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IN THE COURT OF APPEALS OF INDIANA

BRAD A. MORCOMBE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 50A03-1104-DR-172
	)	
KIM D. MORCOMBE,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0909-DR-133

December 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Brad A. Morcombe ("Husband") appeals the trial court's division of assets between him and Kim D. Morcombe ("Wife") in its Order on Division of Property and Debts. Husband presents three issues for our review, which we consolidate and restate as whether the trial court erred in its division of the marital property.

We affirm.

FACTS AND PROCEDURAL HISTORY[1]

Husband and Wife were married on November 15, 2005. Four months before their marriage, they jointly contracted for the purchase of real property and a residence for $78,000. They immediately moved into the residence and lived there throughout their marriage. At the time of the marriage, Husband had negligible assets, and Wife had a PERF account and a 401(k) account, which collectively totaled about $31,751. During the course of the marriage, Husband and Wife held a joint checking account, a joint savings account, and both were gainfully employed.

Early in the marriage, Wife was involved in a serious car accident. As a result of the accident, she had a cervical spine fusion. Wife continues to suffer from severe headaches and pain in her neck and shoulders, and that pain is expected to continue for

[1] We note that Husband has not filed an appellant's appendix. According to our appellate rules, "[t]he appellant shall file its Appendix with its appellant's brief," Ind. Appellate Rule 49(A), the purpose of which "is to present the Court with copies of only those parts of the record on appeal that are necessary for the Court to decide the issues presented," App. R. 50(A)(1). We have held that an appellant may waive appellate review of a trial court's order when the party fails to file an appendix. See, e.g., Yoquelet v. Marshall County, 811 N.E.2d 826, 830 (Ind. Ct. App. 2004). However, because "we prefer to decide issues on the merits when possible," we will review Husband's appellate arguments. See Kelly v. Levandoski, 825 N.E.2d 850, 856 (Ind. Ct. App. 2005), trans. denied.

the rest of her life. Thereafter, Wife was involved in two more car accidents during the marriage.

Each of the three accidents resulted in litigation and, in the spring of 2009, Wife settled the three causes of action for a net total[2] of about $96,300. That money was deposited into the parties' joint checking account and then used to pay the outstanding balance on the marital residence and underlying real property as well as other bills incurred during the course of the marriage. The parties also deposited about $10,000 into their joint savings account.

On September 2, 2009, Husband filed his petition for dissolution of marriage. The trial court held an evidentiary hearing on February 11, 2011. On March 31, 2011, the court entered its order dividing the marital estate as follows:

> 4. [T]he total assets of the parties including the assets brought into the marriage is approximately $126,580 and the debts are $601. The net marital estate is approximately $125,979. The Wife is receiving approximately $115,979 or 92% of the net marital estate. That sum includes $13,672 of the PERF account[,] which was earned prior to their marriage. The Husband is receiving approximately $10,000 or 8% of the net marital estate[,] which are sums he withdrew from the Centier [savings] account prior to separation.
>
> 5. During the course of the marriage, the Wife received three (3) personal injury settlements for injuries suffered in vehicle accidents during the marriage. The total net proceeds by her was $96,366.02. Those sums were used to pay the debt on the house and other debts. Consequently, those funds directly increased the value of the marital estate.
>
> 6. Accounting for the PERF account and the personal injury settlement[s], the Wife directly contributed $110,038.02 or 87% of the net marital estate. If the PERF account was excluded from the value of the net marital estate, the value of the estate is approximately $112,908 of which

[2] The net total is less attorney's fees and related costs.

> the Wife directly contributed 85% from the proceeds of the personal injury settlement[s].
>
> 7. Since the Wife directly contributed 87% to the accumulation of the marital equity, she should receive that sum plus one-half of the balance of the marital estate or a total [of] approximately 93.5% and the Husband should receive 6.5%. The distribution noted above divides the marital estate in the appropriate percentages and is a fair and equitable distribution of the property and debts.

Appellant's Br. at *21-*22.[3] This appeal ensued.

DISCUSSION AND DECISION

Husband appeals the trial court's order, in which the court entered findings and conclusions sua sponte. Sua sponte findings control only as to the issues they cover and a general judgment will control as to the issues upon which there are no findings. Mullin v. Mullin, 634 N.E.2d 1340, 1341 (Ind. Ct. App. 1994). A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence. Id. When a court has made special findings of fact, an appellate court reviews sufficiency of the evidence using a two-step process. First, it must determine whether the evidence supports the trial court's findings of fact; second, it must determine whether those findings of fact support the trial court's conclusions of law. Estate of Reasor v. Putnam County, 635 N.E.2d 153, 158 (Ind. 1994). Findings will only be set aside if they are clearly erroneous. Id. Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. State v. Van Cleave, 674 N.E.2d 1293, 1296 (Ind. 1996), reh'g granted in part, 681 N.E.2d 181 (Ind.

[3] These pages of Husband's brief are not numbered.

1997). 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 1295.

Husband contends that the trial court erred in its division of the marital estate. Indiana Code Section 31-15-7-4 calls for the "just and reasonable" division of marital assets by "division of the property in kind," setting aside certain property to one spouse and requiring payments from the other, ordering the sale of marital assets, or ordering the distribution of benefits. Ind. Code § 31-15-7-4(b). Trial courts "shall presume that an equal division" of the marital assets "is just and reasonable," although this may be rebutted by presenting "relevant evidence" that an equal division would not be just and reasonable. I.C. § 31-15-7-5. In particular, evidence of the following factors may be relevant to rebut the presumption of an equal division:

> (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
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> (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 property is within the sound discretion of the trial court. Eye v. Eye, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006). We review a claim that the trial court improperly divided marital property for an abuse of discretion. Id. In doing so, we consider the evidence most favorable to the trial court's disposition of the property, without reweighing the evidence or assessing the credibility of witnesses. Id. Although a different conclusion might be reached in light of the facts and circumstances, we will not substitute our judgment for that of the trial court. 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 trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute. Id. We do not review the distribution of assets item-by-item, but rather we consider the distribution of assets as a whole. Id.

Husband first asserts that the trial court's order, in effect, excluded the marital residence from the marital pot. In support, he relies on three cases from this court. We summarized two of those cases in the third, stating as follows:

> In Wilson v. Wilson, 409 N.E.2d 1169 (Ind. Ct. App. 1980), a husband and wife divorced after twenty-three years of marriage. The marital estate included property that the husband had acquired by inheritance. The net value of the marital estate was $207,794.00. The trial court awarded the husband more than eighty percent of the marital assets, including all of the inherited assets. Upon appeal, this court reversed the division of assets, holding that the trial court erred in "systematically excis[ing] any portion of the marital assets which was attributable to a gift or an inheritance from [the husband's] parents." Id. at 1174. The court concluded that such a "simplistic or mechanical division of the marital assets," id., did not satisfy the requirements of IC § 31-1-11.5-11, the predecessor to IC § 31-15-7-4 and IC § 31-15-7-5. Those statutory provisions require that, when ordering

an unequal division, the trial court must consider all of the factors set out in IC § 31-15-7-5. We observe that a consideration of whether the property was acquired by one of the parties through inheritance or gift is only one of the five factors a court should review. By focusing only upon one factor when others are present, a trial court runs the risk of dividing a marital estate in an unreasonable manner.

In Swinney v. Swinney, 419 N.E.2d 996 (Ind. Ct. App. 1981), trans. denied, this court held that an award of ninety-seven percent of the marital assets to one of the parties in a dissolution action was an abuse of discretion. In Swinney, the trial court found that the value of the total marital estate was $45,270, of which $40,000 was attributable to the marital residence. The couple's equity in the home was largely the result of gifts given by the wife's father. The trial court awarded to the wife the marital residence, a car, a savings account, a checking account, and household goods, with a total valuation of $43,970. The court awarded the husband only a car valued at $1,300 and items of personal property that were of little monetary value. The division of property was reversed on appeal. Implicit in the Swinney court's decision was its view that the error was based primarily upon the fact that the trial court treated the gifts from the wife's father as if they were not marital assets. In this regard, the court stated:

> Indeed, it appears the trial court did not consider the family residence, which was primarily the result of gifts from wife's father, to be a part of the "marital pot." Indiana case law makes it clear that inherited or gift property is not to be excluded from the marital assets. The spirit of IC 31-1-11.5-11 requires [that] gift property be treated as a marital asset. While the trial court here did not expressly make findings of fact which excluded the residence from the marital pot, the results raise a strong inference that such was the case.

Id. at 999 (citations omitted).

We conclude that the error made by the trial courts in Wilson and Swinney was repeated in the instant case. The trial court left no doubt with respect to the reason for awarding the gift and inherited assets entirely to Chris: "Therefore, the Court finds that the following items from the marital estate should be set off fully to Husband because of his acquisition of them through gifts and/or inheritances." The court's stated rationale, coupled with the striking discrepancy between the respective portions of the marital estate awarded to each of the parties, leads inescapably to the conclusion that the trial court excluded from the marital pot the property acquired during the marriage by gift or inheritance from Chris's family.

> The trial court's intent in fashioning the award as it did is clear and understandable. Chris's interests in the family businesses, along with the real property and improvements thereon, were attained in large part because his status as kinsman to those who built up those businesses over the years. Beginning more than a century ago, Chris's ancestors established successful farming-related business enterprises that have culminated not only in the ongoing farming operations in which he, his brother, and father are engaged, but also in Wallace Farms, Wallace Grains, and to a lesser extent, United Feeds. Moreover, as a direct result of the success of the various enterprises in which his family has engaged, Chris has over the years received gifts of stock. No doubt sensitive to the fact that the aforementioned assets are historically and deeply rooted in Chris's family, the trial court sought to preserve the familial integrity of those assets by setting them aside entirely to Chris.
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> * * *
>
> In summary, the record demonstrates that the trial court systematically excluded from the marital estate those assets that were attributable to gifts or inheritance from Chris's family. Thus, the presumption that the trial court complied with the applicable law in dividing the assets . . . has been rebutted and we conclude that the trial court abused its discretion and the division of the marital estate . . . .

Wallace v. Wallace, 714 N.E.2d 774, 780-81 (Ind. Ct. App. 1999) (emphases added; some citations omitted), trans. denied.

Wallace, Wilson, and Swinney are inapposite to the present facts. In those cases, the trial courts erred because they did not include assets contributed by a single spouse in the marital pot, setting such assets over to the contributing spouse before separately identifying and then dividing the marital estate. Here, the trial court clearly included the marital residence in the marital estate. That the court did so is evident in the trial court's findings. Specifically, the trial court found that the "net marital estate [which included the marital residence] is approximately $125,979." Appellant's Br. at *21-*22. The trial court further found that, including the settlement proceeds and Wife's PERF account,

Wife had "directly contributed" eighty-seven percent of the net marital estate. Id. And in paragraph 7 the court found that, "[s]ince the Wife directly contributed 87% to the accumulation of the marital equity, she should receive that sum plus one-half of the balance of the marital estate[.]" Id. at *22. Husband has not shown that the trial court erroneously excluded the marital residence from the marital pot.

Husband also contends that he was a party to each of the three personal injury actions. But it is not disputed that the settlement checks were made to Wife individually, or that the "Settlement Disbursement" documents prepared by Wife's counsel in those actions each identified only Wife as the "Client." See Resp't Exhs. E, F, & G. It is also not disputed that Wife will suffer pain from those accidents for the rest of her life. A reasonable inference from that evidence is that the settlement proceeds were attributable to Wife's pain and suffering, and it was within the trial court's discretion to maintain Wife's receipt of those awards.

Husband also argues that the trial court failed to consider all of the factors of Indiana Code Section 31-15-7-5. Husband's argument here appears to be two-fold. First, he suggests that the trial court's order is erroneous because it does not clearly identify each of the statutory factors. But that is not a basis for error. Although a trial court must consider all the statutory factors set forth in Indiana Code Section 31-15-7-5, it need not explicitly address all of the factors in each case. Montgomery v. Faust, 910 N.E.2d 234, 239 (Ind. Ct. App. 2009). Accordingly, this argument is without merit.

Second, Husband contends, in essence, that the trial court ignored the evidence favorable to him under the statutory factors. In particular, Husband contends that he was

a party to the three actions based on Wife's car accidents and, therefore, it was error for the trial court to consider the settlement proceeds, or the marital residence that was paid for with those proceeds, exclusively as Wife's property.

In support, Husband relies on Doyle v. Doyle, 756 N.E.2d 576 (Ind. Ct. App. 2001). In particular, Husband states as follows:

> the record does not support an unequal division of the marital estate . . . . This point is [sic] best clarified by this Court when it said, "an unequal division of marital property is justified where a party can demonstrate that certain marital property was acquired by one spouse prior to the marriage, that the other spouse made no contribution toward the acquisition of the property or the accumulation of the property, and the funds were never commingled with joint marital assets." Doyle[, 756 N.E.2d at 579], emphasis added.

Appellant's Br. at 15.

Doyle is inapposite here. Under Husband's reading of that case, an unequal division of property is only justified in the above-stated circumstances. That is not the law. The trial court may deviate from the statutory presumption of an equal division of the marital property whenever relevant evidence shows that an equal division would not be just and reasonable. I.C. § 31-15-7-5. For the reasons discussed above, we conclude that the trial court acted within its discretion when it concluded that the relevant evidence here lead to an unequal division of the marital property.

Further, we also note that Husband has presented no evidence to show that any part of Wife's settlement proceeds were attributable to him. And insofar as Husband further alleges that he was entitled to some portion of the equity in the marital residence, Husband presents no argument or evidence supporting a value for that equity, or whether

the $10,000 he removed from the joint savings account shortly before he filed his petition for dissolution offset his equity. See Ind. Appellate Rule 46(A)(8)(a).

Husband also challenges Wife's evidence regarding the amount of her PERF and 401(k) accounts, as well as her testimony that he removed $10,000 from the joint savings account prior to his filing of the petition for dissolution. But Wife's valuation of those accounts is supported by the record, as is her allegation that Husband removed approximately $10,000 from the joint savings account. See Pet. Exh. 7. That the court did not give weight to the evidence most favorable to Husband does not demonstrate that the court abused its discretion or otherwise failed to consider the statutory factors. To the contrary, Husband's various assertions are nothing more than requests for this court to reweigh the evidence, which we will not do. See Eye, 849 N.E.2d at 701.

In sum, we hold that the trial court acted within its discretion when it divided the marital property. Accordingly, we affirm the court's order.

Affirmed.

ROBB, C.J., and VAIDIK, J., concur.