were to have joint legal and shared physical custody of the Minor Child. Appellant's App. Vol. II, pp. 56-58. Furthermore, the trial court granted Mother temporary exclusive possession of the martial residence. Appellant's App. Vol. II, pp. 56-58. However, the trial court required Mother to pay all costs associated with the marital residence. Appellant's App. Vol. II, pp. 56-58. The trial court further required Father vacate the marital residence, which Father did. Appellant's App. Vol. II, pp. 22-35. Finally, the trial court enjoined the Parties from selling, transferring, or disposing of marital assets except in the ordinary course of business for the necessities of life. Appellant's App. Vol. II, pp. 56-58.

Following the conclusion of the final hearings, the trial court issued its Findings. Appellant's App. Vol. II, pp. 21-35. The trial court's Findings, in relevant part: divided the marital estate in what the trial court claimed to be a 56/44 division in favor of Father; awarded Mother the marital residence; awarded Mother sole legal custody; denied Father's request for attorney's fees; and prohibited the Parties from making disparaging comments about the other party. Appellant's App. Vol. II, 21-35. Father timely appealed the trial court's Findings. Appellant's App. Vol. II, pp. 140.

Additional facts are provided in briefing as necessary.

SUMMARY OF THE ARGUMENT

In this present matter, Father contends that the trial court committed reversable error in several respects. First, Father asserts that the trial court's division of the marital estate is clearly erroneous due to the trial court's failure to consider the tax consequences associated with Father's retirement accounts when dividing the marital estate. Precedent states that, to the extent that the trial court was required and failed to consider tax consequences in dividing the marital estate, and the resulting division does not come close to the attempted apportionment, the findings will not support the judgment and this Court must remand. Here, the trial court's failure to consider the tax burden on Father's retirement accounts will result in Father receiving a much lower percentage of the marital estate than the trial court intended.

Second, the trial court's valuation of the marital residence was an abuse of discretion because the evidence presented revealed the fair market price was much higher than the value assigned by the trial court. Father recognizes the longstanding precedent that trial court's have broad discretion in valuing marital assets. However, precedent also defines the fair market value as the price at which property would change hands between a willing buyer and seller, neither being under any compulsion to consummate the sale. Here, undisputed evidence was presented that Father offered to purchase the marital residence at $345,000.00. Thus, the evidence presented shows the fair market value of the marital residence was, in fact, $345,000.00.

Third, Father asserts that the trial court's award of sole legal custody to Mother was clearly erroneous because such award is not supported by the record evidence. Instead, the evidence presented reveals that an award of joint custody is in the Minor Child's best interests, the Parties shared joint legal custody for approximately two (2) years during the pendency of this matter, and

the Parties have demonstrated their general ability to communicate and work together as it pertains to major areas of the Minor Child's life.

Fourth, Father asserts the trial court abused its discretion in dividing the personal property of the marital residence. In particular, the trial court erred in ordering $2,230.00 be set over to each Party to represent half of the value of the household goods because the undisputed record evidence does not support the conclusion that Father actually received half of the household goods.

Fifth, Father asserts that the trial court abused its discretion in denying his request for attorney's fees. Precedent states that a trial court may order a party in a dissolution proceeding to pay a reasonable amount of the other party's attorney's fees, after considering the parties' resources, their economic condition, their ability to engage in gainful employment and earn income, and other factors bearing on the reasonableness of the award. Here, the undisputed evidence shows that Father's financial resources and Father's economic condition were in a far worse position than Mother's, such that the trial court's denial of Father's request for attorney's fees is against the logic and effects of the facts and circumstances of this matter.

Finally, the non-disparagement clause in trial court's Findings violates Father's First Amendment right under the United States Constitution. Father acknowledges that not all restraints of expression are per se violations of the First Amendment. However, in this instance, the trial court's non-disparagement clause violates Father's First Amendment because it is overly broad due to the fact that it prohibits Father from saying anything about Mother that may be considered "disparaging" to anyone, even outside of the presence of Minor Child. As such, the non-disparagement provision is an impermissible prior restraint on Father's First Amendment right to free speech.

ARGUMENT

I. The Trial Court's Division of the Martial Estate was Clearly Erroneous Because the Trial Court Failed to Consider the Tax Consequences Associated with Father's Retirement Accounts Such that the Resulting Division Does Not Come Close to the Trial Court's Attempted Apportionment of the Marital Estate.

A. Standard of Review.

"Because the trial court issued findings and conclusions, [this Court] applies a two-tiered standard of review." *Baglan v. Baglan*, 137 N.E.3d 271, 275 (Ind. Ct. App. 2019). That is, "first [this Court] determine[s] whether the evidence supports the findings and then if the findings support the judgment." *Maxwell v. Maxwell*, 163 N.E.3d 337, 340 (Ind. Ct. App. 2021). A trial court's judgment will be set aside only if it is clearly erroneous, "and a judgment is clearly erroneous if, after a review of the evidence most favorable to it, [this Court] is firmly convinced that a mistake has been made." *Baglan,* 137 N.E.3d at 275.

Importantly, "to the extent that the trial court was required and failed to consider tax consequences in dividing the marital estate and the resulting division does not 'come close to the attempted apportionment . . . the findings will not support the judgment and [this Court] must remand." *Hardin v. Hardin*, 964 N.E.2d 247, 254 (Ind. Ct. App. 2012).

B. Controlling Law.

Precedent holds that "[t]his Court generally reviews a trial court's disposition of marital assets as a whole and not item by item, and [this Court] determine[s] whether the court has divided the property in a 'just and reasonable manner." *Maxwell*, 163 N.E.3d at 340. However, "[w]hen dividing marital property, the trial court must come close to the attempted apportionment[,] otherwise the findings will not support the judgment and we must remand." *Id*.

In particular, statutory code dictates 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." Indiana Code § 31-15-7-7. This Court has held that the "thrust" of this statute's predecessor is to "recognize that there may be in the plan of division of marital property certain tax consequences which should be taken into account." *Harlan v. Harlan*, 544 N.E.2d 553, 555 (Ind. Ct. App. 1989), *aff'd*, 560 N.E.2d 1246 (Ind. 1990).

In determining which tax implications to consider, this Court stated that "only tax consequences necessarily arising from the plan of distribution are to be taken into account." *Granger v. Granger*, 579 N.E.2d 1319, 1320 (Ind. Ct. App. 1991). Further, "[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. *Id.*

However, precedent clarifies that this "taxable event" does not have to occur at the exact time disposition of property occurs, but instead, the taxable event is an event that will definitely occur at some point in time. *see Maxwell v. Maxwell*, 163 N.E.3d 337, 344 n.6 (Ind. Ct. App. 2021) ("[t]here is no question Husband will be responsible for the taxes on his pension benefits, the tax consequences are no less definite than the assumptions used to calculate the present values of the pensions, and the failure to account for the tax consequences significantly alters the court's intended 60/40 division.").

C. Analysis.

In this present matter, the trial court's division of the marital estate is clearly erroneous because the trial court failed to consider the tax consequences when dividing the marital estate, such that the resulting division of the marital estate does not come close to the attempted

apportionment. Appellant's App. Vol. II, pp. 21-35; see *Hardin v. Hardin*, 964 N.E.2d 247, 254 (Ind. Ct. App. 2012) ("to the extent that the trial court was required and failed to consider tax consequences in dividing the marital estate and the resulting division does not 'come close to the attempted apportionment . . . the findings will not support the judgment and [this Court] must remand").

To expand, pursuant to the marital balance sheet attached to the trial court's Findings, the trial court valued Father's Fidelity/Miami account at $70,870.00, Father's Fidelity/NCAA account at $263,111.00, and Father's Fidelity IU TDA at $4,577.33. Appellant's App. Vol. II, pp. 35. The values relied on by the trial court for Father's respective retirement accounts represents the *pre-tax* value of the retirement accounts. Tr. Vol. III, pp. 32-33, 34, 37, 43. The trial court relied on these valuations, with no consideration of the effect of taxation, in arriving at its "56-44" division of the marital estate. Appellant's App. Vol. II, pp. 21-35.

Yet, the trial court's failure to consider the tax consequences associated with each of Father's retirement accounts results in a division of the martial estate where Mother receives a vastly larger amount than the intended 56-44 division. Appellant's App. Vol. II, pp. 21-35. To illustrate, Father was awarded $332,108.36 of the marital estate[1]. Appellant's App. Vol. II, pp. 35. Of this $332,108.36 awarded to Father, approximately $280,146.36[2] is the gross value of Father's retirement accounts. Appellant's App. Vol. II, pp. 35. In short, approximately 85% of the marital

[1] For clarification, the marital balance sheet attached to the trial court's Findings provides that the distributions represent the "total net estate." Appellant's App. Vol. II, pp. 35. However, the trial court's marital balance sheet does not represent the "net estate" because the trial court's valuation of Father's retirement plans is based on the gross value of the retirement accounts due to the fact that the trial court did not account for the tax consequences of the respective retirement accounts. Appellant's App. Vol. II, pp. 21-35; Tr. Vol. III, pp. 32-33, 34, 37, 43.

[2] This amount represents the $70,870.00 Fidelity/Miami account awarded to Father; the $204,708.83 of the Fidelity/NCAA account awarded to Father; and the $4,577.33 Fidelity IU TDA account awarded to Father. Appellant's App. Vol. II, pp. 35.

property awarded to Father was the gross value of Father's retirement accounts. Importantly, 85% of Father's awarded marital property is subject to taxation, which will dramatically decrease the amount awarded to Father.

This Court's decision in *Maxwell v. Maxwell* provides appropriate analysis to this present matter. In *Maxwell*, the Husband was appealing, in relevant part, the trial court's failure to consider tax consequences of the property division as required under Indiana Code section 31-15-7-7. 163 N.E.3d 337, 341 (Ind. Ct. App. 2021). In particular, the Husband in *Maxwell* argued that "the trial court did not consider the tax consequences associated with his pensions which 'results in a division of the marital estate where [Wife] receives a vastly larger amount than the intended 60-40 division.'" *Id*.

The *Maxwell* Court agreed with Husband, noting that Husband "will be responsible for taxes on the full amounts of his annual pension benefits." *Id*. The *Maxwell* Court found that "[a]ssigning this tax burden to Husband alone, especially in light of the values of the pensions relative to the value of the marital estate, has the result of significantly altering the trial court's intended 60/40 apportionment." *Id*. Therefore, the *Maxwell* Court concluded that "remand [was] appropriate for the trial court to consider the tax consequences of its disposition . . ." *Id*.

The same is true in this present matter, like *Maxwell*, the trial court failed to consider the tax consequences associated with Father's retirement accounts, such that Mother will receive a vastly larger amount than the intended 56-44 division. Moreover, like *Maxwell*, the trial court is assigning the tax burden to Father alone, and in light of the fact that 85% of Father's awarded property represents the gross value of his retirement accounts, the trial court's failure to consider the tax consequences "has the result of significantly altering the trial court's intended . . . apportionment."

In summary, the trial court's failure to consider the tax burden on Father's pensions will result in Father receiving a much lower percentage of the marital estate than the intended fifty-six percent (56%), in turn resulting in Mother receiving much more than the intended forty-four percent (44%) of the marital estate. Appellant's App. Vol. II, pp. 35. As such, this Court should reverse and remand to enter a property division that actually reflects a division of 56-44.

II. The Trial Court Abused its Discretion in Valuing the Marital Home.

A. Standard of Review.

"The trial court has broad discretion in ascertaining the value of property in a dissolution action, and its valuation will not be disturbed absent an abuse of discretion." *Berger v. Berger*, 648 N.E.2d 378, 382 (Ind. Ct. App. 1995). That is, a trial court's "valuation will only be disturbed where the decision is clearly against the logic and effect of the facts and circumstances before the trial court." *Campbell v. Campbell*, 118 N.E.3d 817, 821 (Ind. Ct. App. 2019).

B. Controlling Law.

Precedent holds that "[a]s in dividing the assets of a marital estate, a trial court has broad discretion in valuing an asset based on evidence before it." *Baglan v. Baglan*, 137 N.E.3d 271, 277 (Ind. Ct. App. 2019). This Court reviews "a trial court's valuation of marital assets for an abuse of discretion, and, so long as sufficient evidence and reasonable inferences support the valuation, the trial court has not abused its discretion." *Id*. The general rule is that, "[i]f the trial court's chosen valuation is within the range of values supported by the evidence, [this Court] will affirm." *Campbell*, 118 N.E.3d at 821.

C. Analysis.

In this present matter, the trial court abused its discretion in finding the "fair market value" of the Marital Residence was Three Hundred Thirteen Thousand Five Hundred Dollars ($313,500.00) because the evidence presented did not support such determination. Appellant's App. Vol. II, pp. 27.

To expand, precedent dictates that "[t]he 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.'" *Pitcavage v. Pitcavage*, 11 N.E.3d 547, 564 (Ind. Ct. App. 2014). In this present matter, the fair market value of the Marital Residence was $345,000.00 because this is the price at which Husband was willing to purchase the Marital Residence. Tr. Vol. III, pp. 6-7.

The trial court's valuation was based upon an appraisal prepared on behalf of Husband. Appellant's App. Vol. II, pp. 27. Husband recognizes that this appraisal is generally sufficient to support the trial court's valuation of the Martial Residence. Yet, in this present matter, the trial court's reliance on this appraisal is against the logic and effects of the circumstances of this matter because the fair market value was, at a minimum, $345,000.00, since this is what a willing buyer, i.e., Father, would pay for the Marital Residence. Tr. Vol. III, pp. 6-7.

Father recognizes that trial courts have broad discretion in valuing marital assets. *see Baglan,* 137 N.E.2d at 277 ("a trial court has broad discretion in valuing an asset based on evidence before it."). However, in this present matter, the trial court's finding that the fair market value of the Marital Residence was three hundred thirteen thousand five hundred dollars ($313,500.00) is against the logic and effects of the facts and circumstances because the evidence presented revealed that the fair market value of the Marital Residence was $345,000.00, the price at which Husband offered to purchase the Marital Residence. Appellant's App. Vol. II, pp. 27; Tr. Vol. III, pp. 6-7.

In summary, this Court should reverse the trial court's valuation of the Marital Residence, and remand with instructions to set the fair market value at $345,000.00 which represents the amount at which Husband was willing to purchase the Marital Residence.

III. The Trial Court's Award of Sole Legal Custody to Mother is Clearly Erroneous.

A. Standard of Review.

"When a trial court enters findings of fact pursuant to [Indiana Trial Rule 52(a)], [this Court] review[s] for clear error, employing a two-tiered standard of review." *M.G. v. S.K.*, 162 N.E.3d 544, 547 (Ind. Ct. App. 2020). That is, "[f]irst, [this Court] must determine whether the evidence supports the trial court's findings of fact and second, [this Court] must determine whether those findings of fact support the trial court's conclusion thereon." *Id.* at 548. "Findings are clearly erroneous only when the record leaves us with a firm conviction that a mistake has been made." *Id*.

B. Controlling Law.

"Determinations regarding child custody fall within the trial court's sound discretion." *Swadner v. Swadner*, 897 N.E.2d 966, 973 (Ind. Ct. App. 2008). Specifically, "the award of joint legal custody is governed by Indiana Code section 31-17-2-15." *Id*. at 974.

Indiana Code section 31-17-2-15 provides that, "[i]n determining whether an award of joint legal custody under section 13 of this chapter would be in the best interest of the child, the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody."

Additionally, Indiana Code section 31-17-2-5 states that "[t]he court shall also consider:

(1) the fitness and suitability of each of the persons awarded joint custody;

> (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;
>
> (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) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
>
> (5) whether the persons awarded joint custody:
>
> (A) live in close proximity to each other; and
>
> (B) plan to continue to do so; and
>
> (6) the nature of the physical and emotional environment in the home of each of the persons awarded joint custody."

C. Analysis.

In this present matter, the trial court erred in awarding Mother sole legal custody of the Parties Minor Child because such an award is not supported by the trial court's factual findings. To expand, it appears that the trial court based its award of sole legal custody on the opinion of Dr. Byrd, who performed the child custody evaluation. Appellant's App. Vol. II, pp. 21-35. In particular, the trial court found that "Dr. Byrd opined that 'I would rest legal custody of [Minor Child] on Ms. Israel's shoulders for the time-being.'" Appellant's App. Vol. II, pp. 24.

The trial court's error in relying on Dr. Byrd's opinion in awarding sole legal custody to Mother is that Dr. Byrd's custody evaluation was performed on April 26, 2019, approximately eighteen (18) months prior to the final hearings in this matter. Tr. Vol. II, pp. 111-112. Importantly, Dr. Byrd testified to the following at the January 25, 2021 hearing:

> "Q So having said, sir, would that gap in information, so that we all know, **how does the Court, how do the parties put value on your recommendations and conclusions as of April 26, 2019**?
>
> A Yes, **they were valid at the time, but I don't know what's transpired since then so I can't vouch for them currently**." Tr. Vol. II, pp. 112 (emphasis added).

Cleary then the trial court's reliance on Dr. Byrd's recommendations as they pertain to legal custody, was in error because, as Dr. Byrd testified, he could not "vouch" for his recommendations at the time of the final hearing. Tr. Vol. II, pp. 112.

Not only was the trial court's reliance on Dr. Byrd's recommendations erroneous, but the evidence presented at trial undoubtedly revealed that these Parties have the ability to work together to make major decisions concerning the Minor Child's upbringing. *see Finnerty v. Clutter*, 917 N.E.2d 154, 156 (Ind. Ct. App. 2009) ("'joint legal custody' means that the persons awarded joint custody will share authority and responsibility for the major decisions concerning the child's upbringing, including the child's education, health care, and religious training").

In particular, first, Dr. Byrd testified that Father "should be involved in any important decisions that need to be made with regard to education, medical care, or religious upbringing." Tr. Vol. II, pp. 173. Thus, based on Dr. Byrd's testimony at the time of the final hearings, the Parties should have joint legal custody because otherwise, Father would have no ability to be involved in the important decisions that need to be made relating to Minor Child's upbringing.

Even more, at the final hearing, Dr. Byrd testified "[t]hat means that, okay, under the right conditions that these people can communicate with each other in a non-accusatory, non-inflammatory manner." Tr. Vol. II, pp. 155. Again, Dr. Byrd's testimony at the time of the final hearing reveals that the Parties do have the ability to communicate and work together to make major decisions relating to Minor Child's upbringing.

Additionally, the Parties shared joint legal custody throughout the pendency of this matter, which was approximately two (2) years. Appellant's App. Vol. II, pp. 23; Tr. Vol. II, pp. 188. As such, the only reasonable inference is that the Parties have the ability to work together to make major decisions regarding the Minor Child's upbringing because they were able to do it for

approximately two (2) years. This is further supported by the evidence presented at the time of the preliminary hearing, which revealed that the Parties worked together to select the Minor Child's medical providers. Tr. Vol. II, pp. 19. At the time of the final hearing, the evidence presented revealed that Mother and Father were still both involved in the Minor Child's doctor appointments and participating in same, clearly evidencing their ability to work together. Tr. Vol. II, pp. 213-14.

Additionally, the evidence presented revealed that, at the time of the preliminary hearing, the Parties worked together and were both actively involved in selecting a school for Minor Child. Tr. Vol. II, pp. 20. At the time of the final hearing, the evidence presented revealed that Mother and Father were still involved in the Minor Child's schooling and making decisions relating to same, again, clearly evidencing their ability to work together to make major decisions for the Minor Child. Tr. Vol. II, pp. 213-214.

This Court's decision in *Swadner v. Swadner* provides appropriate analysis for this current matter. Specifically, in *Swadner*, the mother was appealing the trial court's award of joint legal custody, arguing that the trial court should have awarded her sole legal custody. 897 N.E.2d 966, 973 (Ind. Ct. App. 2008). In affirming the trial court's award of joint legal custody, the *Swadner* Court stated: "[w]hile it is true that Mother and Father disagree on whether [child] should attend a private Christian school or public school, and about other matters as well, the parties have demonstrated their general ability to communicate and work together to raise their children." *Id*. at 974. The same is true in this present matter, like *Swadner*, Mother and Father disagree on some matters, but have demonstrated their general ability to communicate and work together to raise their child, particularly as it relates to major decisions concerning Minor Child's upbringing.

In summary, the trial court erred in awarding Mother sole legal custody because the evidence presented fails to support the trial court's determination. Instead, the evidence presented,

reveals that an award of joint custody is in the Minor Child's best interests, as the Parties shared legal custody for approximately two (2) years why the matter was pending, and the Parties have demonstrated their general ability to communicate and work together as it pertains to major areas of the Minor Child's life. This Court should reverse and remand with instructions to enter joint legal custody.

IV. The Trial Court Abused its Discretion in Dividing and Allocating the Personal Property of the Marital Estate.

A. Standard of Review.

This Court's "standard of review for specific findings entered after a party has requested them is two-tiered." *Hyde v. Hyde*, 751 N.E.2d 761, 765 (Ind. Ct. App. 2001). That is, "[f]irst, [this Court] must determine whether the evidence supports the findings, and then whether the findings support the judgment." *Id*. This Court "will reverse the judgment only when it is clearly erroneous." *Id*. "Findings are clearly erroneous when the record lacks any evidence to support them." *Id*.

B. Controlling Law.

"The division of assets lies within the sound discretion of the trial court." *Bloodgood v. Bloodgood*, 679 N.E.2d 953, 956 (Ind. Ct. App. 1997). "The party challenging the trial court's property division bears the burden of proof." *Hyde v. Hyde,* 751 N.E.2d 761, 765 (Ind. Ct. App. 2001). That is, the "party must overcome a strong presumption that the court complied with the statute and considered the evidence on each of the statutory factors." *Id*.

In particular, "[r]eversal is appropriate when there is no rational basis for the award." *Bloodgood v. Bloodgood,* 679 N.E.2d 953, 956 (Ind. Ct. App. 1997). This Court has clarified that

"[t]here is no rational basis if the court's division of marital assets is clearly against the logic and effect of the facts and reasonable inferences to be drawn therefrom." *Id*.

C. Analysis.

In this present matter, the trial court erred when it found that each Party would receive $2,230.00 worth of household goods because the undisputed record evidence does not support that Father actually received $2,230.00 worth of household goods. Appellant's App. Vol. II, pp. 28. In particular, the Parties stipulated to the total value of the household goods in the martial residence being $4,460.00. Appellant's App. Vol. II, pp. 28. The trial court thereby ordered the amount of $2,230.00 be set over to each party. Appellant's App. Vol. II, pp. 28.

The trial court's action of setting over the amount of $2,230.00 to each party was clearly erroneous because the trial court's award is not supported by the record evidence. Specifically, at the final hearing, the undisputed testimony revealed that, upon vacating the marital residence in 2019, Father took a very few items with him from the marital residence. Tr. Vol. III, pp. 14-15. Father explained that he was unsure of what was left in the marital residence as Father had not been in the marital residence for two (2) years. Tr. Vol. III, pp. 15.

As such, Father requested that the Court allow him to visit the marital house so that the Parties could identify what was in the marital residence and how it could be divided. Tr. Vol. III, pp. 15. Father's request was based upon the trial court's order prohibiting the Parties from "selling, transferring or disposing of marital assets except in the ordinary course of business for the necessities of life." Tr. Vol. III, pp. 15; Appellant's App. Vol. II, pp. 23.

The trial court did not grant Father's request to visit the marital residence to identify household goods that could be divided, but instead, awarded Father a few additional items from the marital residence. Appellant's App. Vol. II, pp. 28. These few items that Father originally took

from the marital residence and the few additional items the trial court awarded him after the final hearings do not represent half of the household goods from the marital residence. As such, the trial court's finding that Father was awarded $2,230.00 worth of household goods, i.e. half of the household goods, is not supported by the record evidence.

In summary, the trial court erred in ordering $2,230.00 be set over to each Party to represent half of the value of the household goods because the undisputed record evidence does not support the conclusion that Father actually received half of the household goods. This Court should reverse and remand with instructions to award each Party half of the household goods.

V. The Trial Court Abused its Discretion in Denying Father's Request for Attorney's Fees.

A. Standard of Review.

This Court "review[s] a trial court's decision to award or deny attorney's fees in connection with a dissolution decree using an abuse of discretion standard." *Ahls v. Ahls*, 52 N.E.3d 797, 802-803 (Ind. Ct. App. 2016). Thus, this Court "will reverse only if its decision is clearly against the logic and effect of the facts and circumstances before it or if it misapplies the law." *Id.* at 803.

B. Controlling Law.

Indiana Code section 31-15-10-1 provides that:

> "The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment."

This Court has further clarified that:

> "Pursuant to Indiana Code Section 31–15–10–1, a trial court may order a party in a dissolution proceeding to pay a reasonable amount of the other party's attorney's fees, after considering the parties' resources, their economic condition, their ability to engage in gainful employment and earn income, and other factors bearing on the reasonableness of the award." *Barton v. Barton*, 47 N.E.3d 368, 377 (Ind. Ct. App. 2015).

C. Analysis.

In this present matter, the trial court abused its discretion in denying Father's request for attorney's fees. Appellant's App. Vol. II, pp. 21-35. In particular, the record showed that Father's financial resources and Father's economic condition were in a far worse position than Mother's, such that an award of attorney's fees was justified. See *Barton v. Barton*, 47 N.E.3d 368, 377 (Ind. Ct. App. 2015) ("a trial court may order a party in a dissolution proceeding to pay a reasonable amount of the other party's attorney's fees, after considering the parties' resources, their economic condition, their ability to engage in gainful employment and earn income, and other factors bearing on the reasonableness of the award.").

To expand, first, Father acknowledges that he was making a similar salary to Mother at the time of the final hearing. Appellant's App. Vol. II, 21-35. However, this was not the case for the majority of the time that this case was pending. In fact, throughout the majority of the pendency of this matter, Father was making about half the amount Mother was making. Tr. Vol. II, pp. 37, Tr. Vol. III, pp. 147. Such economic disparity undoubtedly demonstrates that Father's resources during the pendency of this matter were much lower than Mother's resources, thereby supporting an award of attorney's fees.

Not only were Father's resources much lower than Mother's, but Father's economic condition suffered greatly as a result of litigating this matter. In particular, the evidence presented revealed that Father was "tapped out" and had no ability to pay his attorney fees. Tr. Vol. III, pp. 150. The reason being that, in addition to Father making approximately half the amount Mother

made for the majority of the time, this matter went on for approximately (2) years, requiring Father to spend a substantial amount in attorney fees just to be properly represented in the trial court. Tr. Vol. III, pp. 147-150

In summary, the trial court abused its discretion in denying Father's request for attorney's fees because the decision was clearly against the logic and effects of the facts and circumstances before the trial court. The undisputed evidence revealed that Father was making half the amount Mother was making the majority of the pendency of this matter, and Father had to deplete his resources in supporting himself and paying for attorney fees during the two (2) year pendency of this matter. This Court should reverse and remand with instructions to award Father attorney fees.

VI. The Trial Court's Non-Disparagement Clause Violates Father's First Amendment Right.

A. Standard of Review.

This Court "review[s] a constitutional challenge . . . *de novo*." *Morgan v. State*, 87 N.E.3d 506, 508 (Ind. Ct. App. 2017). Specifically, "[this Court] review[s] federal and state constitutional challenges de novo." *Boultinghouse v. State*, 120 N.E.3d 586, 589 (Ind. Ct. 2019).

B. Controlling Law.

"The First Amendment, made applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law ... abridging the freedom of speech...." *In re Paternity of K.D.,* 929 N.E.2d 863, 868 (Ind. Ct. App. 2010). This Court has clarified that "[a] prior restraint is an order forbidding certain communications that is issued before the communications occur." *Id*. "Restraining orders and injunctions that forbid future speech activities are classic examples of prior restraints." *In re Paternity of G.R.G.*, 829 N.E.2d 114, 124 (Ind. Ct. App. 2005).

Precedent dictates that, "[a]ny system of prior restraints of expression comes to [this Court] bearing a heavy presumption against its constitutional validity." *In re Paternity of K.D.,* 929 N.E.2d 863, 868 (Ind. Ct. App. 2010). However, this Court has also clarified that "[t]he protections the First Amendment affords against prior restraints are not triggered unless there is a state action." *In re Paternity of G.R.G.*, 829 N.E.2d 114, 124 (Ind. Ct. App. 2005). Therefore, "a prior restraint is not a per se violation of the First Amendment, but it comes before us with a heavy presumption that it is constitutionally invalid." *In re Paternity of K.D.,* 929 N.E.2d 863, 868-869 (Ind. Ct. App. 2010).

C. Analysis.

In this present matter, the non-disparagement clause in trial court's Findings violates Father's First Amendment right under the United States Constitution. To expand, the trial court specifically provided, in relevant part, the following:

> The parties shall refrain from making disparaging comments about the other in writing or conversation to or in the presence of [Minor Child], friends, family members, doctors, teachers, associated parties, co-workers, employers, the parenting coordinator, media, the press, or anyone. Disparaging remarks including, but are not limited to, negative statements, criticisms, critiques, insults or other defamatory comments . . ." Appellant's App. Vol. II, pp. 31-32.

The trial court's non-disparagement clause is a prior restraint on Father's First Amendment right because it prohibits Father from saying anything to anyone, including the media, that could be considered "negative" or a "criticism" of Mother, regardless of the truth of the remarks. Appellant's App. Vol. II, pp. 31-32.

Father recognizes that not all restraints of expression are per se violations of the First Amendment. However, in this instance, the trial court's non-disparagement clause violates Father's First Amendment because it is overly broad. Appellant's App. Vol. II, pp. 31-32. The

reason being is that the trial court's non-disparagement clause prohibits Father from saying anything about Mother that may be considered "disparaging" at all times, as opposed to instances of when Father is in the presence of the Minor Child. Appellant's App. Vol. II, pp. 31-32.

For example, in this Court's decision of *In re Paternity of G.R.G.*, the father was challenging the trial court's order prohibiting the Parties from "forever" discussing their disputes with the minor child. 829 N.E.2d 114, 123 (Ind. Ct. App. 2005). The *G.R.G.* Court held that the father's First Amendment right was not violated by the provision. *Id.* The *G.R.G.* Court specifically held the following in reaching its determination:

> The trial court's prior restraint was also permissible to the extent it reasonably furthers G.R.G.'s best interests. The order in the case before us did not preclude Father and Mother from disagreeing with each other. **Nor did it preclude Father from discussing with any other third party his disputes with Mother.** Rather, it obviously reflects the trial court's reasonable belief that exposing G.R.G. to such matters would not be in the child's best interests. The restraint on Father's speech was not error." *Id.* (Emphasis added).

The opposite is true in this matter. Again, Father does not dispute the validity of the trial court's non-disparagement clause as it pertains to the prohibition against disparaging comments in the presence of the Minor Child. However, the non-disparagement clause does violate Father's First Amendment right to the extent that it prohibits Father from saying anything about Mother to any third party, even when Minor Child is not present. Appellant's App. Vol. II, pp. 31-32.

In summary, the trial court's non-disparagement clause is overly broad to the extent it prohibits Father from saying anything about Mother that may be considered "disparaging" to anyone, even outside of the presence of Minor Child. Such an overly broad provision is an impermissible prior restraint on Father's First Amendment right to free speech. This Court should reverse and remand with instructions to modify the non-disparagement clause to apply only in instances where the Minor Child is present.

CONCLUSION

For the reasons stated herein, this Court should reverse and/or remand for the reasons stated herein.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I, Alexander N. Moseley, verify that this Appellant's Brief contains no more than 14,000 words, including footnotes, as prescribed by Ind. App. Rule 44(E), notwithstanding those items excluded from page length limits under Ind. App. Rule 44(C), as determined by the word counting function of Microsoft Word 2010

/s/ Alexander N. Moseley
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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served upon the following this 20th day of January, 2022, via the Court's electronic filing system:

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