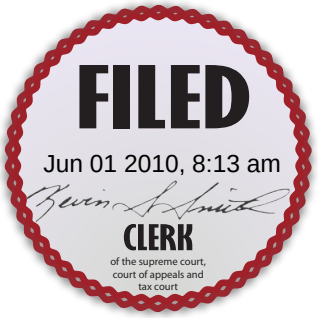

ATTORNEY FOR APPELLANT:

EARL McCOY
Law Office of Earl McCoy
Lafayette, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ALAN KELLY,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 12A05-0912-CV-703
	)	
JULIE KELLY,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE CLINTON SUPERIOR COURT
The Honorable Raymond Kirtley, Senior Judge
Cause No. 12D01-0308-DR-353

June 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Alan Kelly ("Husband") appeals the marriage dissolution decree entered by the trial court in dissolution proceedings initiated by Julie Kelly ("Wife"). We affirm.

Issues

Husband raises three issues, which we restate as follows:

I. Whether the trial court abused its discretion in awarding custody of the parties' minor child to Wife;

II. Whether the trial court abused its discretion in dividing the marital property; and

III. Whether the trial court abused its discretion in awarding attorney's fees to Wife.

Facts and Procedural History

On September 29, 2000, Husband and Wife married.[1] On June 27, 2001, A.K. was born. On August 17, 2003, Husband and Wife separated. On August 21, 2003, Wife filed a petition for dissolution of marriage. The trial court appointed a guardian ad litem ("GAL") on February 21, 2007, to "facilitate minimal visitation communication needed and further to complete home evaluations." Appellant's App. at 20. The GAL was able to complete her evaluation as to Wife, but was unable to do so with regard to Husband because he would not schedule a home visit. In her report, the GAL concluded that she was "unable to give an opinion about Husband's ability to care for [A.K.]" but that she saw "no reason why [A.K.] should not live with her mother." *Id*. at 24.

[1] We admonish Husband's counsel of his obligation to state the facts "in accordance with the standard of review appropriate to the judgment or order being appealed." Ind. Appellate Rule 46(A)(6)(b).

The final hearing began on August 20, 2007, was continued on September 6, 2007, and concluded on December 21, 2007. Husband appeared pro se. The GAL submitted her report and testified. At the conclusion of the hearing, the trial court took all issues under advisement. On November 24, 2008, the trial court entered a partial decree of dissolution, finding only that the marriage was irretrievably broken and dissolving the marriage. On July 29, 2009, the trial court issued its final dissolution decree, awarding custody of A.K. to Wife, dividing the marital estate equally between the parties, and awarding attorney's fees of $9000 to Wife. Husband appeals.

Discussion and Decision

Initially, we note that Wife has not filed an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing arguments on the appellee's behalf, and we apply a less stringent standard of review with respect to showings of reversible error. *Murfitt v. Murfitt*, 809 N.E.2d 332, 333 (Ind. Ct. App. 2004). That is, we may reverse if the appellant establishes prima facie error, which is error at first sight, on first appearance, or on the face of it. *Id*.

I. Custody

Husband challenges the trial court's custody determination. We give considerable deference to the trial court's decision in custody disputes because the trial court saw the parties, observed their conduct and demeanor, and heard their testimony. *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 945 (Ind. Ct. App. 2006). On review, we cannot reweigh the

evidence, judge the credibility of the witnesses, or substitute our judgment for that of the trial court. *Speaker v. Speaker*, 759 N.E.2d 1174, 1179 (Ind. Ct. App. 2001). 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. *Pawlik v. Pawlik*, 823 N.E.2d 328, 330 (Ind. Ct. App. 2005), *trans. denied*.

Here, the trial court entered findings of fact and conclusions thereon. In reviewing the judgment, we must determine whether the evidence supports the findings and whether the findings support the judgment. *Klotz v. Klotz*, 747 N.E.2d 1187, 1190 (Ind. Ct. App. 2001). "The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them." *Swadner v. Swadner*, 897 N.E.2d 966, 971 (Ind. Ct. App. 2008). 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. *Klotz*, 747 N.E.2d at 1190.

Husband first contends that the "trial court's ruling regarding custody was improper in large part because the trial court relied heavily upon the one-sided report of [the guardian ad litem]." Appellant's Br. at 13. The GAL was unable to complete her evaluation of Husband because he declined to schedule a home visitation. Husband asserts that Wife took some furniture from his home and had not returned it, and he did not believe it would be

appropriate for the GAL to visit his home under the circumstances.[2] He claims this is "not unreasonable." *Id*. at 25.

We think it manifestly obvious that Husband's cooperation with the GAL was of paramount importance, and it would have been simple to explain to the GAL that some of his furniture was missing. To the extent that the GAL's report is one-sided, Husband has no one to blame but himself. Further, the GAL acknowledged that she was "unable to give an opinion about Husband's ability to care for [A.K.]" and concluded only that she saw "no reason why [A.K.] should not live with her mother." Appellant's App. at 24. Most important, at the final hearing Husband was able to cross-examine the GAL at length and fully present his own evidence. The trial court considered all the evidence presented, including Husband's testimony and evidence. *See id*. at 24 ("After careful consideration of the Guardian Ad Litem's report and testimony, *the testimony and evidence presented*, the Court now finds that the Petitioner/Wife should have the care and custody of [A.K.].") (emphasis added). We conclude that the trial court committed no error in considering the GAL's report and testimony.

[2] The trial court found that "Husband refused to cooperate with the Guardian Ad Litem's investigations, claiming that the Guardian Ad Litem did not contact him within the time designated by the Court to complete the report." Appellant's App. at 24. Husband argues that the finding is clearly erroneous because he did cooperate with the GAL, and that the reason the home visit was not scheduled was not related to the time period but was due to the fact that Wife had his furniture. Perhaps he did cooperate with the GAL in some respects, but it is undeniable that he did not cooperate in scheduling a home visit, whatever the reason. *See* Petitioner's Ex. 2 ("[Husband] came to [the GAL's] office on March 12, 2007 and paid the Custody Study fee, but refused to schedule a home visit. This [GAL] made at least two requests by phone and two written requests to schedule a home visit.").

Husband also asserts that the trial court erred in determining the best interests of A.K. Custody determinations are governed by Indiana Code Section 31-17-2-8, which provides in pertinent part 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 violence by either parent.

The trial court found that all the relevant factors either weighed in Wife's favor or were neutral. Husband's challenges to the trial court's findings are merely requests to reweigh the evidence, which we may not do. However, we agree with Husband that the trial court committed clear error in finding that he "has been diagnosed with bi-polar, depression, and anxiety issues." Appellant's App. at 23 (finding 7.F). Our review of the record before us does not reveal any evidence that Husband has been diagnosed with bi-polar, depression, and anxiety issues. Nevertheless, the findings of the trial court as to the remaining factors support its determination that it is in the best interests of A.K. to be in the care and custody of

Wife. Accordingly, we conclude that the trial court did not abuse its discretion in awarding custody of A.K. to Wife.

II. Marital Property

Husband argues that the trial court abused its discretion in dividing the marital property. The division of marital assets lies within the trial court's sound discretion, whose determination we will reverse only for an abuse of discretion. *DeSalle v. Gentry*, 818 N.E.2d 40, 44 (Ind. Ct. App. 2004). A party challenging the trial court's division of marital property must overcome a strong presumption that the trial court "considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal." *Id.* "We may not reweigh the evidence or assess the credibility of the witnesses, and we will consider only the evidence most favorable to the trial court's disposition of the marital property." *Id.*

"The division of marital property in Indiana is a two-step process." *Thompson v. Thompson*, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004), *trans. denied* (2005). First, the trial court determines what property must be included in the marital estate. *Id.* Second, the trial court must then divide the marital property under the statutory presumption that an equal division of marital property is just and reasonable. *Id.* "The party challenging the trial court's division of the marital estate must overcome a strong presumption that the court complied with the relevant statute and considered evidence on each of the statutory factors." *Gaskell v. Gaskell*, 900 N.E.2d 13, 19 (Ind. Ct. App. 2009).

As to the first step, Indiana Code Section 31-15-7-4(a) 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). While the trial court may ultimately decide to award a particular asset solely to one spouse, it must first include the asset in its consideration of the marital estate to be divided. *Id.*

Husband first contends that the trial court erred in including his mother's home ("the Rossville home") in the marital estate. On April 4, 2003, approximately four months prior to the parties' separation, Husband's mother executed a quitclaim deed transferring a remainder interest in her home to Husband but reserving a life estate for herself. Tr. at 299; Respondent's Ex. 31. Thus, Husband acquired a remainder interest in the Rossville home after the marriage and before the final separation of the parties, and therefore the trial court was required to include it in the marital estate. *See* Ind. Code § 31-15-7-4(a). However, Husband claims that it should not be included in the marital estate because he did not have a "present possessory interest in the property." Appellant's Br. at 29. Husband claims that he was unaware of the transfer. We fail to see how Husband's purported lack of knowledge of the April 4, 2003, deed divested him of a possessory interest. On September 5, 2003, after Husband allegedly learned of the conveyance, Husband executed a quitclaim deed

transferring his interest in the real estate back to his mother. Tr. at 305; Respondent's Ex. 32. His transfer to his mother of his interest in the property after the date of separation also does not change the fact that he acquired a remainder interest in the Rossville home after the marriage and before final separation.

Husband also argues that his interest in the Rossville home was "too remote" to be included in the marital estate. Appellant's Br. at 30. In support, he cites *Fiste v. Fiste*, 627 N.E.2d 1368 (Ind. Ct. App. 1994). In *Fiste*, the trial court excluded from the marital estate a future interest in real estate that the husband, Roger, possessed by virtue of his grandfather's will. Roger's grandfather devised the real estate first to his wife for life, then to their daughter (Roger's mother) for life, and then to her child or children. Another panel of this Court held that Roger's remainder interest in the real estate was too remote, and therefore not marital property, because he did not possess a present interest of possessory value and his interest was subject to complete disfeasance if he should predecease his mother. *Id*. at 1372.

In contrast, in *Moyars v. Moyars*, 717 N.E.2d 976 (Ind. Ct. App. 1999), *trans. denied* (2000), we held that the husband's one-third remainder interest in real estate was not too remote to be included in the marital estate. *Id*. at 979. There, David and Mechelle lived, for most of their married life, on property owned one-half each by David's father and mother. David's father died. David's father willed one-half of his interest in the property to his wife (David's mother) and the other half to David and his two siblings, subject to a life estate in David's mother. The trial court found that David's remainder interest in the property was too remote to be included in the marital estate. We reversed the trial court, reasoning as follows:

> Although David has no legal present possessory interest in the land, we note that he and Mechelle have in fact enjoyed the possession of a portion [of] the land for many years now. Further, … David's interest in the real property does represent a present pecuniary interest; David could sell or mortgage his interest if he chose to. Remainder interests, like fee simple interests, are capable of valuation. … David's interest in the property is a valuable asset. Thus, we hold that David's vested remainder in the real estate was not too remote to be included in the property division.

Id. at 979 (citations and footnote omitted).[3]

Husband attempts to distinguish this case from *Moyars*, arguing that he did not have physical possession of the Rossville home. However, this case is like *Moyars*, and unlike *Fiste*, in that Husband's interest was *not* subject to disfeasance and thus represented a present pecuniary interest. The April 4, 2003, quitclaim deed conveyed to Husband a fixed right to take legal possession of the Rossville home at some point in the future. Husband's mother retained a life estate, but she was eighty-nine years old at the time of the conveyence. Husband's remainder interest could have been sold or otherwise transferred or mortgaged. In fact, he did so when he transferred his remainder interest in the Rossville home back to his

[3] The *Moyars* court stated, "to the extent that *Fiste* can be read to stand for the proposition that all remainder interests are too remote to be part of the marital estate, we disapprove of the holding." 717 N.E.2d at 979 n.2.

mother. Accordingly, we conclude that Husband's remainder interest in the Rossville home is not too remote to be included in the marital estate.[4]

Husband next asserts that the trial court erred in valuing both the Rossville home and the marital residence. We observe that 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. *O'Connell v. O'Connell*, 889 N.E.2d 1, 13 (Ind. Ct. App. 2008). The trial court's discretion is not abused if there is sufficient evidence and reasonable inferences therefrom to support the result. *Id*. A trial court "abuses its discretion when there is no evidence in the record supporting its decision to assign a particular value to a marital asset." *Thompson*, 811 N.E.2d at 917. The burden of producing evidence as to the value of marital assets is upon the parties to the dissolution proceeding. *Galloway v. Galloway*, 855 N.E.2d 302, 306 (Ind. Ct. App. 2006).

Specifically, Husband argues that the trial court abused its discretion in accepting Wife's testimony that the marital home was worth $125,000 and the Rossville home was

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[4] Husband also contends that his remainder interest in the Rossville home should be "treated as an inheritance and set over to Husband without compensation since the inherited proper [sic] had not been commingled with the parties' joint property." Appellant's Br. at 33. In support, Husband cites *Castaneda v. Castaneda*, 615 N.E.2d 467 (Ind. Ct. App. 1993). Husband's reading of *Castaneda* is inconsistent with that of our supreme court. In *Fobar v. Vonderahe*, 771 N.E.2d 57 (Ind. 2002), our supreme court explained,

> *Castaneda* held that all property of the parties must be included in the marital estate regardless of its source, but the trial court may deviate from the 50-50 statutory presumption if property was brought separately into the marriage, was never commingled with other marital assets, and was never treated as marital assets. … *Castaneda* permits the trial court, in its discretion, to choose to distribute the marital property unequally in favor of one spouse based on statutorily identified considerations, one of which is inherited property. Whether to do so is a matter of trial court discretion in light of all other relevant factors.

Id. at 59 (citations and quotation marks omitted).

worth $90,000 when there was other evidence that showed these values to be much lower. Husband asserts that Wife's values were based solely on speculation, but our review of the record reveals otherwise. Wife has a real estate license and used the multiple listing service to compare these properties with similar properties sold in the area. Tr. at 170-71. Husband's argument amounts to a request to reweigh the evidence, which we must decline. To the extent Husband argues that he was paying a mortgage on the marital home, he had the burden of producing that evidence, and he did not.[5]

Husband next argues that the trial court erred in dividing the marital estate equally. Indiana Code Section 31-15-7-5 provides as follows:

> 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

[5] Because we find that the trial court did not overvalue the real property in the marital estate, Husband's assertion that the trial court overstated the value of the marital estate fails. Therefore, we need not address Husband's argument that the trial court's division of property was improper because the property divided exceeded the actual value of the marital estate.

(B) a final determination of the property rights of the parties.

In addition, we observe,

> Subject to the statutory presumption that an equal distribution of marital property is just and reasonable, the disposition of marital assets is committed to the sound discretion of the trial court. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances, or the reasonable, probable, and actual deductions to be drawn therefrom. … The presumption that a dissolution court correctly followed the law and made all the proper considerations in crafting its property distribution is one of the strongest presumptions applicable to our consideration on appeal. Thus, we will reverse a property distribution only if there is no rational basis for the award and, although the circumstances may have justified a different property distribution, we may not substitute our judgment for that of the dissolution court.

Augspurger v. Hudson, 802 N.E.2d 503, 512 (Ind. Ct. App. 2004) (citations and quotation marks omitted). "The trial court's disposition is to be considered as a whole, not item by item." *Fobar v. Vonderahe*, 771 N.E.2d 57, 59 (Ind. 2002).

The trial court found that "[n]either party rebutted the statutory presumption that an equal division of the marital estate would be fair and reasonable." Appellant's App. at 26. The trial court determined that the value of the marital estate was $237,960. Husband was awarded the bulk of the property, including both parcels of real estate and the two vehicles, such that he received $236,200 of the marital estate and Wife received $1,760. To equalize the distribution, the trial court ordered Husband to pay Wife the sum of $117,220 and granted Wife a lien on the marital residence and the two vehicles.

Husband contends that the equal division of the marital estate is unjust and unreasonable because he owned virtually all the assets before the marriage. Husband states that he owned the home, which was fully furnished, and the two vehicles. He asserts that

there "is no evidence that the value of any of these assets increased in value during the marriage[,]" and that Wife "did not contribute to the accumulation of these assets in any way." Appellant's Br. at 35. He asserts that the trial court must have failed to properly consider these facts.

Husband focuses solely on one statutory factor while ignoring the others. However, all the factors must be considered, with none taking precedence over another. *Chestnut v. Chestnut*, 499 N.E.2d 783, 786 (Ind. Ct. App. 1986). Wife made non-economic contributions to the marital estate. Wife has custody of A.K. and, notwithstanding Husband's payment of child support, will be responsible for the bulk of the financial resources needed to provide for A.K. Wife's economic circumstances are less favorable than Husband's, and her earning ability is significantly less than Husband's. The trial court found that "Husband's income for purposes of calculating child support to be the sum of $673.00 per week[,]" and "Wife's income for purposes of calculating child support to be the sum of $384.00 per week." Appellant's App. at 24-25.

Husband cites *Cowden v. Cowden*, 661 N.E.2d 894 (Ind. Ct. App. 1996), to support his argument that he should receive a greater portion of the marital estate, but there we upheld the trial court's decision to award the husband more than half of the marital property. *Id*. at 897. Here, in contrast, Husband is asking us to reverse the trial court's equal division of marital property, which is presumptively just and reasonable.[6] As we previously noted,

[6] Husband also cites *Schnarr v. Schnarr*, 491 N.E.2d 561 (Ind. Ct. App. 1986), but that case was decided before 1987, when the legislature revised the statute governing property division (at that time Indiana Code Section 31-1-11.5-11) to impose the presumption that an equal division of the marital property between the parties is just and reasonable.

"although the circumstances may have justified a different property distribution, we may not substitute our judgment for that of the dissolution court." *Augspurger*, 802 N.E.2d at 512. Here, we cannot say that there is no rational basis for the trial court's division of the marital estate.[7]

III. Attorney's Fees

Lastly, Husband opposes the trial court's award of attorney's fees to Wife. Indiana Code Section 31-15-10-1(a) provides,

> 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.

"We review a trial court's award of attorney fees in connection with a dissolution decree for an abuse of discretion." *Hartley v. Hartley*, 862 N.E.2d 274, 286 (Ind. Ct. App. 2007). "In determining whether to award attorney fees, the trial court must consider the parties' resources, their economic condition, their ability to engage in gainful employment, and other factors that bear on the award's reasonableness." *Bean v. Bean*, 902 N.E.2d 256, 266 (Ind. Ct. App. 2009). "The trial court, however, need not cite the reasons for its determination." *Id*.

[7] Husband contends that the dissolution decree fails to indicate how he is supposed to pay Wife the sum of $117,220 and asserts that this suggests that the trial court "could not come up with any feasible plan for payment of this judgment." Appellant's Br. at 39. We disagree. The trial court granted Wife liens against the marital home and the vehicles in order to secure the payment. The parties are free to determine the manner in which Husband satisfies the judgment or to pursue whatever legal remedies that arise from the imposition of such liens.

Husband asserts that the trial court did not hear any evidence pertaining to his economic condition. That is an overstatement. Although there is no evidence in the record as to the amount of Husband's mortgage payments, it was his responsibility to submit that evidence. Otherwise, the trial court had sufficient evidence to determine the proper amount of child support and determine the value of the marital estate and how to divide it. We observe that Husband has significantly greater earning power than Wife. "An award of attorney fees is proper when one party is in a superior position to pay the fees of the other party." *Reese v. Reese*, 671 N.E.2d 187, 193 (Ind. Ct. App. 1996), *trans. denied* (1997); *see also Millar v. Millar*, 581 N.E.2d 986, 989 (Ind. Ct. App .1991), *summarily aff'd*, 593 N.E.2d 1182 (Ind. 1992) (concluding that trial court did not abuse its discretion in ordering husband to pay wife's attorney's fees where there was a disparity in income potential and resources available to parties). We find no abuse of discretion here.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.