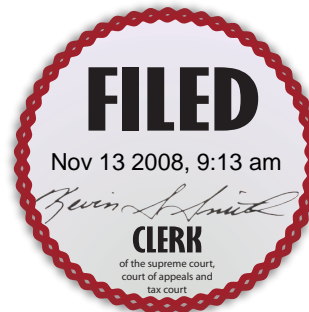


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

PAUL J. WATTS
Watts Law Office, P.C.
Spencer, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DAWN FREDERICK)
)
 Appellant-Respondent,)
)
 vs.) No. 11A04-0807-CV-388
)
 JIM FREDERICK,)
)
 Appellee-Petitioner,)
)

APPEAL FROM THE CLAY SUPERIOR COURT
The Honorable J. Blaine Akers, Judge
Cause No. 11D01-0505-DR-0218

November 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Dawn Frederick appeals the trial court's partial grant of her motion to correct error. Specifically, Dawn contends that the court erred in awarding her only one-third of the value of the marital business, Fun Time Scuba. Second, she contends that the trial court erred in awarding her only one-third of the value of her former husband Jim's 1966 Chevrolet Impala. Third, she contends that the trial court erred in awarding her less than 50% of the marital pot. Finding that the trial court properly awarded her one-third of the value of these assets and that the trial court actually awarded her nearly 50% of the marital pot, we affirm.

Facts and Procedural History

Dawn and Jim Frederick were married in 1988, and two children were born to the marriage. During their marriage, the parties owned a business known as Fun Time Scuba, but Jim was primarily responsible for operating the business. Jim filed a Petition for Dissolution of Marriage on May 25, 2005, and a final hearing was held in September 2006. The trial court issued its findings of fact and conclusions of law dissolving the marriage on December 29, 2006. Despite testimony from a certified public accountant concerning the value of the parties' business, the trial court concluded that there was no business value for Fun Time Scuba. The trial court also found that a 1966 Chevrolet Impala owned by Jim before the marriage should not be included in the marital estate. Dawn filed a motion to correct error, which the court denied.

Dawn appealed, and this Court issued an unpublished memorandum decision in October 2007. *See Frederick v. Frederick*, Cause No. 11A05-0702-CV-0111, 2007 WL

3087462 (Ind. Ct. App. Oct. 24, 2007). Specifically, we held that the trial court abused its discretion by failing to assign any value to Fun Time Scuba. *Id.* at *2. We noted that Jim’s own accountant valued the business at \$40,000 while Dawn valued the business at \$396,822. *Id.* We therefore held as follows:

While it is unlikely that the actual value of Fun Time Scuba is either \$40,000 at the low end of the evidence, or \$396,822 at the high end of the evidence, it is clear that the business has significant, divisible value for dissolution purposes. Consequently, we cannot conclude that the trial court’s finding that “the parties have failed to present sufficient evidence as to the business asset of Fun Time Scuba” is supported by the evidence. We therefore remand this case to the trial court for a determination of the value of Fun Time Scuba.

Id. at *3. As for the car, we reiterated that it is well-established in Indiana that all marital property goes into the marital pot for division, whether it was owned by either spouse before the marriage, acquired by either spouse after the marriage and prior to final separation of the parties, or acquired by their joint efforts. *Id.* As such, we concluded that the trial court erred when it failed to include the 1966 Chevrolet Impala in the marital estate and remanded the case to the court for inclusion of this asset in the marital estate. *Id.*

On March 10, 2008, the trial court issued an “Order Following Remand by Court of Appeals,” in which it found Fun Time Scuba to be worth \$40,000 and included the Impala (which was valued at \$6000) in the marital estate but awarded Dawn only one-third of the value of these assets. Dawn then filed a motion to correct error. On June 13, 2008, the trial court issued an “Order Partially Granting Respondent’s Motion to Correct Error.” In this Order, the trial court acknowledged that it had made several errors in its

March 10, 2008, order, corrected them, and set forth the following allocation of the parties' assets and debts, which we have totaled for ease of understanding:

	Dawn	Jim
Personal Property 50-50 Division		
Sch. A	\$1970	\$7280
Sch. B	\$3600	\$20,450
Sch. C	\$200	\$151.57
Sch. D	\$32,500	\$147,500
Sch. E	0	\$13,976.19
Asset Subtotal	\$38,270	\$189,357.76
Debt Allocation		
	0	\$131,697.93
		\$1089.01
Debt Subtotal	0	\$132,786.94
Total	\$38,270	\$56,570.82
Personal Property 1/3-2/3 Division		
Car	\$2000	\$4000
Business	\$13,333.33	\$26,666.66
Total	\$15,333.33	\$30,666.66

Appellant's App. p. 293-94. The trial court stated that in all other respects, the December 29, 2006, decree of dissolution remained in full force and effect. The court, without providing the basis for its calculation, then ordered Jim to pay Dawn \$27,643.15. *Id.* at 294. Dawn now appeals from this order.

Discussion and Decision

We first observe that Jim, as in the first appeal, has failed to file an appellee's brief. In such a situation, we do not undertake the burden of developing arguments for the appellee. Applying a less stringent standard of review with respect to showings of reversible error, we may reverse the lower court if the appellant can establish prima facie error. *State Farm Ins. v. Freeman*, 847 N.E.2d 1047, 1048 (Ind. Ct. App. 2006). Prima facie is defined in this context as "at first sight, on first appearance, or on the face of it." *Id.* The purpose of this rule is not to benefit the appellant. Rather, it is intended to relieve this Court of the burden of controverting the arguments advanced for reversal where that burden rests with the appellee. *Id.* Where an appellant is unable to establish prima facie error, we will affirm. *Id.*

Dawn raises four issues on appeal, which we consolidate into three. First, she contends that the trial court erred in awarding her only one-third of the value of the business, Fun Time Scuba. Second, she contends that the trial court erred in awarding her only one-third of the value of the 1966 Chevrolet Impala. Third, she contends that the trial court erred in awarding her less than 50% of the marital pot. Before delving into Dawn's specific arguments, we set forth the applicable law.

By statute, the trial court must divide the property of the parties in a just and reasonable manner, including property owned by either spouse before the marriage, acquired by either spouse after the marriage and before final separation of the parties, or acquired by their joint efforts. Ind. Code § 31-15-7-4(a), (b). An equal division of the marital property is presumed to be just and reasonable. Ind. Code § 31-15-7-5. This

presumption may be rebutted by a party who presents relevant evidence, including evidence of 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.

Id. The division of marital assets is a matter within the sound discretion of the trial court.

Webb v. Schleutker, 891 N.E.2d 1144, 1153 (Ind Ct. App. 2008). When a party challenges the trial court's division of marital property, she 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. *Id.* When 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 court's disposition of the

property, without reweighing the evidence or assessing the credibility of witnesses. *Id.* 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 if the court has misinterpreted the law or disregarded evidence of factors listed in the controlling statute. *Id.* at 1153. Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the trial court. *Id.* at 1154.

I. Business

Dawn contends that the trial court abused its discretion in awarding her only one-third of the value of Fun Time Scuba. In its "Order Following Remand by Court of Appeals," the trial court justified awarding Dawn only one-third of the value of the business as follows:

Based upon the most reliable and relevant evidence presented, the Court finds the value of Fun Time Scuba is \$40,000. In accordance with IC 31-15-7-5, this Court finds the equal division of this marital asset would not be just and reasonable, and that the Petitioner has rebutted the presumption of equal division through the presentation of relevant evidence as it pertains to (1) the contribution of each spouse to the acquisition of the property; (2) the extent to which the property was acquired through inheritance or gift; (3) the economic circumstances of each spouse at the time of the disposition of the property[;] (4) the conduct of the parties during the marriage as related to the disposition or dissipation of the property; and (5) the earnings or earning ability of the parties as related to a final division of property; and final determination of the property rights of the parties.

The record clearly discloses that the acquisition of the Fun Time Scuba and the operation thereof was significantly funded by loans and financial contributions and/or financial gifts from the Petitioner's parents. The Respondent did participate, from time to time, with the daily operation of certain aspects of the business, but her lack of business knowledge and omissions, largely led to the dissipation of the business income after the parties engaged in divorce proceedings. Yet, the economic circumstances of the Respondent, due to her lack of knowledge of the scuba business and lesser earning ability, warrant her some equitable portion of the business value of Fun Time Scuba. Based upon relevant evidence, the Court

concludes the Respondent is entitled to . . . one-third of the business value of Fun Time Scuba, to wit: \$13,333.33.

Appellant's App. p. 281-82.

The final hearing proceeded by summary testimony. According to Jim, who did the lion's share of the work in starting Fun Time Scuba, Dawn did not pay the business's bills, maintain the inventory, or timely make the business's tax payments. At the time of separation, the inventory of the store had become severely depleted, and Jim's parents had to loan him \$30,000 to replenish the inventory and pay bills. Jim said the business was doing better than at the time of separation, but it was still in debt. He could not refinance the business because Dawn's name was associated with it. He said that since Dawn was no longer involved with Fun Time Scuba, customers said the store was much nicer inside and the business had a friendlier atmosphere; in essence, it was an all-around better business. Dawn, on the other hand, basically testified that Fun Time Scuba, which was started during the parties' marriage, had been in good shape all along.

On appeal, Dawn primarily argues that the trial court's finding that her lack of business knowledge and omissions led to the dissipation of the business income after the parties engaged in divorce proceedings is not supported by the evidence and "could not be relevant to the value in any event." Appellant's Br. p. 11. Dawn cites *Maloblocki v. Maloblocki*, 646 N.E.2d 358 (Ind. Ct. App. 1995), for the proposition that expenditures during the provisional period cannot justify an unequal division of property. However, Dawn provides neither a pinpoint citation nor an analysis of this case. In any event, we find *Maloblocki* to be inapposite, as it involves child support and the division of the marital estate.

In sum, we conclude that Dawn's conduct with respect to Fun Time Scuba justifies the trial court's award to her of only one-third of the value of the business. Based on the evidence before the trial court, the court properly found that Dawn's conduct devalued Fun Time Scuba and that her conduct should have a consequence in the form of a reduced share of the value of the business. Indiana Code § 31-15-7-5 allows the trial court to take into consideration the conduct of the parties during the marriage as related to the disposition or dissipation of the marital property, and that is what happened here.

In addition, to the extent that Dawn complains that Jim's accountant did not rely on 2006 tax returns in valuing Fun Time Scuba, we note the final hearing was in September 2006.

The trial court did not abuse its discretion in awarding Dawn one-third of the value of Fun Time Scuba.

II. Car

Dawn contends that the trial court abused its discretion in awarding her only one-third of the value of the 1966 Chevrolet Impala. In its "Order Following Remand by Court of Appeals," the trial court justified awarding Dawn only one-third of the value of the Impala as follows:

The Court finds the 19[6]6 Chevrolet Impala shall be included in the marital estate; however, pursuant to IC 31-15-7-5, an equal division of the value of this property would not be just and reasonable for the reason that there is relevant evidence the Respondent (Wife) did not contribute to the acquisition of the 19[6]6 Chevrolet Impala, said vehicle was acquired before the marriage; that during the marriage the Respondent did nothing measurable to enhance the value of the vehicle, and that its present value is \$6,000. Therefore, this Court finds that the presumption of equal division of this marital asset has been rebutted

Appellant's App. p. 281. On appeal, Dawn does not challenge this finding but rather argues that because the parties' marriage lasted seventeen years, "any deviation should be in her favor." Appellant's Br. p. 12. Indiana Code § 31-15-7-5 provides that the presumption of equal division of marital property may be rebutted by a party who presents evidence that an equal division would not be just and reasonable, including evidence concerning the extent to which the property was acquired by each spouse before the marriage. Here, the evidence shows that Jim acquired the Impala before the parties' marriage. Because the parties were married seventeen years, Dawn was awarded one-third of the value of the Impala as opposed to none of the value. The trial court did not abuse its discretion.

III. Division of Marital Property

Dawn contends that the trial court abused its discretion in awarding her less than 50% of the marital pot. Curiously, she does not identify the precise percentage of the marital pot the trial court awarded her. In the same vein, the trial court's order does not identify the ultimate percentages the parties received, though it does indicate that Dawn received one-third of the value of just the business and the car.

Our first task is to determine the percentage of the marital property that Dawn actually received. This requires adding together all of the marital property, which consists of the following figures taken from the trial court's "Order Partially Granting Respondent's Motion to Correct Error": \$38,270 (Dawn) + \$56,570.82 (Jim) + \$6000 (Impala), and \$40,000 (Fun Time Scuba) = \$140,840. Dawn received \$38,270 plus the

\$27,643.15¹ payment the trial court ordered Jim to make. Adding together these two figures, Dawn received \$65,913.15. Dividing \$65,913.15 into \$140,840 reveals that Dawn received 46.8% of the marital pot.

As noted above, an equal division of the marital property is presumed to be just and reasonable. I.C. § 31-15-7-5. Here, the ultimate division of the marital property is nearly equal, especially considering that Dawn was awarded only one-third of the value of two assets, one of which was fairly significant. The trial court did not abuse its discretion in dividing the marital property.²

Affirmed.

KIRSCH, J., and CRONE, J., concur.

¹ We note that Dawn did not receive an interest in the Impala or Fun Time Scuba. Rather, she received one-third of the value of these assets, which equals \$15,333.33. We presume her \$15,333.33 is contained in the \$27,643.15 payment that Jim must make to her.

² To the extent that Dawn argues that she is entitled to 75% of the marital property, she has failed to rebut the presumption of an equal division.