

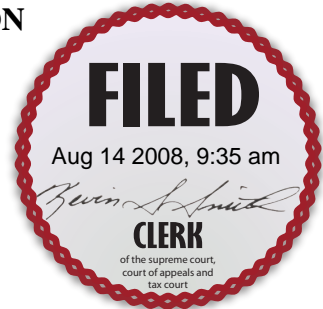
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**IN THE
COURT OF APPEALS OF INDIANA**

RUSSELL DEAN BANKS,)
)
Appellant-Respondent,)
)
vs.)
)
DONNA SUE BANKS,)
)
Appellee-Petitioner.)

No. 82A04-0712-CV-738

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D04-0404-DR-406

August 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, Russell Dean Banks (Russell), appeals the trial court's Order of Final Decree of Dissolution of his marriage to Appellee-Petitioner, Donna Sue Banks (Donna), and the trial court's Order denying his motion to correct error.

We remand for further proceedings.

ISSUES

Banks raises six issues on appeal, which we consolidate and restate as the following four issues:

- (1) Whether the trial court abused its discretion when dividing the marital estate;
- (2) Whether the trial court abused its discretion by ordering Russell to pay one-half of an appraisal fee for an appraisal requested by Donna but not accepted as evidence;
- (3) Whether the trial court abused its discretion by ordering Russell to pay one-half of another appraisal fee incurred by Donna; and
- (4) Whether the trial court abused its discretion when it ordered Russell to contribute towards Donna's attorney fees.

FACTS AND PROCEDURAL HISTORY

Russell and Donna were married on July 22, 2000, and had no children. Donna filed a Petition for the Dissolution of Marriage on April 4, 2004. On January 6, 2006, Donna moved for the trial court to set the matter for a final hearing. On April 13, 2007, the trial court commenced the final hearing, but the hearing was not finished that day. The remainder of the final hearing was completed on July 19, 2007.

On July 27, 2007, the trial court granted the Petition for Dissolution of Marriage and entered its Final Decree of Dissolution. The Decree divided the marital property by stating as follows:

4. **MARITAL RESIDENCE**: The parties own a residence situated at 915 Sycamore Lake Drive, in Vanderburgh County, Indiana. The marital residence shall be sold as expeditiously as possible and the proceeds of the sale shall be divided 52% to [Donna] and 48% to [Russell], after ordinary and reasonable expenses of the sale have been deducted, with the exception that [Russell] may reimburse himself for any monies expended on the marital residence to bring it up to saleable condition. [Russell] shall provide written documentation to [Donna] of any expenditure made pursuant to this paragraph within 72 hours of making said expenditure. [Russell] shall continue to reside in the marital residence, pending sale of same and shall be responsible for all of the expenses, mortgage, taxes, insurance and utilities, on the same until the property is sold.
5. **FARMLAND**: [Russell] was [the] owner, prior to the marriage, of 68 acres of farm land, located in Black Township, Posey County, Indiana, and [Russell] shall be the owner of the same, [Donna] shall take no interest therein.
6. **BARKER AVENUE PROPERTY**: Donna was [the] owner, prior to marriage, of two parcels of real estate located at 1325 and 1327 S. Barker. [Donna] shall be the owner of the same and [Russell] shall have no interest therein.
7. **AUTOMOBILES**: [Russell] shall be the owner of the 2004 Chevy Avalanche and shall assume any indebtedness thereon, be solely responsible therefore and hold [Donna] harmless therefrom. [Donna] shall be the owner of the 2004 Jeep liberty and [Russell] shall have no further interest in that automobile. [Russell] shall be the owner of the 1992 Ford F-250 and [Donna] shall have no further interest therein.
8. **PENSION RETIRMENT ACCOUNTS**: [Donna] shall be the owner of her Federated Life IRA, Shenandoah IRA, her 403 B plans with Mutual of America, [Russell] shall be the owner of his pension through the Mid-West Pipe pension and the Plumbers and Pipe Fitters pension. [Donna] shall have one-half interest in both

[Russell's] Saving and Investment Plan and DRP pension plan through Fluor, as of December 31, 2005[,] which is the date that the [c]ourt uses to value this Pension Plan. The Savings and Investment Plan was worth \$48,668.30 and the DRP [p]ension [p]lan was worth \$8,197.51 as of that date. Both shall be divided by a Qualified Domestic Relations Order, that shall give [Donna] one-half of each Pension Plan as of December 31, 2005.

9. **OTHER LIQUID ASSETS [DONNA] MAY KEEP:** Any of the proceeds remaining from the \$25,000.00 she withdrew from the joint account prior to the Dissolution of Marriage being filed. [Donna] shall be the owner of the cash funds currently on deposit with the Clerk's Office, and the same shall be released to [Donna] forthwith. [Donna] shall be the owner of the funds remaining in the Money Market Funds. Each party shall be the owner outright of any monies in their separate checking accounts.
10. **PERSONAL PROPERTY:** [Russell] shall be the owner of the John Deere lawn tractor, the 110 volt welder and any personal items in his possession. [Donna] shall be the owner of the items of furniture, household accessories and other items she brought to the marriage and any personal items currently in her possession.
11. **COSTS:** [Russell] shall pay one-half of the Appraisal fees from Jerry Peters and William Wilson within 90 days of this date. [Russell] and [Donna] shall split the outstanding bill to R & J Painting, with [Russell] to be responsible for two-thirds of the costs and [Donna] one-third.
12. **ATTORNEY FEES:** [Russell] shall pay \$1,500.00 of [Donna's] attorney fees within 90 days of the date of this Order.

(Appellant's App. pp. 15-18). The trial court did not make any findings as to what the entire marital estate was worth nor explain what percentage was being distributed to either Russell or Donna.

On August 23, 2007, Russell filed a motion to correct error pursuant to Ind. Trial Rule 59. On September 27, 2007 the trial court held a hearing on Russell's motion to correct error. It denied that motion on October 26, 2007.¹

Russell now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Russell first contends that the trial court abused its discretion when dividing the marital estate. Specifically, Russell argues that the trial court did not take into account a \$60,000 down payment made by him on the marital residence, did not take into account payments made by him on the mortgage and upkeep of the house during the dissolution proceedings, and erred when granting Donna 52% of the proceeds generated from the sale of the marital residence.

The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. *Stratton v. Stratton*, 834 N.E.2d 1146, 1151 (Ind. Ct. App. 2005). Indiana Code section 31-15-7-5 provides that

The court shall presume that an equal division of the marital property between 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.

¹ Neither Russell or Donna has included a copy of the trial court's denial of Russell's motion to correct error; so, we will assume it was a summary denial.

(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.

Here, the trial court did not explain that it intended to deviate from an equal division of the marital estate, or if so, why it was doing so.² “Following the legislative adoption of the equal division presumption, we placed the requirement upon trial courts, when effecting an unequal division of marital property, to state the reasons based on the evidence which establish that an equal division is not just and reasonable.” *See Hoskins v. Hoskins*, 611 N.E.2d 178, 180 (Ind. Ct. App. 1994). However, express trial court findings will not be required for “insubstantial deviations from precise mathematical equality.” *Kirkman v. Kirkman*, 555 N.E.2d 1293, 1294 (Ind. 1990). Whether a deviation is substantial depends on the size of the marital estate. *Hoskins*, 611 N.E.2d at 180.

In an attempt to aid us in our evaluation of the trial court’s disposition of the marital estate, Russell has provided us with an Addendum to his Appellant’s Brief, which consists of a list of assets held by the parties prior to marriage and a list of expenses paid by him between January 5, 2006 and July 1, 2007. However, many of the assets listed were disposed

² Russell stated that “It would appear that the trial court intended to set aside the premarital holdings to the respective parties.” (Appellant’s Br. p. 9). This may be true, but it does not necessarily mean that the trial

of during the marriage, and the list does not include other assets that were acquired during the marriage. Further, many of the expenses paid were incurred at least partly for his own benefit. Altogether, Russell's Addendum is not helpful on appeal.

Donna has provided a chart of marital assets divided by the trial court as part of her Appellee's Brief. She has assigned values to the assets, most of which are supported by evidence submitted to the trial court. Based on her calculations, Russell received nearly 70% of the marital assets, or \$528,307.31, and she received the remainder, \$226,430.47. However, the majority of these valuations were not articulated by the trial court in the Decree and we cannot assume that the trial court would agree with each of Donna's valuations or how the dispersion of the assets should be characterized.³

Nevertheless, from a review of the record, we conclude that the trial court made a substantial deviation from an equal split of the marital assets, regardless of whether it

court intended to deviate from an equal division of the marital estate.

³ For example, Donna has listed that the trial court awarded to Russell \$8,000 from the money held by the Clerk of Vanderburgh County Courts. (Appellee's Br. p. 13). However, the trial court's Order from May 1, 2007 specifically states that the \$8,000 that it gave Russell access to was "to be used exclusively for maintenance, rehabilitation, and upkeep of the marital residence." It is doubtful that the trial court would agree with Donna's contention that this \$8,000 should be counted as part of the assets going to Russell.

intended to do so. Therefore, we remand for the trial court to make specific findings, consistent with Indiana Code section 31-15-7-5, detailing the reasons for its deviation from an equal split. Upon remand, the trial court should find the value of each asset awarded to each party and calculate the percentage of net assets being awarded to each party, and then explain why it is deviating from an equal division of the assets. However, if the trial court did not intend to deviate from an equal division of the marital assets, the trial court should take this opportunity to adjust the distribution of property between Russell and Donna.

Finally, because we remand for further proceedings, we need not address the other issues raised by Russell.

CONCLUSION

Based on the foregoing, we conclude that the trial court needs to clarify whether it intended to deviate from an equal division of the marital estate, and if so, explain the reason for the deviation and make findings as to the amount and percentage of the marital estate being distributed to each party. If the trial court does not intend to deviate from an equal split of the marital estate, the trial court should adjust the division of the marital estate accordingly.

Remanded.

BAILEY, J., and BRADFORD, J., concur.