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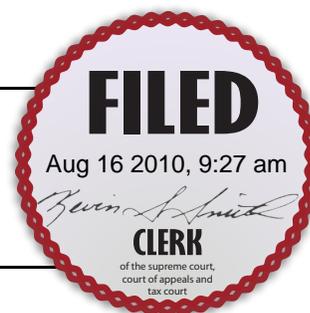
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**IN THE
COURT OF APPEALS OF INDIANA**



BRIAN A. EBY,)
)
Appellant-Respondent,)
)
vs.)
)
JENNIFER L. EBY,)
)
Appellee-Petitioner.)

No. 29A05-0909-CV-521

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0708-DR-870

August 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Brian A. Eby (“Husband”) appeals the trial court’s amended decree that dissolved his marriage to Jennifer L. Eby (“Wife”). On appeal, Husband raises the following restated issues:

- I. Whether the trial court erred when it valued a note and account receivable set aside to Husband as an asset worth \$40,000.00; and
- II. Whether the trial court erred when it deviated from Indiana’s presumption of equal division of marital property.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

Husband and Wife were married on November 18, 1995, and resided in Hamilton County, Indiana, for approximately ten years. No children were born of the marriage. The parties separated, and Wife petitioned for dissolution of marriage on August 7, 2007.

At the final hearing, both parties testified as to their employment history, income, and contributions to the acquisition of marital property during the marriage. For nine years during the parties’ marriage, Husband was employed by European Tanning Systems (“ETS”) as a salesperson at ETS, and earned around \$200,000.00. Husband left ETS in 2004 to start his own company, Northpoint Properties (“Northpoint”), with the goal of buying properties, renovating them, and selling them at a profit. Northpoint was out of business when the dissolution proceedings commenced, but Husband held an account receivable of the business in the amount of \$40,000.00.

Wife was self-employed and ran a graphic design and promotional company called 1-2-One Promotions (“1-2-One”), where she acted as the chief executive officer, the chief operating officer, and sales person and, in 2007, earned \$97,223.56. A draft copy of

Husband and Wife’s 2007 Federal Income Tax Return revealed a combined income from wages and salaries in the amount of “\$120,224”; Wife’s and Husband’s wages were \$97,224 and \$23,000, respectively. *Appellant’s App.* at 131.

Husband and Wife jointly acquired certain real property during their marriage. This property included: (1) the marital residence located at 8 Point Lane in Hamilton County, Indiana (“marital residence”); (2) 13 acres of undeveloped land in Arcadia, Indiana (“13 Acres”); (3) 10 acres of land, also in Arcadia, Indiana, with a large horse barn (“10 Acres”); (4) Wife’s business property at 185 Carey Drive, Noblesville, Indiana (“185 Carey”); and (5) undeveloped property in Marco Island, Florida.

The trial court entered a decree of dissolution in December 2008. It then granted in part, Husband’s motion to correct error and entered an amended decree. In the amended decree, the trial court ordered the marital residence to be sold and the proceeds of the sale to be applied first to the costs of sale, then to the first and second mortgages, then to reimburse Wife for one-half of the parties’ expenses that Wife paid during the pendency of the action. The remaining proceeds, if any, were to be divided equally between the parties.

The trial court assigned the remaining assets and debts to each of the parties as follows:

Wife’s Property

a. 2000 Lexus RX300	\$ 7,825.00
b. Personal Property . . .	\$ 15,470.00
c. 13 Acres	\$169,000.00
d. 10 Acres	\$300,000.00
e. 185 Carey, Noblesville, Indiana	\$222,000.00

f. 1-2-One Promotions	\$204,000.00
g. Retirement Accounts	\$ 58,760.00
Total:	\$977,055.00

Wife's Debts

a. Mortgage on 13 Acres	\$148,668.00
b. Mortgage on 10 Acres	\$145,590.00
c. Mortgage on 185 Carey	\$122,149.00
d. 2 nd Mortgage on 185 Carey	\$150,000.00
e. Keybank	\$ 30,463.00
f. Quantum Mastercard	\$ 21,565.00
g. Visa	\$ 33,832.00
h. Advanta	\$ 11,807.11
i. Capital One	\$ 10,973.57
j. IU Mastercard	\$ 14,728.00
k. Devon Eby	\$ 50,000.00
l. Marco Island Settlement	\$ 75,000.00

Total Obligations: \$814,775.68

Total to Wife: \$162,279.32

Husband's Property

a. 1997 BMW 318i	\$ 5,645.00
b. Personal Property	\$ 33,330.00
c. Advances	\$ 33,000.00
d. Northpoint Properties	\$ 40,000.00

Total: \$111,975.00

Husband's Debt:

a. Northpoint Mastercard	\$ 11,752.36
b. IU Mastercard	\$ 2,184.94
c. Marco Island Settlement	\$ 35,000.00

Total Obligations: \$ 48,973.30

Total to Husband: \$63,037.70

Id. at 19-21.

In determining the division of the marital property, the trial court set aside property with a net value of \$162,279.32 to Wife and \$63,037.70 to Husband. Husband now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The trial court entered written findings and conclusions pursuant to Indiana Trial Rule 52(A); therefore, we apply a two-tiered standard to review the trial court's judgment. *Grathwohl v. Garrity*, 871 N.E.2d 297, 300 (Ind. Ct. App. 2007). We must first determine whether the evidence supports the findings, and second, whether the findings support the judgment. *Maxwell v. Maxwell*, 850 N.E.2d 969, 972 (Ind. Ct. App. 2006), *trans. denied*. In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. *Grathwohl*, 871 N.E.2d at 300 (citing *Carmichael v. Siegel*, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001)). We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. *Id.* (citing *Carmichael*, 754 N.E.2d at 625).

To prevail, a challenger must establish that the trial court's findings are clearly erroneous. *Id.* Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. *Id.* While we defer substantially to findings of fact, we do not do so to conclusions of law. *Id.* ““Additionally, a judgment is clearly erroneous under Indiana Trial Rule 52 if it relies on an incorrect legal standard. We

evaluate questions of law de novo and owe no deference to a trial court's determination of such questions.'" *Id.* (quoting *Carmichael*, 754 N.E.2d at 625).

II. The Marital Estate

"The division of marital property in Indiana is a two-step process. *O'Connell v. O'Connell*, 889 N.E.2d 1, 10 (Ind. Ct. App. 2008); *Thompson v. Thompson*, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004), *trans. denied*. First, the trial court determines what property must be included in the marital estate. *O'Connell*, 889 N.E.2d at 10. Second, the trial court must divide the marital estate in a just and reasonable manner. *Id.* at 10-11. In Indiana, there is a statutory presumption that an equal division of marital property is just and reasonable. *Id.*; *see* Ind. Code § 31-15-7-5.

A. Account Receivable

Husband asserts that the trial court erred in assigning the account receivable to him as a \$40,000.00 asset. We agree.

At the final hearing, Husband testified regarding the account receivable of the business which was secured by a second mortgage on the debtor's property. He stated that the debtor had filed bankruptcy and may have fled the state. Husband had tried unsuccessfully to collect the receivable and believed it would never be collected. *Tr.* at 321-22. Wife presented no evidence to rebut Husband's testimony regarding the value of the account receivable.

On the basis of the record before us, we find that the trial court abused its discretion in setting aside to Husband an asset of questionable or no value and valuing it at its face value of \$40,000.00. Accordingly, we reverse that part of the amended decree

setting aside the account receivable to Husband and valuing it at \$40,000.00, and we remand with instructions to divide the account receivable evenly between the parties.

B. Division of Marital Estate

Husband contends that the trial court erred in deviating from Indiana's presumption that the marital estate should be divided equally. Here, the trial court equally divided the marital residence but awarded Wife a significantly greater share of the remaining marital estate.

“After determining what constitutes marital property, the trial court must then divide the marital property under the presumption that an equal split is just and reasonable.” *Leever v. Leever*, 919 N.E.2d 118, 124 (Ind. Ct. App. 2009) (citing Ind. Code § 31-15-7-5). In dividing marital property, the trial court shall presume that an equal division of the marital property between the parties is just and reasonable. Ind. Code § 31-15-7-5. This presumption may be rebutted, however, by evidence that an equal division would not be just and reasonable. *Montgomery v. Faust*, 910 N.E.2d 234, 238 (Ind. Ct. App. 2009). Factors suggesting that an equal division would not be just and reasonable include:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
 - (A) before the marriage; or
 - (B) through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in

the family residence for such periods as the court considers just to the spouse having custody of any children.

- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
- (5) The earnings or earning ability of the parties as related to:
 - (A) a final division of property; and
 - (B) a final determination of the property rights of the parties.

Ind. Code § 31-15-7-5. In dividing marital property, the trial court must consider all of these factors. “We begin with the strong presumption that the trial court considered and complied with the applicable statute, which must be overcome by a party challenging the trial court’s division of marital property. *Eye v. Eye*, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006).

Here, the trial court did not divide the marital estate equally. Although the trial court stated that it was setting aside 72% of the marital estate to Wife and 28% to Husband, when we factor out the \$40,000.00 account receivable that the evidence showed to be of little or no value, the division becomes 87.57% to Wife and 12.43% to Husband. As justification for its substantial deviation from the presumptive equal division, the court made no mention of the above statutory factors; instead, it found that the presumptive equal division was rebutted for the following reasons:

1. During the pendency of the action the Wife expended \$145,906.53 preserving marital assets particularly the marital real estate with no contribution from Husband.
2. The Wife is to pay the bulk of the marital debt (approximately 93% in excess of \$800,000.00). It is true that she was awarded a large percentage of the assets but the majority of the assets are non-income earning real estate. The testimony at trial was in dispute as to whether the property could be developed.

3. As it pertains to the Marco Island Property the Husband settled his case in such a manner that it placed the [W]ife in a less than advantageous position for negotiations and it cost her approximately \$40,000.00 more to settle the foreclosure action.

Appellant's App. at 21-22.

Husband claims that the trial court's stated reasons for an unequal division of the marital estate fail to rebut the presumptive equal division. We agree.

1. Wife's Expenditures to Preserve Marital Assets

Focusing on the first factor, it is uncontested that Wife expended \$145,906.53 to preserve the marital assets. We have held that a trial court may consider the payment of joint marital debts during the pendency of the action in dividing marital property. *See Ellis v. Ellis*, 730 N.E.2d 201, 205 (Ind. Ct. App. 2000) (trial court did not abuse its discretion in considering payments made during pendency of dissolution). Here, however, the trial court ordered that one half of the expenses that Wife paid on the marital residence during the pendency of the action (\$72,953.26) were to be reimbursed to her from the proceeds of sale of the marital residence. The effect of this order was that the expenses advanced by Wife would be shared equally by the parties. As a result of such reimbursement, the fact that Wife initially paid such expenses does not justify a deviation from the statutory presumption of equal division.

2. Wife's Payment of Marital Debt

Husband next contends that the trial court erred in justifying the unequal division of the marital estate by citing to the fact that "Wife is to pay the bulk of the marital debt

(approximately 93% in excess of \$800,000.00).” *Appellant’s App.* at 21. Again, we agree.

First, property in a dissolution is to be valued at its net value. *See Erb v. Erb*, 815 N.E.2d 1027, 1030 (Ind. Ct. App. 2004). Using the fact that certain property is subject to indebtedness as a justification for an unequal property division would undermine this principle. Second, Wife herself requested that the assets that were subject to the indebtedness be set aside to her together with the debt thereon. *Pet’r’s Ex.* 20¹. The trial court erred by using the fact that certain assets were subject to indebtedness as justification to award Wife a greater share of the assets.

3. Marco Island Property

Finally, Husband contends that the trial court erred in using the Marco Island property to justifying the unequal division of the marital estate. Again, we agree.

In the amended decree, the trial court noted, “Marco Community Bank foreclosed on the Marco Island property. Husband negotiated a release of his individual liability for \$35,000.00. Subsequent to that, Wife also negotiated a release of her individual liability in the sum of \$75,000.00. This was funded by her retirement account. . . .” *Appellant’s App.* at 16. In explaining its reasons for the unequal division of the marital assets, the trial court stated, “As it pertains to the Marco Island Property the Husband settled his case in such a manner that it placed the [W]ife in a less than advantageous position for negotiations and it cost her approximately \$40,000.00 more to settle the foreclosure action.” *Id.* at 22.

¹ We note that Petitioner’s Exhibit 20 bears the improper label of “State’s Exhibit 20.”

The record before us does not support the trial court's finding. Wife, herself, stated that she "was required to pay \$40,000 more than Husband to negotiate the settlement on the foreclosure action on the joint real estate in Marco Island, Florida *because she negotiated her settlement prior to Husband.*" *Appellee's Br.* at 15 (emphasis added). Additionally, the record before us contains copies of e-mails and payments that reveal Wife settled the Marco Island foreclosure claim in June 2008, two months before Husband's August 2008 settlement. *Pet'r's Exs.* 29, 30; *Resp't's Exs.* M, N. The evidence does not support a finding that Wife paid \$40,000.00 more in connection with the Marco Island property *because* Husband settled his claim first and, in this way, placed Wife in a less advantageous position for negotiations.

4. Statutory Factors

Turning to the statutory factors set forth at Ind. Code § 31-15-7-5, there is nothing in the record before us to support an unequal division in favor of Wife. Both parties made substantial contributions to the acquisition of the property; there was no substantial property acquired by Wife before the marriage or through inheritance or gift; the Wife's economic circumstances at the time of the dissolution were at least equal, if not superior, to Husband's; there was no evidence of improper disposition or dissipation of property by either spouse; finally, the earnings and earnings ability of the Wife at the time of the dissolution were superior to Husband's.

Here, the evidence does not support the trial court's findings and the findings do not support the trial court's judgment to divide the marital estate unequally. We reverse the trial court's unequal division of the marital estate and remand with instructions that

the trial court divide the marital estate equally between Husband and Wife, including the equal division of the account receivable.

Reversed and remanded.

FRIEDLANDER, J., and ROBB, J., concur.