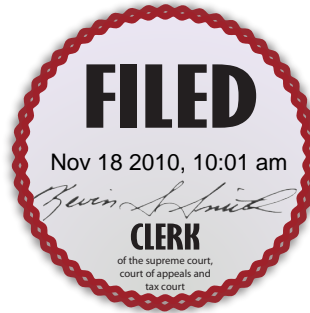


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

MICHAEL C. KEATING
YVETTE M. LAPLANTE
Keating & LaPlante, LLP
Evansville, Indiana

ATTORNEY FOR APPELLEE:

SHAWN M. SULLIVAN
Terrell, Baugh, Salmon & Born, LLP
Evansville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

PATRICK ALVEY,)

Appellant-Respondent,)

vs.)

NATALIE K. (ALVEY) HITE,)

Appellee-Petitioner.)

No. 82A05-1002-DR-141

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D04-0901-DR-25

November 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Patrick Alvey (“Husband”) appeals from the dissolution court’s decree which ended his marriage to Natalie Hite (“Wife”). He presents three issues for our review, which we consolidate and restate as whether the dissolution court abused its discretion when it divided the marital estate.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Husband and Wife married in 1996. They had no children together, but Husband had four children from a previous marriage. During the marriage, Husband and Wife lived in Evansville, where they operated three small businesses together: Evansville Trend Supply Company (“Trend”); Deliveries, Inc. (“Deliveries”); and A & F Scratch and Dent, Inc. (“A & F”). However, in 2004, Husband became ill and was unable to help Wife run the businesses for at least eighteen months. Husband transferred his ownership interest in Trend to Wife, and Wife operated that business by herself through the dissolution proceedings.

Husband’s mother died in 2004, and he and his brother inherited certain property. In particular, Husband inherited a vested ownership interest in a family trust, and he and his brother inherited their parents’ home, subject to their father’s life estate. At the time of his mother’s death, Husband’s interest in the family trust was valued at \$244,721.16.

In 2009, Wife filed a petition for dissolution of marriage. Following a hearing, the dissolution court entered the following relevant findings and conclusions:

5. **PROPERTY:** The Court finds that the parties have the following property, a marital residence located at 6515 Newburgh Road in Evansville,

Indiana. The house contains furnishings and other items of personal property. The parties were owners of three business entities: Trends, Inc., Deliveries, Inc., and A and F Scratch and Dent. The Wife was the owner of A and F Scratch and Dent. The Husband had operated Deliveries and the Wife had operated Trends for the last several years. The parties treated Trends and Deliveries as one business for tax purposes as their income and expenses had been jointly reported to the Internal Revenue Service. The Husband is the owner of certain real estate located at 1700 and 1710 Bartlett. The property at 1710 Bartlett had been used as a showroom for the Trends business. The property at 1700 is a warehouse that had been used for the Deliveries business. The Trends business had never been profitable and was not profitable as of the date of the final hearing in this cause. Deliveries had been at one time a profitable business but had recently fallen into a situation in which the business was not thriving as it had been due primarily to the loss of the contract with General Electric. The business entities owned some assets which are titled in Trends' name. The Deliveries' assets which were actually titled to Trends include a 2004 Ford truck, a 1997 Ford truck, a 1995 Ford truck, a couple of dollies, some hand tools and a computer.

The Court now finds that the assets of the parties have the following values:

Marital residence	\$135,000
Personal Property and Furnishings	The Court finds the value of the parties' property is as set forth in Exhibit E.
2004 Ford F650	\$11,000
1999 Ford F800	\$9,000
1999 Ford Truck	\$500
Dollies	\$50
Computer	\$100

6. DEBT: The parties currently owe the following debt: On the Bartlett Avenue Property there are mortgages in the amount of approximately \$47,000. On the marital residence there is a line of credit which had been used to operate the Trends business primarily in the amount of \$147,000. There is approximately \$60,000 owed to G.E. There is approximately

\$130,000 owed to the Indiana Department of Revenue for the failure to pay sales tax obligations for the Trends and Deliveries businesses for the years 2004, 2005, 2006 and 2007.

7. **PERSONAL PROPERTY:** The Court finds the Wife shall have the following items of personal property: The Christmas house, the china in the dining room, her personal clothing and jewelry, the green and blue couch, the lighthouse, the Total Gym, the leg exerciser, the vacuum cleaner, the water board, camping equipment, the NA .22 caliber magazine, the Maverick 88 shotgun, the Rugar, the Derringer .38 caliber, the Mustang and the ski boat and trailer.

Husband shall be the owner of all remaining items of personal property

8. **DISTRIBUTION:** The Husband shall be the owner of the marital residence and shall assume the line of credit indebtedness thereon and hold the Wife harmless therefrom. The Husband shall be the owner of Trends and Deliveries businesses and shall assume any indebtedness therewith and hold the Wife harmless therefrom. The Wife shall be the owner of her interest in A and F Scratch and Dent and shall assume any indebtedness associated with that business and hold the Husband harmless thereon. Wife shall be solely responsible for any judgment entered against her by her partner in the A and F Scratch and Dent business from the litigation that was pending against her as of the date of the final hearing of this cause and shall hold the Husband harmless thereon. The Husband shall be the owner of the Bartlett Avenue property that he brought into the marriage. Wife did not contribute to the acquisition of this property and this property the Court feels should be set aside to the Husband.

9. **SALES TAX LIABILITY:** The major issue of contention between the parties during the dissolution proceeding is who should be responsible for the sales tax obligation currently owing to the Indiana Department of Revenue. Originally this indebtedness exceeded \$190,000. Wife was able, with the aid of legal counsel, to negotiate with the Indiana Department of Revenue and reduce that to \$150,000. \$10,000 was taken from the line of credit and paid against that obligation and then her agreement was that there were to be \$2,500 a month payments to satisfy this obligation otherwise the department would presumably insist upon the entire \$190,000 payment. The Husband's position throughout the litigation has been that the Wife incurred this obligation knowingly and without advising him that she was not paying the sales tax obligations and should therefore become solely responsible for this debt. Husband argues that Wife clearly understood her obligations to pay this debt and that he had not only advised

her to do so, but had asked her on a number of occasions if she had paid the sales tax obligations. His position is that the Wife's failure to pay these obligations was deliberate. Wife's position through the litigation has been that she was a very poor business person, that she did not understand all the complexities of running businesses of the size and scope of Deliveries and Trends and that she did not realize that the sales tax obligations were not being met until she actually received a tax warrant from the Indiana Department of Revenue. The Court having heard the testimony of both parties and examining the evidence, including their demeanor while testifying now finds that the Wife's failure to remit the sales tax was not for the most part deliberate. She had little business experience and relied on the Husband to make most of the financial decisions both in the business and the household. Husband had complete control of the business entities and all the financial aspects of the parties' relationship until his disability became total in approximately 2004. The Wife did admit that she did not tell the Husband of the tax liability issue after it came to light hoping to resolve the same herself and fearing that the Husband would be angry at her mismanagement of the business. The Court finds that both parties profited from the revenue that they shared that should have gone to the Indiana Department of Revenue. If the Husband did not know if this liability as it was being incurred he certainly did know of the Wife's lack of business acumen and his prior history of total control of all the parties' finances and had some obligation to follow up on what both parties concede is an important financial and legal obligation. The Court therefore finds that each party should bear some responsibility for the tax liability. Husband shall be responsible for 40 percent and the Wife shall be responsible for 60 percent. The Court does not feel it is appropriate to order the Husband to sell his real estate [on Bartlett] that he brought into the marriage to pay this debt. He had that property for several years prior to the marriage. It was given to him by his parents. This would relieve the Wife completely of all consequences for her misconduct in this matter and would be inequitable given the fact that the Court is imposing upon the Husband, the remainder of the parties' substantial debt. It would also take from the Husband an important asset that he will need to support himself in the future as his disability is permanent and progressive.

Appellant's App. at 8-13. The dissolution court did not make any findings or conclusions with respect to the property Husband inherited after his mother's death. This appeal ensued.

DISCUSSION AND DECISION

The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. Sanjari v. Sanjari, 755 N.E.2d 1186, 1191 (Ind. Ct. App. 2001). We will not reweigh the evidence or assess the credibility of witnesses, and we consider only the evidence most favorable to the trial court's disposition of marital property. Id. The party challenging the trial court's property division must overcome a strong presumption that the trial court complied with the statutory guidelines. Id.

It is well-established in Indiana that all marital property goes into the marital pot for division, whether it was owned by either spouse prior to the marriage, acquired by either spouse after the marriage and prior to final separation of the parties, or acquired by their joint efforts. Hill v. Hill, 863 N.E.2d 456, 460 (Ind. Ct. App. 2007). Property is broadly defined to include "all the assets of either party or both parties." Ind. Code § 31-9-2-98. We have consistently held, however, that only property in which the party has a vested interest at the time of dissolution may be divided as a marital asset. Hann v. Hann, 655 N.E.2d 566, 569 (Ind. Ct. App. 1995), trans. denied. The "one pot" theory thus requires the trial court to include in the marital pot any asset in which a party has a vested interest. See id. While the trial court may ultimately determine that a particular asset should be awarded solely to one spouse, it must first include the asset in its consideration of the marital estate to be divided. Thompson v. Thompson, 811 N.E.2d 888, 914 (Ind. Ct. App. 2004), trans. denied.

Here, Husband contends that the dissolution court abused its discretion when it divided the marital estate. In particular, Husband maintains that while the dissolution court expressed its intention to divide the parties' debt 60-40, the practical effect of the decree is that he and Wife will each bear approximately one-half of the debt. Husband asserts that, contrary to the dissolution court's expressed intent, he will be forced to sell the Bartlett properties in order to pay the debt assigned to him. But Husband's contention on this issue amounts to a request that we reweigh the evidence, which we will not do. The dissolution court explained in great detail its reasons for dividing the parties' liabilities in the manner that it did, and Husband does not challenge any of the court's findings as lacking evidentiary support.

In essence, Husband maintains that Wife should be obligated to pay more of the parties' debts because she was more responsible for incurring those debts. But the dissolution court expressly addressed that issue and concluded that Wife had, "for the most part," not deliberately incurred the sales tax liability and that Husband and Wife both profited from the revenue that resulted in that liability. Appellant's App. at 12. Husband has not demonstrated that the dissolution court abused its discretion when it assessed the parties' obligations on the marital debt.

Further, to the extent Husband maintains that the dissolution court ignored Wife's alleged superior earning potential in distributing the marital estate, Husband ignores the value of his inheritance. As Wife points out, taking Husband's inherited interest in the family trust into account, Husband is understating the value of the marital assets awarded to him. Indeed, the dissolution court did not include Husband's inherited property in the

marital estate before it distributed the assets and debts to each party. The dissolution court's failure to assign any value to Husband's inherited property and its failure to include that property in the marital estate is clear error. See Hann, 655 N.E.2d at 569. Therefore, we remand with instructions for the dissolution court to include Husband's inherited property in the marital estate, to value that property,¹ and to issue a new order redistributing the marital assets and liabilities accordingly. See Grathwohl v. Garrity, 871 N.E.2d 297, 302 (Ind. Ct. App. 2007). Otherwise, we affirm the dissolution decree.

Affirmed in part, reversed in part, and remanded with instructions.

MATHIAS, J., concurs.

BAKER, C.J., concurs with separate opinion.

¹ Wife submitted extensive evidence regarding the value of Husband's inherited property. There is no need for an additional hearing on the issue.

**IN THE
COURT OF APPEALS OF INDIANA**

PATRICK ALVEY,)	
)	
Appellant-Respondent,)	
)	
vs.)	No. 82A05-1002-DR-141
)	
NATALIE K. (ALVEY) HITE,)	
)	
Appellee-Petitioner.)	
)	

BAKER, Chief Judge, concurring.

I fully concur in the majority opinion. I write separately to observe that I believe it was the trial court’s intention to award Husband’s inherited property to Husband. While it was erroneous to omit this property from the marital pot, I note that on remand, it would be within the trial court’s sound discretion to award this inherited property to Husband without otherwise altering the division of assets already in place. See Lulay v. Lulay, 591 N.E.2d 154, 155-56 (Ind. Ct. App. 1992) (finding that trial court’s failure to include husband’s pensions in the marital pot was harmless error because, although the pensions should have been included in the pot, the trial court, “in its sound discretion, . . . could have awarded the pension interests to [Husband]”).