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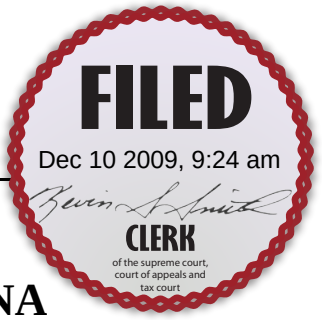

IN THE
COURT OF APPEALS OF INDIANA

DONALD RIGGS,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 48A02-0902-CV-105
	)	
BEVERLY D. RIGGS,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Carl E. VanDorn, Special Judge
Cause No. 48D02-0604-DR-375

December 10, 2009

MEMORANDUM DECISION-NOT FOR PUBLICATION

KIRSCH, Judge

Donald Riggs ("Donald") appeals the trial court's division of marital property in the dissolution of his marriage to Beverly D. Riggs ("Beverly"). Donald raises the following restated issue: whether the trial court abused its discretion in its division of the marital estate.

We affirm in part, reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

On March 12, 1998, Donald and Beverly entered into a pre-nuptial agreement, and were married on March 15, 1998. No children were born of the marriage. The parties separated on April 14, 2006, and Beverly petitioned for dissolution on April 25, 2006. At the final hearing, the parties entered into a personal property settlement agreement as to household items and submitted the agreement to the trial court. At the conclusion of the hearing, the trial court requested that the parties submit proposed findings of fact and conclusions thereon.

The trial court issued its findings of fact and conclusions thereon, judgment, and decree of dissolution of marriage from which Donald now appeals. More specifically, Donald raises the following allegations of error: (1) the inclusion of a yacht as a marital asset and the division of the equitable interest in the yacht; (2) the requirement that Donald reimburse Beverly $8,000, which was Beverly's share of the equity in a prior marital residence that she had deposited in the parties' joint checking account; (3) the alleged unequal division of assets without findings to support a deviation from the presumption of an equal division; and (4) the award of attorney fees to Beverly.

DISCUSSION AND DECISION

I. Standard of Review

The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of that discretion. *Nornes v. Nornes*, 884 N.E.2d 886, 888 (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 consider only the evidence most favorable to the trial court's disposition of marital property. *Id.*

Indiana Code section 31-15-7-5 provides that a trial court shall presume that an equal division of the marital property between the parties is just and reasonable. The court may deviate from the statutory presumption of equal distribution if a party presents relevant evidence to show that an equal division would not be just and reasonable. *Nornes*, 884 N.E.2d at 888. Such evidence may include evidence of: (1) each spouse's contribution to the acquisition of property; (2) acquisition of property through gift or inheritance prior to the marriage; (3) the economic circumstances of each spouse at the time of disposition; (4) each spouse's dissipation or disposition of property during the marriage; and (5) each spouse's earning ability. Ind. Code § 31-15-7-5; *Nornes*, 884 N.E.2d at 888.

Here, the trial court sua sponte issued findings of fact and conclusions thereon in support of its order. In that situation, the specific findings control only as to the issues they cover, while a general judgment standard applies to any issue upon which the court has made

no findings. *Coffman v. Olson & Co., P.C.*, 906 N.E.2d 201, 206 (Ind. Ct. App. 2009). In reviewing the judgment, this court must determine whether the evidence supports the findings and whether the findings, in turn, support the conclusion and judgment. *Id*. We will reverse a judgment only when it is shown to be clearly erroneous, i.e., when the judgment is unsupported by the findings of fact and the conclusions entered on the findings. *Id*. In order to determine that a finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made. *Id*. at 206-07. In determining the validity of the findings or judgment, we consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom, and we will not reweigh the evidence or assess the credibility of witnesses. *Id*. at 207. In the case of a general judgment, a general judgment may be affirmed on any theory supported by the evidence presented at trial. *Id*.

II. Antenuptial Agreements Generally

> Antenuptial agreements are legal contracts by which parties entering into a marriage relationship attempt to settle the interest of each party in the property of the other during the course of the marriage and upon its termination by death or other means. The interpretation of a contract is primarily a question of law for the court, even if the instrument contains an ambiguity needing resolution. Thus, on appeal, our standard of review is essentially the same as that employed by the trial court. Antenuptial agreements are to be construed according to principles applicable to the construction of contracts generally. If the language of the instrument is unambiguous, the intent of the parties must be determined from its four corners.
>
> Antenuptial agreements are favored by the law as promoting domestic happiness and adjusting property questions that otherwise would often be the source of litigation. Antenuptial agreements, so long as they are entered into freely and without fraud, duress, or misrepresentation and are not, under the particular circumstances of the case, unconscionable, are valid and binding.

Boetsma v. Boetsma, 768 N.E.2d 1016, 1020 (Ind. Ct. App. 2002) (internal citations omitted). Neither party in the present case contests the existence or validity of the pre-nuptial agreement.

III. The Second Yacht

The pre-nuptial agreement entered into by Donald and Beverly provided in pertinent part with respect to each party:

> All present and future earnings and income; all real property, personal property (both tangible and intangible), and mixed real and personal property; all retirement accounts, pension or profit sharing, defined benefit or other retirement plan accounts; any rents, gains, losses and other proceeds received from the rental, sale or encumbrance of any of this property; any property acquired with the proceeds of any sale or encumbrance; any future additional to, income from or increases in any of this property; any increases or decreases in value of any of the property; and any property and interest of any kind and character hereafter or heretofore acquired by [the party], whether by gift, inheritance or otherwise, [hereinafter referred to as "[the party's] property"] shall, after the parties' marriage, be and remain the separate property of [the party] to have, hold, dispose of as [the party] may see fit.

Appellant's App. at 29.

The trial court issued the following findings and conclusions regarding the second yacht.

> Findings:
>
> 11. In May 2000, the parties purchased a 1965 Chris Craft 42' Constellation yacht. [Donald] paid $35,000 for the yacht and after the purchase, both parties worked on the yacht, with [Beverly] making substantial contributions during weekends when she was not required to work at her place of employment, and [Donald] working on the yacht each weekend.

12. In November 2005, the parties purchased a second 1965 Chris Craft 42' Constellation yacht from Adams Marina for $35,000, plus the trade-in value of their first yacht. [Donald] paid $15,000 of the $35,000, leaving the balance of $20,000 to be paid May 1, 2006.

13. [Donald] contends that he returned the yacht to Ed Adams, the seller, or that Ed Adams repossessed the yacht on June 1, 2006. Despite [Donald's] purported loss of investment of some $50,000, together with the value of the parties' substantial efforts to repair the first yacht, [Donald] and Ed Adams have been and continue to be good friends and have maintained an ongoing and close relationship.

14. Both parties testified that the yacht has remained docked as always at Ed Adams[sic] Marina, together with the parties' tools, tarps, parts and other accoutrements in which the parties' maintain ownership.

15. [Donald] maintained insurance of $100,000 on the yacht until the parties' first scheduled final hearing date of July 13, 2007, when [Donald] cancelled the insurance.

16. [Beverly] testified that [Donald] had owned a boat during an earlier marriage, but was required to sell the boat and divide proceeds with his previous Wife, and further that he had advised [Beverly] that he was not going to ever lose another boat to divorce.

17. At the time of separation and filing this case the court finds the value of the second Chris Craft to be $40,000 (Petitioner exhibit 10) and the parties owed $20,000 on said property leaving an equity of $20,000. [Donald] is awarded any remaining interest in the boat and [Beverly] is awarded her ½ of the equity in the amount of $10,000.00.

18. [Beverly] is awarded a money judgment of $32,950, which represents $14,950.00 of the parties' equity in the marital residence, $8,000 repayment of [Beverly's] retirement from her former husband, and $10,000.00 as her share of the equity in the parties[sic] yacht.

Conclusions:

5. [Beverly] is awarded a money judgment of $32,950, which represents $14,950.00 of the parties' equity in the marital residence, $8,000 repayment of [Beverly's] retirement from her former husband, and $10,000.00 as her share of the equity in the parties[sic] yacht.

Id. at 10-13.

On appeal, Donald argues that the trial court's findings of fact and conclusions thereon are clearly erroneous with respect to the inclusion of the second yacht in the marital estate. Donald claims that the second yacht was purchased with assets Donald owned prior to his marriage to Beverly and that were set over to him pursuant to the terms of the pre-nuptial agreement. On the other hand, Beverly argues that Donald is precluded from raising this issue for the first time on appeal as Donald argued below that the second yacht was not a marital asset because his friend had repossessed the second yacht or because he had returned the second yacht to his friend.

The evidence seems to indicate that Donald used the proceeds from the sale of a plane he owned prior to the marriage to fund the purchase of the first yacht from his friend, Ed Adams. By the terms of the pre-nuptial agreement, the first yacht would belong to Donald since it was property acquired with the proceeds from the sale of a pre-marital asset. The evidence also suggests that the first yacht had no trade-in value when Donald purchased the second yacht from Adams. Although there is evidence to indicate that Donald issued a check from his business account to make the initial payment on the second yacht, there is evidence that savings bonds acquired during the marriage were redeemed and deposited into that business account prior to that payment. Donald argued below that the second yacht was not a marital asset because it had been repossessed by his friend, Ed Adams, for failure to complete the payments. There was also testimony that Donald walked away from the second yacht.

Now, on appeal, Donald argues that he is entitled to the second yacht and all of its value because it is a tangible asset traceable from pre-marital assets owned and sold by him.

As a general rule, a party cannot argue on appeal an issue which was not properly presented to the trial court. *Pitman v. Pitman*, 717 N.E.2d 627, 633 (Ind. Ct. App. 1999). Appellate review of the issue is waived when it is not presented before the trial court. *Id.* "This rule exists because trial courts have the authority to hear and weigh the evidence, to judge the credibility of witnesses, to apply the law to the facts found, and to decide questions raised by the parties." *GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC.*, 764 N.E.2d 647, 650 (Ind. Ct. App. 2002). "Appellate courts, on the other hand, have the authority to review questions of law and to judge the sufficiency of the evidence supporting a decision." *Id.* "The rule of waiver in part protects the integrity of the trial court; it cannot be found to have erred as to an issue or argument that it never had an opportunity to consider." *Id.* Because the trial court was not asked to consider whether the second yacht should be awarded to Donald pursuant to the pre-nuptial agreement, we decline to consider that argument. Instead, we review the issue that was before the trial court: whether the findings and conclusions thereon support the trial court's inclusion of the second yacht as a marital asset.

Here, Donald had claimed both that he had walked away from the second yacht and that Adams had repossessed the second yacht. Beverly argued that Adams was Donald's very good friend, that they remained friends after the repossession letters were sent, and that the second yacht was docked where it had always been located at Adams Marina. Donald

maintained insurance on the yacht until the parties' first scheduled final hearing date at which time he cancelled the insurance. Donald had told Beverly that he once owned a boat during an earlier marriage, but was required to sell the boat and divide the proceeds with his previous wife. He also stated that he was not going to lose another boat to divorce. Viewed in the light most favorable to the trial court's decision, we find that the findings and conclusions support the trial court's decision to include the second yacht as a marital asset.

"A trial court has broad discretion in valuing marital assets, and its valuation will only be disturbed for an abuse of that discretion." *Webb v. Schleutker*, 891 N.E.2d 1144, 1151 (Ind. Ct. App. 2008). "A trial court does not abuse its discretion as long as sufficient evidence and reasonable inferences exist to support the valuation." *Id*. "If the trial court's valuation is within the scope of the evidence, the result is not clearly against the logic and effect of the facts and reasonable inferences before the court." *Id*. Here, the value assigned to the second yacht by the trial court, $40,000.00, is within the range of the evidence presented. Donald testified that he still owed $20,000.00 on the yacht. The trial court then equally divided the equity between Donald and Beverly as both parties had spent time working on the yacht. The trial court did not err.

IV. $8,000.00 Reimbursement

Donald claims that the trial court erred in its award of $8,000.00 to Beverly. Beverly received $8,000.00 in February of 1998 as her share of the equity in a home from a previous marriage. Beverly and Donald co-habited prior to their marriage and had a joint checking account into which Beverly deposited the $8,000.00 upon her receipt of the funds. Beverly

testified that the $8,000.00 remained in their joint checking account one month later when the parties entered into the pre-nuptial agreement, but the asset was not listed separately as Beverly's property in the pre-nuptial agreement.

More specifically, Donald argues that the money was used to pay marital debt and no longer exists; consequently it cannot be marital property subject to division. He contends that the trial court erred by awarding Beverly the value of that asset. We agree.

Although the $8,000.00 Beverly received as her portion of the equity from the sale of a prior marital residence was Beverly's asset, and arguably subject to the terms of the pre-nuptial agreement, she deposited that money in a joint checking account from which checks were written to satisfy marital debts. That money no longer existed at the time of the dissolution.

We note that property which is separate at its inception may lose its separate characteristic if it is not kept segregated. *Kemp v. Kemp*, 485 N.E.2d 663, 667 (Ind. Ct. App. 1985). "Specifically, money brought into a marriage as separate property becomes marital property when placed in a joint bank account with the other spouse." *Id*. Money used to satisfy marital debts prior to dissolution is not marital property subject to division. *Quillen v. Quillen*, 671 N.E.2d 98, 100 (Ind. 1996). Generally, the marital pot closes on the day the petition for dissolution is filed. *Granzow v. Granzow*, 855 N.E.2d 680, 683 (Ind. Ct. App. 2006).

As a consequence, because the $8,000.00, which was separate at its inception, was placed into a joint bank account and used to satisfy marital debts prior to dissolution, it was

not marital property subject to division. The money was not used to purchase identifiable, traceable items which could be awarded to Beverly pursuant to the pre-nuptial agreement. We find that the trial court erred by awarding to Beverly repayment of the $8,000.00, and the money judgment to her must be reduced by that amount.

V. Deviation from Presumption of Equal Division

Next, Donald argues that if we find that the trial court correctly valued and included the second yacht and $8,000.00 in the marital estate, the trial court's order must be revised because the division of property substantially deviates from the presumption of an equal division without any statement of the grounds for such deviation.

A 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. However, a party may rebut that presumption with evidence that an equal division would not be just and reasonable. *Schueneman v. Schueneman*, 591 N.E.2d 603, 608 (Ind. Ct. App. 1992). "If the trial court determines from the evidence that a 50/50 split would not be just and reasonable, it must state its reasons for deviating from the presumptive 50/50 split." *Id*.

Here, the trial court gave Donald and Beverly each one half of the equity in the marital residence, and one half of the equity in the yacht. Other items were distributed to the parties according to the pre-nuptial agreement and a personal property agreement reached between the parties. A passing reference is made by Donald about $19,000.00 paid from the parties' joint checking account for Beverly's dental work. However, Donald does not present any cogent argument to explain how he would be entitled to credit for a portion of that expense.

As a consequence, we find that the trial court did not err in its equal division of the marital estate.

VI. Attorney Fee Award

Lastly, Donald argues that the trial court erred by awarding attorney fees to Beverly. He cites to the specific language of the pre-nuptial agreement where both sides agree to be responsible for their own attorney fees. More specifically, the pre-nuptial agreement provides as follows:

> In the event of dissolution or separation, each party agrees to bear her or his attorney's fees and expenses and to hold the other party harmless therefrom.

Appellant's App. at 30.

A trial court is allowed broad discretion to award attorney fees in dissolution proceedings, and may consider the misconduct of a party that directly results in additional litigation expenses. *See Rump v. Rump*, 526 N.E.2d 1045, 1047 (Ind. Ct. App. 1988) (trial court has discretion in assessing attorney fees, but is not required to award fees); *Hendricks v. Hendricks*, 784 N.E.2d 1024, 1029 (Ind. Ct. App. 2003) (proper award of attorney fees based upon misconduct of party and income disparity).

Here, Beverly did not ask for an award of attorney fees and the pre-nuptial agreement provided that each party would bear his or her own attorney fees in the event of dissolution. Furthermore, while Beverly argues now that the attorney fee award could be supported by a finding of misconduct, the trial court did not specifically find that Donald engaged in misconduct relating to the dissolution proceedings. The trial court erred by ordering Donald to pay $2,000.00 of Beverly's attorney fees.

Accordingly, we affirm the trial court in part, reverse and remand for modification of the judgment consistent with this opinion.

Affirmed in part, reversed and remanded.

NAJAM, J., and BARNES, J., concur.