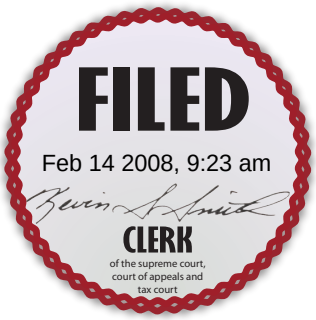

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IN THE
COURT OF APPEALS OF INDIANA

JENNIFER NEWCOMB,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 65A05-0705-CV-264
	)	
BRIAN NEWCOMB,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE POSEY CIRCUIT COURT
The Honorable Maurice C. O'Connor, Special Judge
Cause No. 65C01-0503-DR-100

February 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Jennifer Newcomb ("Mother") appeals from a final decree of dissolution. We affirm.

Issues

Mother raises several issues, which we consolidate and restate as follows:

I. Whether the trial court violated Mother's due process rights when it entered a judgment against her for childcare expenses and health insurance incurred after the hearing;

II. Whether the court's custody determination, made fourteen months after having heard evidence, violated Mother's due process rights and was supported by sufficient evidence;

III. Whether the trial court's determination of child support was clearly erroneous; and

IV. Whether the trial court abused its discretion in dividing the marital estate.

Facts and Procedural History

Mother and Brian Newcomb ("Father") were married on May 2, 1998. They had two children: T.N. in 1999, and M.N. in 2001. Although Mother and Father shared responsibility for the children's daily care, Father's flexible work schedule permitted him to transport the children to appointments more often than Mother's.

From the Fall 2003 through the Spring 2005, Mother suffered from numerous health problems. She underwent a hysterectomy, jaw surgery, and operations for a herniated cervical disc. In addition, she developed a mass in her liver that required CAT scans every two months. Also, she had biopsies of her cervix and breast. During this time, she was fired from her job and hospitalized for four days for depression. Under a great deal of chronic pain and stress, Mother was irritable and moody. On top of this,

medications prescribed by her physician made her tired and at times unable to perform her normal duties around the house. Accordingly, Father took on more family responsibilities.

By the Spring of 2005, the situation was strained between the parties. On March 31, 2005, Father called police, claimed that Mother had hit him,[1] and filed a petition for dissolution of marriage. As a result, Father obtained a protective order, possession of the family home, and temporary custody of the children. Mother filed for a change of venue from judge, moved in with her mother, and exercised visitation with T.N. and M.N. pursuant to a June 2005 provisional agreement. Thereafter, Father moved for a continuance, and the parties attempted but failed at mediation.

On January 18, 2006, the parties signed (and the court approved) an agreed entry that modified the June 2005 agreement. Specifically, Mother promised to pay $1,347 in past due childcare expenses, $125 per week for ongoing childcare expenses, and $259.56 per month for health insurance. Appellant's App. at 68. In exchange, Father promised to allow Mother to have parenting time with the children on alternating weekends and on Wednesday evenings. *Id*. On February 21 and 22, 2006, the court held a final hearing at which witnesses testified for and against both Mother and Father. By then, Mother was employed, no longer on any medications, and in much better health. At the conclusion of the hearing, the court requested proposed entries from each party and took the matter under advisement. According to the CCS, on February 27, 2006, the parties submitted

[1] Though arrested on that day, Mother was eventually found not guilty.

"their proposed Order for the Court's approval." *Id*. at 5. No copies of the proposed order(s) appear in the materials provided on appeal. In September 2006, the parties each filed an information for indirect contempt. *Id*. In November 2006, Father filed a request to bifurcate, and Mother filed a response thereto. *Id*.

The CCS contains no indication that the court ever ruled on the contempt or bifurcation motions. Indeed, the next CCS entry is not until April 20, 2007, and it consists of the court's final judgment. Further facts and more detailed procedural history shall be supplied where necessary.

Discussion and Decision

I. Due Process and Expenses Incurred After Final Hearing

Per the April 20, 2007 final judgment, Mother was ordered to pay $6,875 for fifty-five weeks of unreimbursed childcare expenses incurred through December 21, 2006, and $1,297.80 for five months of health insurance incurred after the close of evidence. Appellant's App. at 10. Mother asserts that her due process rights were violated because the judgment regarding these two amounts was entered without notice or opportunity to be heard. Appellant's Br. at 7.

The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. *Thompson v. Clark County Div. of Family and Children*, 791 N.E.2d 792, 794-95 (Ind. Ct. App. 2003), *trans. denied*. Due process is described as the opportunity to be heard at a meaningful time and in a meaningful manner. *Id*. In addressing due process claims, courts attempt to balance three factors: (1) the private interests affected by the proceeding; (2) the risk of

error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. *McKinney v. McKinney*, 820 N.E.2d 682, 688 (Ind. Ct. App. 2005) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). The balancing of these factors recognizes that although due process is not dependent on the underlying facts of the particular case, it is "nevertheless flexible and calls for such procedural protections as the particular situation demands." *Id*.; *see also Rosendaul v. State*, 864 N.E.2d 1110, 1115 (Ind. Ct. App. 2007), *trans. denied*.

In the January 18, 2006 provisional agreement, Mother promised to pay $125 weekly for childcare and $259.56 monthly for health insurance. Appellant's App. at 68. However, at the final hearing in February 2006, Mother testified that she had not made these payments and "had no intentions" of paying when she signed the provisional agreement. Tr. at 422-23. Indeed, Mother testified: "I signed that but I'm not going to pay [Father's] girlfriend to watch my children in my house." *Id*. at 423. As for the health insurance, Mother testified that she had not paid it and that it was "being paid for out of the business that I own half of." *Id*.[2]

Father maintains that a "counsel's meeting with the Court" occurred on December 14, 2006; that during that meeting Father's attorney updated the Court regarding how far Mother was in arrears; and that the amounts were calculated using the agreed-upon weekly/monthly numbers from the January 2006 provisional order. Appellee's Br. at 8

[2] Mother and Father were shareholders of Newcomb Drywall & Painting, Inc., which Father ran. Tr. at 42, 104.

n.2.[3] Mother replies that the "alleged [December counsel's] meeting is not reflected in the CCS and is not a part of the record of appeal," thus "should not be considered" on appeal. Reply Br. at 2 n.1 (citing *Frye v. Vigo County*, 769 N.E.2d 188, 198 (Ind. Ct. App. 2002); *Shafer v. Lambie*, 667 N.E.2d 226, 232 (Ind. Ct. App. 1996)).

Mother is correct that the CCS does not reveal any activity in this case in December 2006 -- let alone contain any reference to, or entry for, a counsel's meeting. Yet, Mother does not directly contend that the counsel's meeting with the court did not happen or that Mother's lawyer did not attend such a meeting. Moreover, Mother filed no motion to correct error, in which she might have challenged the amount of arrearage. Even on appeal, she makes no claim that she *did* pay (in whole or in part) the childcare and/or health insurance as required by the January 2006 agreed entry that she signed.

Given that provisional orders are to be followed until final orders are entered, Indiana Code § 31-15-2-17 and Indiana Code § 31-15-4-14, Mother wisely does not contend that she was unaware of her obligation in this regard. More importantly, it should have been abundantly clear that past and future child support and health insurance were issues to be resolved in the final dissolution decree. Indeed, at the two-day final hearing, the court received a substantial amount of testimony and other evidence from both Mother and Father concerning, *inter alia*, child support and health insurance. This simply is not a situation where a party did not have notice and opportunity to be heard on these issues. Mother was represented by counsel throughout these proceedings, and no

[3] The final judgment confirms that the amounts ordered were calculated using the method propounded by Father.

allegations of duress have been raised. While it was certainly unusual for the mandates of the provisional order to be in place for fourteen months, we disagree with Mother that a due process violation occurred.

In addition, on appeal, we have difficulty addressing Mother's contention regarding the unfortunate delay between the final hearing and the final judgment when, during the same time period, Mother never questioned the delay. Our trial rules provide a mechanism that either party could have used to avoid just the sort of delay that occurred here.

> Whenever a cause … has been tried to the court and taken under advisement by the judge, and the judge fails to determine any issue of law or fact within ninety (90) days, the submission of all the pending issues and the cause may be withdrawn from the trial judge and transferred to the Supreme Court for the appointment of a special judge.

Ind. Trial Rule 53.2(A). Mother's failure either to prod the trial court into action or to seek transfer of the case makes her challenge to timeliness even less compelling on appeal.

II. Custody Determination and Due Process

Mother next contends that she was denied her due process rights as a result of the trial court's failure to expedite the custody hearing. In a related argument, Mother challenges the actual child custody determination.

A. Due Process

Because child custody proceedings implicate the fundamental relationship between parent and child, Indiana courts have long recognized that procedural due process must be provided to protect the substantive rights of the parties. *See Hayden v.*

Hite, 437 N.E.2d 133, 136 (Ind. 1982). To that end, our legislature requires: "Custody proceedings must receive priority in being set for hearing." Ind. Code § 31-17-20-6. Indeed, this court has previously reversed a permanent custody order where the trial court scheduled a custody hearing over fifteen months after modifying temporary custody by an ex parte order. *See Wilcox v. Wilcox*, 635 N.E.2d 1131, 1137 (Ind. Ct. App. 1994). We have also reversed where the trial court committed several procedural irregularities, one of which was a failure to prioritize the custody hearing as evidenced by the two-month delay between the granting of temporary custody through an ex parte proceeding and the final custody hearing. *See Brown v. Brown*, 463 N.E.2d 310, 314 (Ind. Ct. App. 1984).

More recently, however, we have held that scheduling a second day of a child custody trial seven months after a temporary modification of custody was not a failure to prioritize the final hearing in violation of due process. *Stratton v. Stratton*, 834 N.E.2d 1146, 1150 (Ind. Ct. App. 2005). In *Stratton*, the trial court modified temporary custody after the first day of trial, that is, after considering evidence that included psychological evaluation. Thus, it was not ex parte, plus the mother was accorded meaningful contact with the child during the delay between the temporary modification and the final hearing. Similarly, in *Francies v. Francies*, 759 N.E.2d 1106 (Ind. Ct. App. 2001), *trans. denied*, we found no due process problem where two years elapsed from the time of an emergency custody order (that awarded child to grandmother) until the final custody determination. 759 N.E.2d at 1110-11. We explained that thirteen days after the emergency order, the court held a hearing at which mother was represented, and that part

of the two-year delay was attributable to the mother's own request for a continuance and request for further hearing. *Id*. at 1111; *see also Spencer v. Spencer*, 684 N.E.2d 500, 502 (Ind. Ct. App. 1997) (holding that eighteen month delay between emergency change of custody and hearing on permanent change of custody did not deny mother due process where she contributed to and was not prejudiced by the delay).

In resolving the case at bar, we find the following timeline helpful.

> *March 31, 2005* - Father files petition for dissolution of marriage, and obtains a protective order, possession of the family home, and temporary custody of the children. Pre-trial set for April 11, 2005.
>
> *April 1, 2005* – Although service was issued to Mother, certified mail not served, thus April 11 pretrial vacated.
>
> *April 12, 2005* – Mother, by counsel, files unverified change of venue from judge.
>
> *May 2, 2005* – Special judge accepts appointment.
>
> *May 13, 2005* – Father files petition for emergency hearing modifying protective order provisions or for a provisional order.
>
> *May 25, 2005* – Telephonic conference between Judge and both counsel during which hearing set for June 2.
>
> *June 2, 2005* – Hearing begins, but recesses for negotiations between parties. Parties return with agreed provisional order, which court approves.
>
> *June 10, 2005* – Citing incomplete discovery and counsel's vacation, Father files motion to continue.
>
> *June 14, 2005* – Over Mother's objection, court grants continuance and sets telephonic conference for June 22.
>
> *July 14, 2005* – Parties file joint request for approval of mediator, which court grants five days later.
>
> *August 9, 2005* – Mother files emergency petition for custody.

August 17, 2005 – Mother informs court that she "is *not* requesting a hearing to be set on [her] Emergency Petition for Custody at this time." Appellant's App. at 4 (emphasis added).

August 19, 2005 – Mother files request for appointment of guardian ad litem or CASA.

September 14, 2005 – Mediator's report filed; report indicated that mediation was held and was to be rescheduled.

September 27, 2005 – Telephonic conference with counsel held, and pretrial is scheduled for November 16.

November 16, 2005 – Telephonic pretrial held, and final hearing is set for January 26, 2006.

January 18, 2006 – Parties submit proposed agreed entry, which court approves in full. Over parties' objections, Court changes location of final hearing and resets it from January 26, 2006 to February 22, 2006.

February 21-22, 2006 – Final hearing held. At conclusion of hearing, court orders parties to submit proposed entries "with regard to the disposition of real and personal property, business, pensions, indebtedness, custody, visitation and child support worksheet." *Id*. at 5.

February 27, 2006 – "Parties submit their proposed Order for the Court's approval." *Id*.

September 22, 2006 – Mother files information for indirect contempt.

September 29, 2006 – Father files information for contempt.

November 3, 2006 – Father files request to bifurcate.

November 14, 2006 – Mother files response to bifurcation motion.

April 20, 2007 – "Received Order approved by" special judge, i.e. final judgment.

Appellant's App. at 1-6.

To summarize, upon the filing of the dissolution petition and Mother's arrest, temporary custody was awarded to Father. Pretrial was set to occur eleven days later, but was delayed by a service problem and by Mother's motion to change venue/judge. Twelve days after the special judge accepted the appointment, Father petitioned for a provisional order. Within just two weeks, at a hearing on the matter, the parties took a break to negotiate an agreed provisional order, which was approved by the court that day, June 2, 2005. After granting Father a brief continuance over Mother's objection, the court set a teleconference date of June 22, 2005. In July 2005, the parties attempted mediation. In August 2005, Mother filed an emergency petition for custody, yet informed the court that she was not requesting a hearing to be set on the petition, and then asked for the appointment of a guardian or CASA.

By the end of September 2005, mediation apparently had broken down, and the court and parties scheduled a pretrial for November 16, 2005. At the November 16 pretrial, the final hearing was set for January 26, 2006. One week before the final hearing, the parties submitted a proposed agreed entry, which the court approved in full before resetting the final hearing for the following month. The final hearing took place February 21-22, 2006.

The present case is clearly distinguishable from the situations in *Brown* and *Wilcox*, where there was a considerable delay between an ex parte order and a hearing of any kind. In addition, part of the delay about which Mother now complains is attributable to her own request for a new venue/judge and various attempts at mediation. Furthermore, unlike the limited, supervised visitation permitted to the mother in *Wilcox*,

Mother has had ample visitation throughout these proceedings. Under these particular circumstances, we decline to hold that Mother was denied due process.

B. Custody Decision

Determinations regarding child custody fall within the trial court's sound discretion. *Francies*, 759 N.E.2d at 1115-16. We will affirm unless we determine that the trial court abused this discretion. *Id*. In this case, the trial court entered findings of fact and conclusions of law. Therefore, we undertake a two-tiered standard of review: first, we must determine if the evidence supports the findings; and second, we must determine if the findings support the judgment. *Orlich v. Orlich*, 859 N.E.2d 671, 674 (Ind. Ct. App. 2006). When making these determinations, we will not reweigh the evidence or judge witnesses' credibility. *Id*. Instead, we will consider only the evidence favorable to the judgment, and will make all reasonable inferences from that evidence. *Id*. The fact that evidence at trial conflicted will not lead us to conclude that the trial court abused its discretion, and we will not substitute our judgment for that of the trial court. *Periquet-Febres v. Febres*, 659 N.E.2d 602, 605 (Ind. Ct. App. 1995), *trans. denied*. It is the appellant's burden to demonstrate that the trial court's findings of fact are clearly erroneous. *Orlich*, 859 N.E.2d at 674.

When making custody decisions, courts strive to discern the best interests of the child. *Naggatz v. Beckwith*, 809 N.E.2d 899, 902 (Ind. Ct. App. 2004), *trans. denied*. Indiana Code Section 31-14-13-2 specifically states no preference for either parent and lists several relevant factors to be considered when determining best interests. They include the age and sex of the children, the wishes of the parents and children, the

interaction and interrelationship among key figures, the children's adjustment to home, school, and community, the mental and physical health of all involved, and patterns of violence. *See* Ind. Code § 31- 14-13-2.

The court in the present case found that Mother and Father should have joint legal custody of their children, that Father should have primary physical custody, and that Mother should have parenting time pursuant to Indiana's Parenting Time Guidelines. Appellant's App. at 8 (findings 2, 3, and 4). Without reweighing evidence or assessing witness credibility, and considering only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, we cannot say that the findings lack any evidence or reasonable inferences from the evidence to support them.

The parties agree that Father has always shared the work of parenting the children. In fact, Mother does not dispute that when her health began to suffer in 2003, Father took on the majority of parenting responsibilities and continued to do so throughout the dissolution proceedings. Evidence from the transcript reveals that Father kept the children clean and fed, did their laundry, coordinated school routines, brought them to appointments, and took them to sports, museums, etc., and was generally described as a good father. Tr. at 60, 175, 178, 204-05, 214, 220, 223, 230, 239, 246.

The transcript revealed the following about Mother. At times she would leave home and be gone all day and night, and she had left the family stranded on more than one occasion. *Id.* at 63-64. Mother has slept during her visitation time. *Id.* at 68, 229. Evidence was also introduced that Mother smokes and has done so in a vehicle while T.N. was present, despite his breathing issues. *Id.* at 64-65, 232, 268, 427. Her

screaming has driven the children to hide beneath a bed. *Id*. at 66, 74. Mother has had a difficult relationship with T.N. *Id.* at 64. While in Mother's care, T.N. was burned, hit with a spatula, and knocked across a room. *Id*. at 69, 74, 257. On a hot July day, Mother left both children unattended in a car while she was at a cellular service store. *Id*. at 72-73, 238. In light of our standard of review, we cannot say the court abused its discretion when it awarded primary physical custody to Father.

Mother does not dispute the above evidence per se nor does she deny the negative repercussions said evidence could have on her pursuit of primary physical custody. Instead, she focuses upon the time that has passed between the final hearing and the date of the final order. She generally asserts that within that time period, the relevant factors "have changed." Appellant's Br. at 11. Without a doubt, the final order should have been issued less than fourteen months after the final hearing. Such a time lag should not occur in matters involving parent-child relationships. However, we cannot grant relief based upon bare allegations of changed factors. Having failed to utilize Trial Rule 53.2(A), Mother's recourse now, if any, would be to pursue modification of custody. *See* Ind. Code § 31-17-2-21.

III. Child Support

Mother makes a multi-part challenge to the child support calculation. First, she asserts that the court speculated on Father's income and that there is "no evidence in the record to support this finding." Appellant's Br. at 13. Second, she contends that the court "erred when it included, as work related childcare expenses, sums [that Father] voluntarily gave his girlfriend which remained available to the household to offset family

expenses." *Id.* at 15. Third, she maintains that the court erred by failing to consider the childcare tax credit when calculating work-related childcare expenses. *Id.* at 16.

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

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

The relevant findings provide:

> 8. The Court notes that given the fact that there is some difficulty in ascertaining the Father's income from his business, and also taking into consideration that some business expense can be attributed to living expenses, the Court imputes and assigns the Father's gross yearly income at $27,000.00 per year. The Court finds the Mother's current income to be $13.00 per hour. The Court finds that the cost of the weekly health insurance premium is $31.30 and that the weekly childcare is $125.00. The Court finds the Mother is entitled to credit for 98 overnight visits with the

> children. Therefore, pursuant to the attached Child Support Worksheet,[4] the Mother shall pay child support to the Father in the amount of $123.75 per week through an Income Withholding Order to the Posey County Clerk's office or State Central Collection Agency beginning Friday, December 22, 2006. The Clerk/Agency is ordered to accept said payments and to maintain an accounting of the payments. The Mother shall be responsible for the annual administrative fee.
>
> 9. The Father shall be entitled to claim both children as exemptions for the 2006 tax year. Thereafter, the Mother shall be entitled to claim [T.N.] as an exemption and the Father shall be entitled to claim [M.N.] as an exemption for state and federal tax purposes. When only one child remains to be claimed as an exemption, the parties shall rotate the exemption with the Mother claiming in even numbered tax years and the Father claiming in odd numbered tax years.

Appellant's App. at 9.

Our review of Father's tax records reveals that he earned $20,800 in wages, salaries, tips, etc., $34 in interest, and $6,707 in supplemental income from rental of "office and shop in home" ($10,237 "rents received" minus $3,530 "expenses"). Appellant's App. at 35, 38-39; *see* Ind. Child Support Guidelines 3(A)(1) (gross income includes salary, wages, interest, self-employment income) and 3(A)(2) (self-employment equals gross receipts minus ordinary and necessary expenses). However, his business

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[4] Since 1989, the Indiana Child Support Guidelines have required, in all cases in which the court is requested to order support, that both parents complete and sign, under penalty of perjury, a child support worksheet to be filed with the court verifying the parents' incomes. *Glover v. Torrence*, 723 N.E.2d 924, 931 n.2 (Ind. Ct. App. 2000). Despite this mandate, in some cases, parties still fail to submit worksheets. *See, e.g.*, *Payton v. Payton*, 847 N.E.2d 251 (Ind. Ct. App. 2006). In *Payton*, another panel of this court found that it could not adequately review the trial court's child support order where the parties had not submitted verified child support worksheets *and* the trial court had not entered adequate findings to justify and explain its order. *See id*. at 253-55 (remanding for entry of more complete findings or to obtain and adopt a party's verified child support worksheet). Here, although the court references an attached worksheet, we have not located one in the materials submitted on appeal. This may be because no copy of any proposed orders exists in the materials. In any event, the court's findings that we have excerpted provide sufficient detail and explanation for us to review the child support determination in this case.

had $8,512 in losses, which arguably brings his income down to approximately $19,000. Yet, Father took cash draws from the business to purchase food, entertainment, gasoline, insurance, etc. *See* Appellant's App. at 44-61. Surely, some portion of these could be deemed "reasonable out-of-pocket expenditures necessary to produce income" for Newcomb Drywall & Painting Inc. *See* Ind. Child Support G. 3(A)(2). Others, however, might more accurately be characterized as "reduc[ing] personal living expenses" and thus could be categorized as additional income. *Id*. Given this record, we cannot say there was no evidence to support the court's finding imputing Father's income as $27,000 (adding on approximately $8,000 for "business" purchases that reduced his personal living expenses).

We are likewise unimpressed with Mother's argument regarding the $125 in work-related childcare expense. There was evidence within the record to support the finding that weekly childcare was $125. *See* Tr. at 80, 123-24, 230-31. That the sitter was Father's new girlfriend is irrelevant given the testimony that she was not a member of the household and had her own apartment. *Id*. at 235-37.

As for Mother's last challenge to the child support amount, we examine Child Support Guideline 3(E)(1), which provides that childcare costs incurred due to employment of the parents should be added to the basic child support obligation. "Such child care costs must be reasonable and should not exceed the level required to provide quality care for the children." Child Supp. G. 3(E)(1). The commentary to that guideline provides that where a parent "claims the work-related child care credit for tax purposes, it would be *appropriate* to reduce the amount claimed as work-related child care expense

by the amount of tax saving to the parent." Child Supp. G. 3(E), cmt (emphasis added). "The exact amount of the credit may not be known at the time support is set, but *counsel* should be able to make a rough calculation as to its effect." *Id*. (emphasis added). We have no evidence that Mother's counsel offered to the court any calculation (rough or exact) as to what a proper ongoing credit[5] would be. We also have no indication that Mother requested that the court calculate such an amount. Moreover, "appropriate" does not mean required/shall/must/mandatory or that there is only one method to account for such a credit. In sum, we cannot say that the court's child support determination, which required Mother to pay $123.75 per week for T.N. and M.N's support, is clearly against the logic and effect of the facts and circumstances that were before the trial court or that the court has misinterpreted the law. Our conclusion is not meant in any way to discourage Mother from seeking modification of support if she can meet the applicable standard. *See* Ind. Code § 31-16-8-1.

IV. Division of Marital Estate

Mother takes issue with the court's division of marital property. Specifically, she challenges the valuation of the residence, the inclusion of indebtedness for, but not value of, vehicles, the valuation of a tanning bed, and the court's decision regarding retirement benefits. We address each of her concerns.

Indiana Code Section 31-15-7-5 requires the trial court to divide the marital estate in a just and reasonable manner, with an equal division being presumed just and

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[5] We can see from Father's tax records that in 2005, the entire credit for child and dependent care expenses amounted to $311.

reasonable. The party challenging a trial court's division of the marital estate must overcome a strong presumption that it considered and complied with the applicable statute. *Frazier v. Frazier*, 737 N.E.2d 1220, 1223 (Ind. Ct. App. 2000). The presumption is one of the strongest presumptions applicable to our consideration on appeal. *Bizik v. Bizik*, 753 N.E.2d 762, 766 (Ind. Ct. App. 2001), *trans. denied.* In reviewing a trial court's disposition of the marital assets, we focus on what the court did, not what it could have done. *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, 59 (Ind. 2002).

> [W]hen we review a claim that the trial court improperly divided marital property, we must decide whether the trial court's decision constitutes an abuse of discretion, considering only the evidence most favorable to the trial court's disposition of the property, without reweighing the evidence of assessing the credibility of witnesses. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable probable, and actual deductions to be drawn therefrom. An abuse of discretion also occurs when the trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute.
>
> Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the trial court.

Bizik, 753 N.E.2d at 766 (quotation marks and citations omitted); *see also J.M. v. N.M.*, 844 N.E.2d 590, 602 (Ind. Ct. App. 2006), *trans. denied*.

Indiana Code Section 31-15-7-5 provides,

> The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

> (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.

The parties purchased the marital residence in 2000 for $90,000. Tr. at 369. Thereafter, the parties bought an additional .67 (not 6.7) acres. *Id*. In a 2005 appraisal, which included the additional two-thirds acre and workshop/pole barn and which was adjusted for comparables outside the standard time frame, valued the marital residence at $126,000. Appellee's App. at 6-21. Mother guessed that the residence and property were worth $185,000, yet admitted that she was not an expert and that she did not believe it could have doubled in value during the five years since purchase.[6] Tr. at 371-72. Within its final order, the court devoted six-pages to listing, valuing, and dividing assets and debts among Mother and Father. Within that list, the court valued the marital residence at $140,000, certainly within the realm of the evidence provided. Similarly, the appraiser had legitimate reasons for his valuation of the tanning bed, and it was not clearly erroneous for the court to utilize the value ascribed by the licensed, experienced

[6] Mother also testified about another appraisal that she said was done in 2004 for purposes of refinancing and which she stated valued the residence at $155,000. Tr. at 371. However, no copy of that appraisal was introduced, and whoever performed that appraisal did not testify.

appraiser. Appellee's App. at 27; Tr. at 195-96.

As for the van and pickup truck that Mother contends were not included in the division of property, one of Mother's own exhibits shows them as part of Father's business. *See* Mother's Exh. B; Tr. at 113. That same exhibit listed the "tax net book value" of Father's business at $23,397.40. *Id*. In its Finding #15, the court listed "Business" among Father's assets and valued it at $25,000, which lends credence to the idea that the van and pickup truck were included within the business and accordingly were a part of the division of property. The fact that more was owed on the vehicles than they were worth (an unfortunately all-too-frequent occurrence with vehicles) does not make inclusion of the debts thereon clearly erroneous.

Finally, we reach the pension question. It is well-established in Indiana that all marital property goes into the marital pot for division, whether it was owned by either spouse prior to the marriage, acquired by either spouse after the marriage and prior to final separation of the parties, or acquired by their joint efforts. Ind. Code § 31-15-7-4(a); *Beard v. Beard*, 758 N.E.2d 1019, 1025 (Ind. Ct. App. 2001), *trans. denied*. "Only property acquired after the final separation date of the parties is excluded from the marital assets." *Coffey v. Coffey*, 649 N.E.2d 1074, 1076 (Ind. Ct. App. 1995). "While 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." *Hill v. Hill*, 863 N.E.2d 456, 460 (Ind. Ct. App. 2007).

The final decree's list of assets includes under Mother's name an SBC pension of $9,656.74 and an SBC 401(K) of $11,189.90. Appellant's App. at 14. These numbers

find support in Mother's answer to an interrogatory that requested values on the date of separation. Father's Exh. 8 (interrogatory number 4[7]); *Sanjari v. Sanjari*, 755 N.E.2d 1186, 1192 (Ind. Ct. App. 2001) (noting marital pot generally closes on day dissolution petition is filed/date of separation). The asset portion of the decree lists under Father's name a $2,000 IRA, $2,757 tax refund, $8,789.25 business checking account, and a notation for painters pension "all interest to the Father." Appellant's App. at 14-15. According to a letter from the International Painters and Allied Trades Industry Pension Fund, Father's "estimated accrued monthly benefit earned from May 1998 through October 2001, the date contributions were last received on [his] behalf, is $432.00 at age 65." Appellant's App. at 34. However, that same letter explained that the pension plan "does not pay benefits in a lump sum," that there are "multiple ways to calculate the lump sum value of pensions," and that it would "not be able to provide you with a lump sum value for pension benefits." *Id*.

Mother neither disputed the future monthly amount of the painter's pension nor offered a present value for a benefit that would not occur until Father reached age sixty-five. *See Galloway v. Galloway*, 855 N.E.2d 302, 304-05 (Ind. Ct. App. 2006) (reminding parties that the burden of producing evidence as to the value of the marital property rests squarely on the shoulders of the parties and their attorneys). Instead, Mother asked for an order granting her fifty percent of Father's pension earned during the time of the marriage. Tr. at 382. Father asserted that he made contributions to his

[7] Incidentally, the answer to the interrogatory that sought March 31, 2005 values is actually $9,756.74 not $9,656.74. Since neither party mentions this small error, we will not address it.

pension for eight years prior to marriage, contended that Mother's pension "is worth a lot more than" his, and suggested that "the difference [between Mother's pension and his] be taken off the equity of the home." *Id*. at 59. In the end, the court did not take the difference off the equity of the home nor did it award Father any of Mother's pension or 401(K). The court did not award Mother a portion of the painter's pension that Father contributed to during three years of their seven-year marriage. Rather, in the final decree, the court ordered that each party "shall be the sole owner of any pension plan, 401K, savings account or any form of retirement plan that a party shall have." Appellant's App. at 16-17 (finding 19). Moreover, the court calculated the net marital estate per party as $27,837.54 for Father and $30,029.64 for Mother, and found that such a division of assets and debts was "just and equitable." *Id*. at 16.

Examining only the evidence most favorable to the court's disposition of the property and without assessing witness credibility, we have considered the division of marital property as a whole. Applying the appropriate standard, we cannot say the court abused its discretion or misapplied the law. Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the trial court. Mother has not overcome the strong presumption that the court considered and complied with the applicable statute when it determined the division to be just and reasonable. *See Galloway*, 855 N.E.2d at 304-05 (affirming dissolution decree and its division of property where court did not receive competent evidence of estate's two main assets, business and pension); *see also Perkins v. Harding*, 836 N.E.2d 295, 302 (Ind. Ct. App. 2005) (recognizing validity of protecting trial court from risk of reversal if it

distributes marital property without specific evidence of value where party fails to introduce such evidence).

Affirmed.

NAJAM, J., and BAILEY, J., concur.