ATTORNEY FOR APPELLANT:

GARY D. LEBRATO
Lebrato Law Office
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

PERRY D. SHILTS
Shilts Law Office
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

NEIL K. GROVE,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 02A03-0803-CV-131
	)	
VICKI J. GROVE,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Charles F. Pratt, Judge
The Honorable Lori K. Morgan, Magistrate
Cause No. 02D07-0603-DR-166

October 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Neil Grove ("Neil") appeals the trial court's property disposition order arising from the dissolution of his marriage to Vicki Grove ("Vicki").

We affirm.

ISSUES

1. Whether the trial court properly divided the marital estate.

2. Whether the trial court properly awarded Vicki attorney fees.

FACTS

Neil and Vicki were married on April 14, 1990. Both had been married before and each brought assets into the marriage. Vicki filed a petition for dissolution of marriage on March 23, 2006. No children were born of the marriage, and the only issue for the dissolution hearing was the division of marital debts and assets. The trial court conducted a final hearing on February 5, 2007 and August 20, 2007. The trial court issued a final order on November 16, 2007, in which it made the following relevant findings of fact:

> 8. That [Vicki] was employed throughout the parties' marriage. She sold funeral arrangements the last few years of the marriage and earned $23,432.00 in 2005, however, the company that she worked for was sold, and the new owners changed the formula for compensation. [Vicki] earned $6,333.00 in annual income in 2006 and earned $10,183.00 in annual income as of July 27, 2007. [Neil] had been a union member in the International Union of Operating Engineers since 1972. He retired on December 1, 2004 and in 2005, he received $36,981.00 from his pension benefit and $17,724.00 from Social Security. In 2006 and 2007, [Neil's] income was similar to that earned in 2005 due to his retirement and the receipt of ongoing retirement benefits.

9. At the time of the marriage, [Vicki] owned a home located at 3514 Plantation Trail, in Fort Wayne[,] Indiana. The real estate had a fair market value of $100,000 at the time of the marriage. There was a mortgage balance of $36,000 owed to First Source Bank as of the date of the marriage. [Vicki's] pre-marital equity in the marital home was $64,000.

10. At the time of the marriage, [Neil] owned a pick-up truck and had a pension with 18 years of service under the pension plan. Law Data values his pre-marital pension benefit at $97,497.

11. During the parties' marriage, they lived at the Plantation Trail residence. The mortgage on the residence was refinanced in 1996 and 1999 and [Neil's] name was added to the mortgage and deed as part of the refinancings. The parties made improvements to the home and performed routine maintenance on the home with the money from the refinancings.

12. The parties agreed to sell the home on 3514 Plantation Trail after the divorce was filed. . . . The home sold for $167,400.00 on December 4, 2006, and the funds were deposited into an account at Lake City Bank. The balance in the account as of August 6, 2007, was in the sum of $101,621.07. Interest is accruing at the rate of $267.00 per month.

13. [Neil] owns a Certificate of Deposit worth $19,000 which is on deposit with Tower Bank. The $19,000 represents the amount of inheritance that [Neil] received some time prior to 2000 when his father died. Said sum shall be included in the marital estate.

(Neil's App. 14-15).

The trial court then listed the items included in the marital estate. The first item listed was the marital residence. The trial court found that the residence had been sold for $167,400 and that, after paying off the outstanding mortgage, the net proceeds from the sale were $100,049. The trial court then found that "[t]aking into consideration the return of [Vicki's] pre-marital equity of $64,000, which results from the marital residence having a FMV of $100,000 at the time of the marriage, less a $36,000.00 mortgage at the

time of the marriage to First Source Bank," the value of the residence was $36,049. (Neil's App. 16).

The trial court included Neil's International Union of Operating Engineer's Pension ("the Pension") in the marital estate. In valuing this asset, the trial court noted that the value of the Pension on the date the dissolution petition was filed was $380,290. The court then subtracted $97,497, which it stated was the value of the Pension at the date of marriage, to conclude that the value of the Pension was $282,793. The trial court also included the $19,000 certificate of deposit ("CD") Neil received as inheritance from his father in the marital estate. The trial court found that the total value of the marital estate was $381,740.32 less $13,669, which constituted the total marital debt.

The trial court noted that Vicki had incurred $18,920.30 in attorney fees, while Neil's fees totaled $15,359.39. The court found that "neither party has presented evidence sufficient enough to rebut the presumption that a 50-50 division of the marital estate is just and reasonable." (Neil's App. 18). The court then concluded that Vicki's petition for dissolution of marriage should be granted.

The trial court listed the marital assets it awarded to the parties. Vicki received $36,049 in proceeds from the sale of the marital residence. The total value of the assets awarded to Vicki was $64,048.32. Neil was awarded the $19,000 CD and his Pension, which the trial court valued at $282,793. The total value of Neil's assets was $317,692. The trial court ordered Neil to pay the $13,669 owed as marital debts. The court then found:

> A property equalization judgment in the sum of $119,542.98 is entered against [Neil] and in favor of [Vicki]. . . . [Neil] shall transfer to [Vicki] pursuant to a Qualified Domestic Relations Order the sum of $119,542.98. Said Qualified Domestic Relations Order shall be prepared by [Neil's] counsel and forwarded to [Vicki's] counsel for review.

(Neil's App. 21). The trial court also found:

> That, in light of the disparity in income between the parties and the greater income earning ability of [Neil], [Neil] shall pay an attorney fee award to [Vicki's] attorney . . . in the sum of Five Thousand Dollars ($5,000.00). Said sum shall be paid in full within 180 days of the date of this order.

(Neil's App. 22).

Thus, the trial court set aside to Neil the pre-marital value of his pension, which it valued at $97,497, and set aside to Vicki $64,000 in pre-marital equity she held in the marital residence. When $97,497 is added to $317,692 less the $13,669 in marital debt Neil was ordered to pay, the total value of the marital assets awarded to Neil is $401,520. Vicki was awarded $64,000 plus $64,048.32 in marital assets, a total value of $128,048.32. The total value of the marital assets awarded to Neil and Vicki is $529,568.32. The trial court, though, ordered Neil to pay Vicki through a Qualified Domestic Relations Order ("QDRO") $119,542.98. Because of this, the total value of the marital assets awarded to Neil is $281,977.02, or 53.25% of the total marital assets, while Vicki received $247,591.30, or 46.75% of the total marital assets. Neil now appeals.

DECISION

The trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52. In this situation, we first determine whether the evidence supports the findings and then assess whether the findings support the judgment. *Granzow v.*

Granzow, 855 N.E.2d 680, 683 (Ind. Ct. App. 2006). We will set aside the findings or the judgment only if they are clearly erroneous. *Id.* Findings of fact are clearly erroneous if the record lacks any evidence or reasonable inferences to support them. *Id.* The trial court's judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings. *Id.* In determining whether the findings or judgment are clearly erroneous, we consider only the evidence most favorable to the judgment and all reasonable inferences flowing therefrom. *Id.* We will not reweigh the evidence or assess witness credibility. *Id.*

1. Division of Marital Estate

Neil argues that the trial court abused its discretion in dividing the marital estate and in valuing certain marital assets. The division of marital assets lies within the discretion of the trial court, and we will reverse only for an abuse of that discretion. *Keown v. Keown*, 883 N.E.2d 865, 868 (Ind. Ct. App. 2008). "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances presented." *Id.* When we review a challenge to the trial court's division of marital property, we may not reweigh the evidence or assess the credibility of witnesses, and we will only consider the evidence most favorable to the trial court's disposition of marital property. *Id.*

The trial court must divide the marital property in a just and reasonable manner, including property owned by either spouse prior to the marriage, acquired by either spouse after the marriage and prior to final separation, or acquired by their joint efforts. *Id.*; Ind. Code § 31-15-7-4. "An equal division of marital property is presumed to be just

and reasonable." *Miller v. Miller*, 763 N.E.2d 1009, 1011 (Ind. Ct. App. 2002); I.C. § 31-15-7-5. This presumption, however, may be rebutted by a party who presents relevant evidence, including evidence of the following factors:

> (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.

I.C. § 31-15-7-5. The party challenging the trial court's property division must overcome a strong presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal. *Miller*, 763 N.E.2d at 1011.

Additionally, we review a trial court's decision in ascertaining the value of property in a dissolution action for an abuse of discretion. *Balicki v. Balicki*, 837 N.E.2d 532, 536 (Ind. Ct. App. 2005), *trans. denied*. "We will find no abuse of discretion if the trial court's decision is supported by sufficient evidence and reasonable inferences therefrom." *O'Connell v. O'Connell*, 889 N.E.2d 1, 13 (Ind. Ct. App. 2008).

A. Pension

Neil makes a number of arguments regarding the trial court's division of his pension. Neil first contends that the trial court abused its discretion when it found that, at the time he married Vicki, the value of the Pension was $97,497. Evidence in the record, though, supports this finding. The parties introduced into evidence a document titled "Joint Marital Balance Sheet." This document listed various marital assets, including the Pension. The parties specified in this document that the value of the Pension at the time the dissolution petition was filed was $380,290 and that the value of the Pension on the date of marriage was $97,497. The parties further noted that "Husband does not dispute values, but believes Wife should receive a prorata share of monthly payments he is currently receiving, if she is entitled to any." (Vicki's App. 125). Based on this evidence, the trial court could properly conclude that the premarital value of the Pension was $97,497.

Even if we were to assume that the trial court erred in finding that the premarital value of the Pension was $97,497, Neil invited this error. "The doctrine of invited error is grounded in estoppel and precludes a party from taking advantage of an error that he or she commits, invites, or which is the natural consequence of his or her own neglect or misconduct." *Balicki*, 837 N.E.2d at 541. As already stated, the parties filed a "Joint Marital Balance Sheet" that stated the premarital value of the Pension was $97,497. This document specifically states that Neil does not dispute this value. When Vicki's counsel introduced the "Joint Marital Balance Sheet" into evidence, Neil did not object. After the "Joint Marital Balance Sheet" was introduced into evidence, Neil's counsel stated, "I'm

not quite sure how the calculation was made that there was $97,000 in there before, I haven't seen any particular documentation for that. But that certainly would be, hum, would be our position on that." (Tr. Vol. 1 38). Based on the "Joint Marital Balance Sheet" and the statement by Neil's counsel regarding the premarital value of the Pension, the trial court was entitled to rely on the representation that the premarital value of the Pension was $97,497.

Next, Neil asserts that after setting aside to him $97,497 of the Pension, the trial court ordered the remainder of the Pension, $282,793, be divided equally between the parties. Neil contends that this was an abuse of discretion and was not a just or reasonable division of this marital asset because it provided a windfall to Vicki "in the amount of approximately $140,000 . . . ." Neil's Br. 16.

The trial court, however, did not order that the $282,793 remaining in the Pension be divided equally between Neil and Vicki. Instead, the trial court awarded this sum solely to Neil. The trial court did order Neil to pay Vicki $119,542.98, but this was done to equalize the division of the marital estate, and this sum is not one half of $282,793.

To the extent that Neil is arguing the trial court erred in ordering him to pay Vicki $119,542.98, we cannot say the trial court abused its discretion in this regard. The trial court must divide the marital estate in a just and reasonable manner. I.C. § 31-15-7-4. We presume that an equal division of the marital property is just and reasonable. *Miller*, 763 N.E.2d at 1011. Had the trial court not ordered Neil to pay Vicki $119,542.98, the total value of the marital assets awarded to Vicki would only have been $128,048.32, or 24% of the marital estate, compared to Neil who would have received marital assets

totaling $401,520, or 76% of the marital estate. The judgment entered by the trial court against Neil in favor of Vicki for $119,542.98 was meant to bring about a more equal division of the marital estate. Given the disparity between the parties in terms of the value of the assets awarded, we conclude that this was proper.

Neil also contends that the trial court abused its discretion by ordering him to make a lump sum payment of $119,542.98 to Vicki because he does not have the financial ability to satisfy this judgment. The trial court, though, did not order Neil to make a lump sum payment to Vicki. It ordered Neil to transfer $119,542.98 to Vicki pursuant to a QDRO prepared by his counsel. Through the QDRO, Neil will transfer a percentage of his monthly pension to Vicki until the $119,542.98 judgment is satisfied. The trial court did not abuse its discretion in this regard.

B. Inheritance

Neil argues the trial court abused its discretion when it did not set aside to him the $19,000 CD he received as inheritance. A trial court must include an inheritance in the marital pot, but it has discretion to set over the inheritance to one spouse. *Scott v. Scott*, 668 N.E.2d 691, 708 (Ind. Ct. App. 1996). The fact that one or both spouses separately inherited property, though, does not automatically require a deviation from a 50/50 split of the marital estate or that the inherited property be set off to the spouse who inherited it. *Grathwohl v. Garrity*, 871 N.E.2d 297, 301 (Ind. Ct. App. 2007). We have previously concluded that a trial court properly sets aside an inheritance to one spouse where that spouse can demonstrate that the inheritance was not co-mingled with other marital assets

and that the other spouse did not contribute to the accumulation of the asset. *Scott*, 668 N.E.2d at 709; *Castaneda v. Castaneda*, 615 N.E.2d 467, 470-71 (Ind. Ct. App. 1993).

Here, the trial court found that Neil's inheritance consisted of a $19,000 CD deposited with Tower Bank that Neil "received some time prior to 2000 when his father died." (Neil's App. 15). The trial court included the inheritance in the marital pot and awarded this asset to Neil. It is relevant to note that the trial court did not state the date Neil received the inheritance, the value of the inheritance on the date Neil received it, the value of the inheritance at the time Neil and Vicki married, or the amount the inheritance appreciated over the course of the marriage. This is because Neil did not introduce any such evidence. This evidence, though, is significant because "[e]ven where the trial court properly sets aside the value of premarital assets to one spouse, the appreciation over the course of the marriage is a divisible marital asset." *Wanner v. Hutchcroft*, 888 N.E.2d 260, 263 (Ind. Ct. App. 2008). Without this evidence, the trial court could not assess the reasonableness of setting aside the inheritance to Neil, as it would have been unable to determine whether Vicki was entitled to any of the appreciation of the inheritance.

Furthermore, during the final hearing, no evidence was presented that suggested Vicki did not contribute to the accumulation of the inheritance. Neil's attorney did assert that the inheritance was not co-mingled with other marital assets, but Neil did not testify to this and no records were introduced to substantiate this assertion. Neil has not shown that the trial court should have set aside the inheritance to him.

It is also relevant that during the final hearing, Neil testified that he had spent the $19,000 in the CD even though a restraining order entered by the trial court on July 7,

2006 barred him from doing so. Given all of the above, we cannot say that the trial court abused its discretion by not setting aside the inheritance to Neil.

C. Premarital Equity in the Marital Residence

Neil argues that the trial court abused its discretion when it set aside to Vicki $64,000 for premarital equity she had in the marital residence. He contends that the full value of the marital residence should have been placed in the marital pot and divided equally between the parties.

Although a trial court must include all assets in the marital pot, it may ultimately decide to award an asset solely to one spouse as part of its just and reasonable property division. *Id.* Where, as here, there are assets that were acquired by the parties prior to marriage,

> the trial court may achieve a just and reasonable property division by determining the appreciation over the course of the marriage of such assets and dividing the appreciation between the spouses, while setting over to the appropriate spouse the pre-marriage value of the assets at issue.

Doyle v. Doyle, 756 N.E.2d 576, 579 (Ind. Ct. App. 2001).

The trial court found that Vicki owned the marital residence prior to her marriage to Neil. At the time Neil and Vicki married, the residence had a fair market value of $100,000, but there was also a mortgage on the property for $36,000. Based on these figures, the trial court concluded that Vicki's premarital equity in the home was $64,000. Because Vicki owned the home prior to her marriage to Neil, the trial court acted within its discretion to set aside to Vicki the $64,000 in premarital equity she had in the residence. *See id.*

Additionally, our Supreme Court has explained that "[t]he 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). "In crafting a just and reasonable property distribution, a trial court is required to balance a number of different considerations in arriving at an ultimate disposition." *Id.* The trial court may allocate some assets or debt to one spouse because of its disposition of other items. *Id.* In considering the trial court's disposition of the marital estate as a whole, we note that even with the $64,000 in premarital equity, Vicki only received 46.75% of the total marital estate, while Neil received 53.25%. Given this difference, we believe it was reasonable and not an abuse of discretion for the trial court to award Vicki her premarital equity in the marital residence.

2. Attorney Fees

Neil contends that the trial court abused its discretion when it failed to impute income to Vicki and awarded her $5,000 in attorney fees.

We first consider whether the trial court erred by not imputing income to Vicki. During the final hearing, both parties introduced evidence of Vicki's income. The evidence introduced by Neil suggested that Vicki's income in the five years leading up to the hearing was similar to Neil's, or approximately $50,000 per year. Vicki's evidence suggested that her income was substantially lower than $50,000 per year. The trial court found as follows:

> That [Vicki] was employed throughout the parties' marriage. She sold funeral arrangements the last few years of the marriage and earned $23,432.00 in 2005, however, the company that she worked for was sold, and the new owners changed the formula for compensation. [Vicki] earned

> $6,333.00 in annual income in 2006 and earned $10,183.00 in annual income as of July 27, 2007.

(Neil's App. 14). Neil's argument asks us to reweigh the evidence, which we cannot do. *See Granzow*, 855 N.E.2d at 683. The trial court's findings as to Vicki's income are not clearly erroneous as they are supported by evidence in the record.

We next consider whether the trial court abused its discretion in awarding Vicki $5,000 for her attorney fees.

> Indiana Code Section 31-15-10-1 provides that a trial court may order a party to pay a reasonable amount to the other party for the cost of maintaining or defending any action in dissolution proceedings. We review a trial court's award of attorney fees in connection with a dissolution decree for an abuse of discretion. The trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before it. When making such an award, the trial court must consider the resources of the parties, their economic condition, the ability of the parties to engage in gainful employment and to earn adequate income, and other factors that bear on the reasonableness of the award. Consideration of these factors promotes the legislative purpose behind the award of attorney fees, which is to insure that a party in a dissolution proceeding, who would not otherwise be able to afford an attorney, is able to retain representation. "When one party is in a superior position to pay fees over the other party, an award of attorney fees is proper." *Ratliff v. Ratliff*, 804 N.E.2d 237, 249 (Ind. Ct. App. 2004).

Hartley v. Hartley, 862 N.E.2d 274, 286-87 (Ind. Ct. App. 2007) (some citations omitted).

The trial court found that Vicki incurred $18,920.30 in attorney fees, while Neil's attorney fees were $15,359.39. The trial court ordered Neil to pay $5,000 of Vicki's attorney fees because of the disparity in income between the parties. With regard to the parties' incomes, the trial court found that in 2005 Vicki earned $23,432, but only earned $6,333 in 2006 and just $10,183 as of July 27, 2007. Neil, on the other hand, received

each year $36,981 from his Pension and $17,724 from Social Security. The evidence supports the trial court's finding that there was a disparity in income between Neil and Vicki. Due to this disparity, the trial court did not abuse its discretion by ordering Neil to pay $5,000 of Vicki's attorney fees. *See Scott*, 668 N.E.2d at 709 (concluding that the trial court properly ordered partial payment of attorney fees due to the disparity between the parties' incomes).

3. Appellate Attorney Fees

Vicki argues that she should be awarded her appellate attorney fees because the arguments raised by Neil on appeal are without merit. "Indiana follows the 'American Rule' that each party involved in litigation must pay its own attorney's fees." *Hill v. Davis*, 850 N.E.2d 993, 995 (Ind. Ct. App. 2006). Nevertheless, Indiana Appellate Rule 66(E) states: "The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorney's fees." "Our discretion to award attorney fees under Appellate Rule 66(E) is limited, however, to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Helmuth v. Distance Learning Sys. Indiana, Inc.*, 837 N.E.2d 1085, 1094 (Ind. Ct. App. 2005). "[W]hile Appellate Rule 66(E) provides this court with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal." *Id.* "A strong showing is required to justify an award of appellate damages, and the sanction is not imposed to punish mere lack of merit, but something more egregious." *Id.*

We cannot say that Neil's "appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Id*. Neil had a valid basis for his arguments and supported those arguments with citations to authority. Therefore, we conclude that an award of appellate attorney's fees to Vicki is not warranted.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.