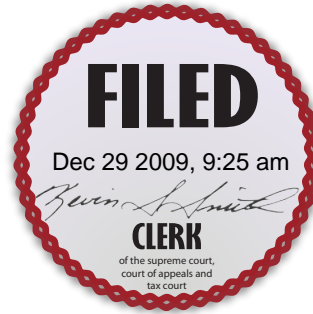


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**IN THE
COURT OF APPEALS OF INDIANA**

RODGER DALE HAMMACK,)

Appellant/Respondent,)

vs.)

No. 29A05-0908-CV-488

SUSAN LORENE HAMMACK,)

Appellee/Petitioner,)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable David K. Najjar, Magistrate
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0604-DR-330

December 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Respondent Rodger Hammack appeals from the trial court's disposition of his motion to correct error following the dissolution of his marriage to Susan Hammack. Rodger contends that the trial court's order violates a stay issued in his pending personal bankruptcy case and that the trial court abused its discretion in disposing of several items of personal property. We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

The underlying facts of this action as found by the trial court are as follows:

1. [Susan] and [Rodger] were married on July 5, 1974.
2. [Susan] filed for divorce on April 12, 2006.
3. At the time [Susan] filed for divorce, there were no minor children, and [Susan] is not pregnant.
4. [Susan] and [Rodger] both resided in Hamilton County, Indiana for more than six (6) months prior to the date of filing for dissolution of marriage.
5. The marriage of parties is irretrievably broken.

Appellant's App. p. 3. On October 23, 2007, Rodger voluntarily filed for bankruptcy in the United States Bankruptcy Court for the Southern District of Indiana under Chapter 7.

On January 3, 2008, the trial court issued a decree of dissolution which provided, in part, as follows:

8. During the marriage the parties acquired real estate in Sheridan, Indiana at 609 West 2nd Street which was held in joint title. The parties agreed that the property had been appraised at \$185,000 by Bonita Renner. [Rodger] contended the property had reduced in value since the appraisal was done and was more comparable in value to a neighboring house that sold for \$171,000.00. [Rodger] previously had valued the house in his deposition testimony and for purposes of a small business loan at \$200,000.00. [Rodger] has had possession of the real estate and the advantage of continuing to reside therein whereas [Susan] was required to vacate the marital residence and live with her mother due to her inability to

finance a new home. [Rodger] testified he was three (3) months in arrears on the payments and anticipated filing bankruptcy. Since that time, [Rodger] has filed bankruptcy under Cause No. 07-10402, reaffirming both mortgages.

9. The Court finds the house should be sold and the proceeds equally divided between the parties. [Rodger] may elect to purchase the real estate at \$185,000.00 by written election made within 10 days and filed with the court and by then refinancing the same within the next sixty (60) days to remove [Susan's] name and to pay her, her proportionate share.

....

12. When [Susan] vacated the home, both [Susan] and [Rodger] testified that [Susan] took all the belongings she wanted from the home, without consulting with [Rodger], and that [Rodger] had no choice about the items which were taken from the marital residence.

13. [Rodger] testified that [Susan] took sixty percent (60%) of the marital property. [Susan] testified that she took fifty percent (50%) of the marital property.

14. The Court finds that both parties failed to enumerate certain miscellaneous items of personal property with apparently nominal value. These items should be set off to the person who now has possession of said property subject to each party being entitled to their family heirlooms and items uniquely personal to them.

....

16. The Court further finds that both parties estimated values of certain items of property which values may or may not be accurate, and which values have been disputed by the opposing party. The Court finds that [Susan] has disposed of some property, or given away the property or the value of the property to another family member. The Court finds [Rodger] is claiming certain property which is actually an asset or fixture of his business, and has reported conflicting values of other property in filings in the Bankruptcy case.

17. As a result, the Court finds that the personal property, furniture, fixtures, and other items of property within the marital estate have been divided more or less equally between the parties. The Court finds the values and the owner should be as set forth per the attached chart and each side to have their own family heirlooms and items uniquely personal to them. The Court further finds that both parties may have failed to enumerate items of personal property. Any items not referred to, shall remain in the custody of the person who has possession of those items.

18. The Court is aware that each party may have items in their possession which are claimed by the other party. Within fifteen (15) days of this order, any party wishing to make a claim against any property then in the custody of the other party shall send written notification to the other

party specifying the item(s) of property claimed. The other party shall have fifteen (15) days within which to return the property, or notify the claiming party that the return of such item(s) is contested. After these thirty (30) days have passed, [Susan] shall choose one item from the total list of contested items. [Rodger] shall then choose one item from the remaining list. [Susan] and [Rodger] shall continue alternating choices until all contested items have been claimed. The process of choosing items can take place in any manner mutually agreeable to the parties, but in any event should not take longer than seven (7) days to complete. Once all contested items have been selected, each party shall deliver to the other party all contested items then in their possession but selected by the other party within seven (7) days.

....
23. [Rodger] is the owner of a certain business, Hammack Construction.

....
25. The Court finds that [Rodger] should own Hammack Construction Company with all indebtedness and liability related thereto.

....
37. The Court finds that the statutory presumption of an equal division has not been rebutted. Each shall be entitled to 50% of the marital estate. Due to the differences in opinions as to valuation, the miscellaneous personal property of nominal value that was not scheduled by either party, [Rodger's] refusal to participate according to the preliminary Court Order to divide the personal property and his failure to timely provide documentation, the Court finds that the personal property has been equitably divided and each person should retain that personal property as noted in the chart attached without offsetting payment from either party to the other, except as otherwise noted herein.

Appellant's App. pp. 4-8.

A chart attached to the trial court's dissolution decree detailed how various assets were to be distributed. Among the assets assigned to Susan were a Marlin rifle; one half each of a clock collection, a glass owl collection, and a coin collection; and a "2002 Pace American Cargo Trailer[.]" Appellant's App. p. 13. On January 25, 2008, Rodger filed a motion to correct error and to clarify the trial court's dissolution decree. On February 25,

2008, Rodger was discharged in his bankruptcy proceeding. On March 26, 2009, the trial court held a hearing on Rodger's motion.

At the hearing, Rodger testified that the Marlin rifle was uniquely personal to him, that he had personally purchased it, and that "a hunting rifle is a man thing[.]" Tr. p. 25. Rodger also testified about an Ansonia clock, saying that he had purchased it in 1973, or the year before he and Susan were married. As for the owls, Rodger testified that at one time the collection consisted of 150 owls, that he and Susan had acquired only six of them together, and "the rest of them [he] bought as time went a long [sic]." Tr. p. 27. Rodger had divided the owl collection on shelves, with the "ones [he] paid the most money for ... on the bottom shelf." Tr. p. 26. When Susan came to the marital home to collect personal property, "[s]he chose to come in and take the ones off the bottom shelf[.]" which owls numbered forty-three altogether. Tr. p. 26. Rodger did not testify that the coin collection, which consists of some silver dollars and a state quarter collection, was uniquely personal to him, saying that "those are just something that I bought. [Susan] never collected coins, I did." Tr. p. 27. The following exchange regarding a trailer also occurred:

Q Do you believe the trailer is your personal property based on the fact that it is used for your business and you were awarded the business in the dissolution?

A Yes.

Q And so you are requesting that your [sic] keep the trailer?

A Yes.

Tr. p. 42.

Also at the hearing, Rodger testified regarding a life insurance policy in Susan's name, the premiums for which he had paid. At some point, Susan "cashed [the life insurance policy] in and got \$2500 off of it." Tr. p. 37. Susan testified that the rifle was not related to her or her family in any way, she was not willing to trade the Ansonia clock for another, she would be willing to "switch owls" with Rodger, the coin collection was not uniquely personal to Rodger, she had failed to disclose the life insurance policy, and she had redeemed the policy for its cash surrender value of \$2500 and "bought tires for [her] Explorer." Tr. p. 64. Following the hearing, the trial court, *inter alia*, reaffirmed its ruling that the marital residence "should be sold as soon as may be permitted by the bankruptcy Court" and also denied Rodger's motion to correct error with respect to all other claims. Tr. p. 96.

DISCUSSION AND DECISION

Standard of Review

At the outset, we note that Susan has not filed an Appellee's brief. In such cases, we do not need to develop an argument for Susan, and we apply a less stringent standard of review. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). We may reverse the trial court if the appellant is able to establish prima facie error, which is error at first sight, on first appearance, or on the face of it. *Id.* Our standard of review of property divisions in marriage dissolutions is well-settled:

In a dissolution action, the trial court must divide 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. Ind. Code § 31-15-7-4. 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. *J.M. v. N.M.*, 844 N.E.2d 590, 599 (Ind. Ct. App. 2006), *trans. denied*. 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. *Daugherty v. Daugherty*, 816 N.E.2d 1180, 1187 (Ind.Ct.App.2004).

Keown v. Keown, 883 N.E.2d 865, 868 (Ind. Ct. App. 2008).

I. Whether the Trial Court's Order that the Marital Residence be Sold Violates a Bankruptcy Stay

The United States Bankruptcy Code provides for an automatic stay upon the filing of a bankruptcy petition, affecting, *inter alia*,

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- (4) any act to create, perfect, or enforce any lien against property of the estate;
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
- (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
- (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
- (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability

of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

11 U.S.C. § 362(a) (2006). “There are two purposes behind the automatic stay: (1) to provide the debtor with a ‘breathing spell’ from creditors; and (2) to protect individual creditors from the effects of a ‘race to the courthouse’ and thereby promote equal treatment of creditors.” *Matter of Isley*, 104 B.R. 673, 679 (Bankr. D.N.J. 1989).

Rodger contends that the trial court’s order that the marital residence be sold at the first opportunity violates the section 362 automatic stay. It is true that an automatic stay under section 362 would appear to apply to a property division in a divorce proceeding. *See* 11 U.S.C. § 362(b)(2)(A)(iv) (providing that automatic stay does not apply to a proceeding “for the dissolution of a marriage, *except to the extent that such proceeding seeks to determine the division of property that is property of the estate*”) (emphasis added). The record indicates, however, that Rodger was discharged from bankruptcy on February 25, 2008, thereby lifting the automatic stay by operation of law. “[T]he stay of any other act under subsection (a) of this section continues until the earliest of[,] ... if the case is a case under chapter 7 of this title concerning an individual ..., the time a discharge is granted or denied[.]” 11 U.S.C. § 362(c)(2). The trial court’s March 26, 2009, order that the marital residence be sold cannot violate an automatic stay that is no longer in effect.¹

II. Whether the Trial Court Abused its Discretion in Disposing of Certain Collectibles

¹ The marital residence was not sold pursuant to the trial court’s original dissolution decree of January 3, 2008. To the extent, then, that the trial court may have violated the automatic stay with the earlier decree, that violation can only be considered harmless.

Rodger contends that the trial court abused its discretion in disposing of several items of personal property that he claims are heirlooms or uniquely personal to him: half of a glass owl collection, half of a coin collection, a Marlin rifle, and a certain Ansonia clock. Division of marital estates is governed by statute:

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.

Ind. Code § 31-15-7-5 (2005).

The record establishes that Susan collected forty-three of approximately 150 glass owls from the marital residence, a selection Rodger maintains includes the most desirable owls and some that he had received as gifts. In the absence of any evidence regarding relative value of the two groups of owls, however, and bearing in mind that the trial court

was under no obligation to credit Rodger's testimony on the topic, we cannot conclude that the trial court has abused its discretion with regard to the owl collection.²

Although Rodger also challenges the disposition of the coin collection, Rodger never claimed at the hearing that the coin collection was uniquely personal to him, and there is no evidence that it is an heirloom. Under the circumstances, we cannot say that the trial court abused its discretion in dividing it equally. As for the Marlin rifle, although Rodger testified that it is uniquely personal to him, the trial court was under no obligation to credit this testimony. We cannot say that the trial court abused its discretion in this regard. Finally, although Rodger testified that he purchased the disputed Ansonia clock in 1973, before his marriage to Susan, Susan testified that it was her grandfather's. Given the clock's connection to Susan's family, we cannot conclude that the trial court abused its discretion in apparently finding that it was not uniquely personal to Rodger.

III. The Trailer

As previously mentioned, the trial court found, inter alia, that "[Rodger] is the owner of a certain business, Hammack Construction" and that "[Rodger] should own Hammack Construction Company with all indebtedness and liability related thereto." Appellant's App. p. 6. Also as previously mentioned, the trial court apparently awarded a trailer used in the business to Susan. We agree with Rodger that the trial court's award of the trailer to Susan is inconsistent with its conclusion that Rodger should own Hammack construction. We remand with instructions for the trial court to either clarify why it

² Rodger suggests that switching owls would "solve the owl problem[.]" a solution to which Susan agreed at the hearing. Appellant's Br. p. 7. We agree that this seems like a reasonable solution to the "owl problem" and are left only to wonder why it has not already been accomplished.

awarded the trailer to Susan, given the trial court's award of Hammack Construction to Rodger, or award it to Rodger.

IV. Susan's Life Insurance Policy

All relevant evidence indicates that Susan failed to disclose a life insurance policy that she was able to surrender for \$2500 in cash. The trial court's order on Rodger's motion to correct error, however, does not address the policy. In the absence of any findings rebutting the presumption of equal division of this asset, we remand with instructions for the trial court to either clarify why it did not award Rodger half of the policy's cash surrender value, *i.e.*, \$1250, or to award him an additional \$1250.

Conclusion

We reverse in part and remand with instructions to (1) either clarify why the trailer should be awarded to Susan or award it to Rodger as a part of his Hammack construction business and (2) either clarify why half of the life insurance policy's cash surrender value should not be awarded to Rodger or award Rodger an additional \$1250. In all other respects, we affirm the judgment of the trial court.

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

FRIEDLANDER, J., concurs.

NAJAM, J., concurring in part and dissenting in part.

**IN THE
COURT OF APPEALS OF INDIANA**

| | | |
|-----------------------|---|-----------------------|
| RODGER DALE HAMMACK, |) | |
| |) | |
| Appellant/Respondent, |) | |
| |) | |
| vs. |) | No. 29A05-0908-CV-488 |
| |) | |
| SUSAN LORENE HAMMACK, |) | |
| |) | |
| Appellee/Petitioner. |) | |

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable David K. Najjar, Magistrate
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0604-DR-330

NAJAM, Judge, concurring in part and dissenting in part.

I respectfully dissent on the question of whether the trial court erred in awarding the Marlin hunting rifle to Susan. Susan has not filed a brief in this appeal, and, therefore, Rodger need only establish prima facie error by the trial court. See Fowler v. Perry, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). 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. Keown v. Keown, 883 N.E.2d 865, 868 (Ind. Ct. App. 2008) (quotation

omitted). 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.

Here, Rodger testified that the Marlin rifle was "uniquely personal" to him because he had "bought that item from a guy that worked with me [And] a hunting rifle is a man thing." Transcript at 25. Likewise, Susan testified that the rifle was not related to her or her family in any way. Rather, when asked about the rifle, Susan agreed that her "counsel typed up an incorrect Motion," which resulted in her "t[aking] two rifles [only one of which] belong[ed] to [her] step-father." Id. at 67.

Accordingly, I would hold that Rodger has met the prima facie threshold of showing that the trial court's decision to award the rifle to Susan was clearly against the logic and effect of the facts and circumstances presented. Thus, on that issue, I dissent from the majority's opinion. On all other issues, I fully concur.