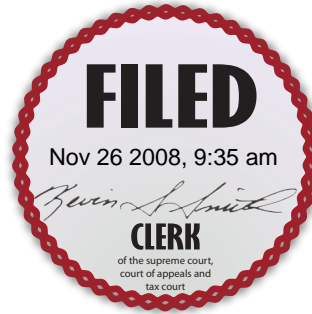


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

SUSAN SCHULTZ
Corydon, Indiana

ATTORNEY FOR APPELLEE:

WILLIAM H. DAVIS
Corydon, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JANEEN L. MATHES,)

Appellant-Defendant,)

vs.)

No. 31A04-0808-CV-471)

JOSEPH W. MATHES,)

Appellee-Plaintiff.)

APPEAL FROM THE HARRISON CIRCUIT COURT
The Honorable H. Lloyd Whitis, Judge
Cause No. 31C01-0604-DR-63

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Janeen L. Mathes (“Janeen”) challenges the trial court’s division of the marital estate upon the dissolution of her marriage to Joseph W. Mathes (“Joseph”). We reverse and remand with instructions.

Issue

Janeen presents a single issue for review: whether the dissolution court abused its discretion by deviating from the statutory presumption of an equal division of the marital estate without providing adequate reasons for the deviation supported by sufficient evidence.

Facts and Procedural History

Janeen and Joseph were married on October 23, 1987 and divorced on July 6, 2007. The dissolution court divided the parties’ property unequally by awarding Joseph \$29,735.06 and Janeen a deficit of \$37,595.40, a difference of \$67,330.46 in favor of Joseph. Mathes v. Mathes, No. 31A01-0711-CV-531, slip op. at 7 (Ind. Ct. App. Mar. 7, 2008). In so doing, the dissolution court omitted debt valued at \$59,478 from its calculation and omitted the value of a truck in Joseph’s possession. See id. at 8-9. On appeal, this Court remanded the matter to the dissolution court with instructions to redistribute the marital property or state reasons supporting a deviation. Id. at 10.

On remand, the dissolution court again awarded Joseph real estate acreage (valued at \$69,250.00), his truck, and some personal property. Joseph was allocated the debts for the real estate and his truck, as well as \$5,711.00 to W.F. Financial. Janeen was awarded personal property and her vehicle. She was also allocated unsecured debt as follows:

Citibank	\$ 27,500
----------	-----------

Discover	11,039
Discover II	5,711
Target	2,938
THD/CBUSA	2,727
Kohl's	2,632
GEMB/JCP	2,512
Dell	2,287
HSBC/FRNRW	<u>2,132</u>
	\$ 59,478

(App. 130.) Joseph was ordered to make an equalization payment of \$9,865.11 to Janeen.

The dissolution court included the following explanation within the Amended Decree of

Dissolution of Marriage:

That the one half of the “equity” is not an equal division of the marital property due to Petitioner/Husband being awarded primary custody of the parties’ minor daughter, the desire that Petitioner/Husband keep the real estate for the minor daughter’s horses, and Respondent/Wife’s incurring substantial debt during the marriage which had a substantial negative impact on the parties’ assets.

(App. 6-7.) Janeen filed a motion to correct error, which was deemed denied. Janeen now appeals.

Discussion and Decision

Janeen argues that the dissolution court did not give adequate reasons, supported by evidence of record, to justify its ultimate distribution of \$24,866.10 to Joseph and negative \$34,872.89 to her. We agree.

Marital property includes both assets and liabilities. McCord v. McCord, 852 N.E.2d 35, 45 (Ind. Ct. App. 2006), trans. denied. Indiana Code Section 31-15-7-5 governs the distribution of marital property and provides as follows:

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

(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.

The foregoing statute creates a rebuttable presumption that an equal division of the marital property of the parties is just and reasonable. Wanner v. Hutchcroft, 888 N.E.2d 260, 263 (Ind. Ct. App. 2008). Subject to the statutory presumption, the distribution of marital property is committed to the sound discretion of the trial court, and a party who challenges the trial court's division of marital property must overcome a strong presumption that the court considered and complied with the applicable statute. Id.

Here, the dissolution court reasoned that Joseph, as the custodial parent, should be able to keep the real estate (consisting of thirteen acres of unimproved property) for his daughter's horses. Indiana Code Section 31-15-7-5(3) contemplates the consideration of a

“right to dwell in the family residence” applicable to a custodial parent and the child(ren). However, there is no corollary statutory provision that would suggest that the dissolution court may set aside marital property to one spouse, thereby effecting an unequal distribution, for the purpose of pasturing animals.

Additionally, the dissolution court reasoned that Janeen “incur[ed] substantial debt during the marriage which had a substantial negative impact on the parties assets.” (App. 7.)

Although the dissolution court did not explicitly so state, the language suggests that the dissolution court may have believed that Janeen dissipated marital assets.

Dissipation of marital assets involves “the frivolous, unjustified spending of marital assets.” Goodman v. Goodman, 754 N.E.2d 595, 598 (Ind. Ct. App. 2001). Relevant factors include: (1) whether the expenditure benefitted the marriage or was made for a purpose entirely unrelated to the marriage; (2) the timing of the transaction; (3) whether the expenditure was excessive or de minimus; and (4) whether the dissipating party intended to hide, deplete, or divert the marital asset. Id.

The evidence discloses that the parties incurred significant debts and were in serious financial trouble by the end of their twenty-year marriage. They were able to sell the marital residence and pay off the mortgage. However, unsecured debt remained that exceeded their assets. They attempted to address the situation by entering into an agreement with Lawgistix, a debt assistance provider. On April 24, 2006, Joseph signed an agreement with Lawgistix, acknowledging that the debts included Citibank, two Discover accounts, W.F. Financial, Target, THD/CBUSA, Kohls, GEMB/JCP, Dell Financial, HSBC/FRNRW, Tractor Supply, Community First Bank, Fifth Third Bank, Community First Bank, WFNNB/Lane Bryant,

Fashion Bug, and Macy's. The Citibank account, the largest of the unsecured debts, had been opened ten years earlier.

Joseph testified that Janeen was in charge of paying the household bills and making the household purchases for the family of three. He testified that he "very, very seldom" used a credit card, preferring to use checks or a debit card. (Tr. 51.) He lacked specific knowledge of the purpose of most individual purchases made via credit cards over the years. Although Joseph knew there was household debt, he "didn't know it was like that [until signing the Lawgistix contract]." (Tr. 53.) He opined "there's a chance" that Janeen purchased some furnishings for her new house on credit cards. (Tr. 57.)

In sum, it is clear that Joseph was not fully aware of the extent of the parties' debts. However, notwithstanding Joseph's reference to a "chance," there is no evidence that any debt was incurred for the sole benefit of Janeen. Certainly, the allocation of the entirety of the unsecured debt to Janeen is unsupportable from the record. To the extent that the dissolution court based the deviation from a fifty-fifty split on dissipation of assets, the determination lacks evidentiary support.

The record of the parties' final hearing does not establish dissipation of marital assets and, on remand, no additional evidence was presented. Accordingly, the deviation from the statutory fifty-fifty split, achieved by allocating almost all the marital debt to Janeen, was an abuse of the dissolution court's discretion.

We reverse the property distribution provisions of the amended dissolution decree and remand to the dissolution court with instructions to divide the marital estate, including assets and liabilities, equally.

Reversed and remanded with instructions.

RILEY, J., concurs.

BRADFORD, J., dissents with opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

JANEEN L. MATHES,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 31A04-0808-CV-471
)	
JOSEPH W. MATHES,)	
)	
Appellee-Plaintiff.)	

BRADFORD, Judge, dissenting.

Because I believe that the evidence included in the record was sufficient to support the trial court’s determination that Janeen L. Mathes (“Wife”) incurred substantial debt during the course of her marriage to Joseph W. Mathes (“Husband”) which had a substantial negative impact on the parties’ assets, I respectfully dissent. It is well-established that the trial court must divide the property of the parties in a divorce proceeding in a just and reasonable manner. *In re Marriage of Coyle*, 671 N.E.2d 938, 941 (Ind. Ct. App. 1996). Although an equal division of the marital property is presumed to be just and reasonable, that presumption may be rebutted by a party who presents relevant evidence including evidence relating to the conduct of the parties during the marriage as it relates to the disposition or dissipation of the property. *Id.* at 941-42. The division of marital property is committed to

the sound discretion of the trial court and we reverse only when the decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* at 942. On review, we consider only the evidence most favorable to the trial court's disposition of the marital property, and we may not reweigh the evidence or assess the credibility of witnesses. *Id.* Therefore, "[t]he party challenging the trial court's property division must overcome a strong presumption that the court considered and complied with the applicable statute." *Id.*

Here, the record establishes that Wife controlled the parties' financial affairs and that Husband had either never used the parties' various credit cards or had only used them on rare occasions and as a result was not aware of the parties' substantial credit card debt. Appellant's App. pp. 37-38, 47. I believe that the trial court was within its discretion to draw the reasonable inference that Wife's unchecked credit card expenditures were for her benefit only. Therefore, given Wife's role in accumulating the parties' substantial debts, I conclude that there was a rational basis for assigning the responsibility for the majority of the debts to Wife. *See In re the Marriage of Merrill*, 455 N.E.2d 1176 (Ind. Ct. App. 1983) (providing that given Wife's control of the parties' financial affairs and her role in accumulating the parties' debts, the Court could not conclude that there was no rational basis for assigning responsibility for the majority of the debts to Wife).

The record also establishes that, just prior to the parties' divorce, Wife bought items, including a washer and dryer, a kitchen stove/oven, a dining room set, bedroom furniture, a leather couch, a television and DVD player, phones, as well as other various other items for her new home in Corydon. Appellant's App. pp. 31-33, 152. The record is clear that these items were not purchased for the family's comfort and enjoyment, but rather to furnish

Wife's new home. The purchase of these items, as well as items that were bought at some prior time, including a tanning bed, could arguably impose a substantial negative impact on the parties' assets.¹

Furthermore, I believe that in instructing the trial court to divide the marital estate equally, the majority effectively reweighed the evidence and reassessed the credibility of the parties. The trial court was within its discretion to determine that Husband's testimony regarding Wife's purchases for her new home was credible and I would not reweigh the evidence or reassess the parties' credibility on appeal. *See In re Coyle*, 671 N.E.2d at 942. Had I concluded that the trial court's division of the marital assets was not supported by the evidence, I believe the better approach would have been to remand the matter to the trial court for further proceedings rather than instruct the trial court to impose a specific division of the marital assets. In light of the evidence of Wife's role in accumulating the parties' substantial debt and the weight attributed to the parties' testimony by the trial court, I would affirm the trial court's division of marital property.

¹ To the extent that the majority concludes that the trial court erred in granting Husband ownership of the 13.85 acres of real estate, which was apparently used as a pasture for daughter's horses, merely because it resulted in an unequal distribution of the marital property, I disagree. I see no difference between granting Husband ownership of the property, and the routine practice of granting a party to a divorce a particular marital asset because of the party's interest in the particular item.