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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF	)	
	)	
MARY W. HALL,	)	
	)	
Appellant-Petitioner,	)	
	)	
and	)	No. 71A03-0606-CV-236
	)	
CHARLES R. HALL, JR.,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
Cause No. 71C01-0304-DR-252

October 24, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant Mary W. Hall ("Mary") appeals the trial court's order awarding 59% of the marital estate to Appellee Charles R. Hall, Jr. ("Charles") and 41% to Mary. We reverse and remand.

Issue

Mary raises one issue, which we restate as whether the trial court abused its discretion by basing an unequal division of the marital estate on factors other than those prescribed by statute.

Facts and Procedural History

Mary and Charles married in 1967, had six children, and purchased a home in 1974, in which Charles still resides. On April 17, 2003, Mary petitioned for dissolution of marriage. The trial court dissolved the marriage on August 26, 2005.

Four of the children became emancipated prior to the trial court's order dividing the marital estate, described below. The other two children, Colleen Hall and Kerri Hall ("Colleen and Kerri"), are currently attending college in Indiana, and residing with Charles when not at college. They have no meaningful contact with Mary. Contrary to the trial court's direction,[1] Mary has not contributed significantly to Colleen's or Kerri's college expenses. Indeed, Charles has provided the primary financial support for Colleen and Kerri. The parties' shares of the estimated, remaining college expenses amount to $90,000.00.

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[1] The trial court found that, "absent direction by this Court, the Wife has not significantly contributed to the post-secondary educational expenses of the children." Appellant's Appendix at 6. On appeal, however, neither appendix contains the trial court's order.

Charles is 63 and in poor health after bariatric surgery and multiple medical procedures to repair his heart. He earns $35,000.00 per year, supplemented by a pension from a prior employer amounting to $12,000.00 per year. His future income, however, is limited because of his significant health issues. Mary is 61 and in good health, earning $24,000.00 per year working part-time at a college. She holds masters degrees in chemistry and teaching, as well as an Indiana Teacher's Certification.

On April 10, 2006, the trial court entered its findings of fact, conclusions of law, and judgment, awarding 59% of the marital estate to Charles and 41% to Mary, awarding Charles legal and physical custody of Colleen and Kerri, and ordering Mary to pay Charles $59.00 per week in child support. Further, the trial court ordered Mary to pay supplemental child support amounting to 10% of "any income from additional employment." As to the future costs of college, the trial court allocated Colleen and Kerri to pay at least 20% of their own tuition, fees, room, and board. After the daughters' contributions, loans, grants, and scholarships, the trial court ordered Charles and Mary to pay, respectively, 62% and 38% of the remaining college costs.

Mary now brings this appeal, challenging only the trial court's division of the marital estate.

Discussion and Decision

I. Standard of Review

In reviewing a trial court's division of the marital estate, we assess whether the trial court abused its discretion. Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2002). "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." Hatten v. Hatten, 825 N.E.2d 791, 794 (Ind. Ct. App. 2005) (citing Bizik v. Bizik, 753 N.E.2d 762, 766 (Ind. Ct. App. 2001), trans. denied), reh'g granted, trans. denied.

II. Analysis

Mary asserts that the marital estate should have been divided equally, pursuant to Indiana Code Section 31-15-7-5, which 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.

I.C. § 31-15-7-5 (emphasis added). Where a court deviates from an equal division, it must state its reasons. Thompson v. Thompson, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004), reh'g denied, trans. denied. "Importantly, 'when ordering an unequal division, the trial court must consider all of the factors set out in [the statute].'" Eye v. Eye, 849 N.E.2d 698, 702 (Ind. Ct. App. 2006) (citing Wallace v. Wallace, 714 N.E.2d 774, 780 (Ind. Ct. App. 1999) (emphasis in original), trans. denied).

In dividing the marital estate, the trial court concluded, "[d]ue to the continuing needs of the unemancipated children and the disproportionate amount of debt and educational liability assumed by the Husband, the marital estate should be divided unequally with the Husband receiv[ing] approximately fifty-nine percent (59%) and the Wife receiving approximately forty-one (41%)."[2] Appellant's Appendix at 13 (emphasis added). The trial court essentially based its deviation from an equal division on two elements of its order: first, Charles's obligation to pay 62% of Colleen and Kerri's ongoing needs, including college expenses, and second, Charles's obligation to pay the mortgage on the family home. The mortgage is the only "debt" Charles takes under the trial court's order.

Mary argues that neither of the reasons stated by the trial court for deviating from an equal division comports with the factors enumerated in the statute. We agree. First, the trial court addressed separately the daughters' ongoing needs in calculating child support. While

[2] Mary's award of 41% of the net marital estate amounts to $262,843.00. In appealing for 50% of the marital estate, Mary is essentially seeking $58,667.00. (Total net estate is $643,020.00. Half of that is $321,510.00. $321,510.00 - $262,843.00 = $58,667.00)

the statutory list of five factors is not exclusive,[3] a deviation from an equal division must be based upon more than the trial court's concern with the effect of its own child support order. Second, the trial court accounted twice for Charles's obligation to pay the mortgage, first subtracting it from his assets to calculate his net portion of the marital estate and subsequently pointing to the same debt as justification for deviating from an equal division. The listed reasons for deviating from an equal division do not comport with the analysis required by I.C. § 31-15-7-5.

Therefore, we reverse and remand for the trial court to determine (1) whether, and in what amount, to offset Mary's educational expense liability, and (2) whether, and to what degree, to deviate from an equal division of the marital estate, considering the appropriate statutory factors for deviation.

Conclusion

For the reasons discussed above, we conclude that the trial court abused its discretion by not relying on statutory factors as the basis for its unequal division of the marital estate. Reversed and remanded.

RILEY, J., concurs.

MAY, J., dissents with separate opinion.

[3] See Justus v. Justus, 581 N.E.2d 1265, 1274 (Ind. Ct. App. 1991), reh'g denied, trans. denied.

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MAY, Judge, dissenting.

Because I disagree with the majority's interpretation of the language the trial court used to justify its unequal division of the marital assets, I must respectfully dissent.

First, I would not find error to the extent the court's decision was based on factors not enumerated in the statute. The presumption of equal division of marital property "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." Ind. Code § 31-15-7-5 (emphasis added). Because the legislature used the words "including evidence concerning the following factors," the list of factors provided is non-exclusive. *See Justus v. Justus*, 581 N.E.2d 1265, 1274 (Ind. Ct. App. 1991) (section "lists a number of nonexclusive

factors which a court may consider"), *reh'g denied, trans. denied*; *see also In re Lehman*, 690 N.E.2d 696, 702 (Ind. 1997) (noting Professional Conduct Rule 1.5(a), which includes the phrase "factors to be considered in determining the reasonableness of a fee *include the following*," provides a "nonexclusive list" of factors to consider) (emphasis added). Accordingly, I would not conclude the trial court abused its discretion "by not relying on statutory factors as the basis for its unequal division of the marital estate." Draft op. at 6.

Second, I believe the court's deviation from an equal division was based on "more than the trial court's concern with the effect of its own child support order." *Id*. The trial court concluded:

> 15. Due to the continuing needs of the unemancipated children and the disproportionate amount of debt and educational liability assumed by the Husband, the marital estate should be divided unequally with the Husband receive [sic] approximately fifty-nine percent (59%) and the Wife receiving approximately forty-one (41%).

(Appellant's App. at 13.)

The majority apparently presumes the "disproportionate amount of … educational liability assumed by the Husband" (*id.*) refers to the *prospective* order that Husband pay sixty-two percent of "[t]he post secondary educational expenses for either child not otherwise paid by the child directly or by loans or through grants-in-aid or scholarships." (*Id*. at 11.)

A more likely interpretation, based on the use of the past tense ("assumed") in Conclusion 15, is that the court is referring to the *retrospectively* "disproportionate amount of … educational liability assumed by the Husband." (*Id.* at 13.) In other words, the court was acknowledging Husband had shouldered the majority of the children's educational expenses from March 2003, when Wife left the marital residence, to April 2006, when the court

entered the appealed order. A number of the court's Findings of Fact support this interpretation of Conclusion 15:

> 2. Wife filed her petition for dissolution of marriage on April 17, 2003.
>
> * * * * *
>
> 4. The parties are the parents of six (6) children . . . .
>
> * * * * *
>
> b. [C.H.] is twenty-one years of age and is attending Saint Mary-of-the-Woods College, Saint Mary-of-the-Woods, Indiana, as a full time student;
>
> c. [K.H.] is nineteen years of age and is attending Purdue University, West Lafayette, Indiana, as a full time student;
>
> * * * * *
>
> 6. Since the Wife left the marital residence, neither [C.H.] nor [K.H.] have any meaningful contact with their mother. In addition, since that time, the Wife has not had any effective communication with the Husband regarding the children or their education. Although the Wife has provided some minor gifts to the children, she has left the Husband to assume most of the responsibility for the college expenses of [C.H.] and [K.H.]. In fact, absent direction by this Court, the Wife has not significantly contributed to the post-secondary educational expenses of the children. . . . .
>
> * * * * *
>
> 15. The children . . . are full-time students in college and they will have continuing need for financial support, including tuition, fees, housing, food, transportation, etc. To this date, the Husband has provided the primary financial support for these children and, under the present circumstances, the Court would be within its discretion to provide the Husband with more than fifty percent (50%) of the marital estate to meet the financial needs of the children.

(*Id*. at 5-8.)

Wife claims Husband did not assume most of the responsibility for educational expenses, because she contributed $6,588.32 from the AIM Fund toward C.H.'s 2003-04 college expenses. However, the facts most favorable to the judgment are found in the cross-examination of Wife:

> Q The question that I asked you, and this is for her freshman year, of '03

and ’04.

A Freshman.

Q Did you pay any money out of your funds for [C.H.’s] education.

A I don’t know. My main remembrance is paying out of her AIM Fund.

Q And as we’ve discussed, that was her money, that was not your money. Correct?

A I was the custodian of it.

Q But the money was hers that you were – you couldn’t have used that money for anything else.

A No. It was earmarked for her college. That’s accurate.

Q And also, when you were ordered in court and there was a percentage that was worked out, that was for [C.H.’s] sophomore year, was it not?

A Yes.

(Tr. at 66.) In addition, Husband testified:

Q Subsequent to Mrs. Hall leaving in March of ’03, both the girls were in high school at that period of time. Is that right?

A That’s correct.

Q And did you continue to pay their tuition?

A Yes, I did.

Q And then . . . [C.H.] went to St. Mary’s [sic] -of-the-Woods College.

A That’s correct.

Q Could you tell the Court how her tuition was paid for in her freshman year?

A Freshman year, the first semester or -- it was actually paid -- the first semester was paid early in the second semester. We had -- Mrs. Hall had used her AIM Account, approximately $6,400, to pay for her tuition and room and board. And later on in that semester what I did was I used my 401k, it’s the only one I would get money out of, to pay the remaining tuition, room and board for [C.H.].

Q And how much money was that?

A Oh . . . I believe it was about $7,500 maybe. I’m not sure of the exact amount. I don’t have it here. Maybe it was $8,000 and something. I don’t know.

Q That was taken out in ’03 or ’04?

A That was taken out in -- oh, that was taken out in ‘04. I’m just -- I’m just trying to think here. In ’03, it might have been early ’04, because it was -- Mrs. Hall had paid first, and then I had -- I had to pick up the rest.

* * * * *

Q And you mentioned that you used her AIM Account. You meant --who is her?

A [C.H.]'s AIM Account.
Q Did Mrs. Hall contribute at all to that?
A Yes, she did.
Q To the payment of the tuition.
A Oh, no. I'm sorry. I thought you meant to the AIM Account. To the best of my knowledge, no.
Q You mentioned that contributions to the AIM Account in terms of building up the balances, and Mrs. Hall indicated that some inheritance money went in there.
A That's correct.
Q There was a monthly payment that went in as well.
A That's correct.
Q Who would make the monthly payments?
A When the monthly payment was done it was done by myself.

(*Id.* at 105-08.)

Then, when Wife would not assist with payments required to hold K.H.'s registration for her freshman year at Purdue University, Husband "had [K.H.] take out a Stafford Loan; also took out a Parent Plus Loan, and then just -- we needed some additional monies, and I borrowed it from my son." (*Id.* at 112.) Husband also explained he had also paid additional sums without assistance from Wife for such things as "[K.H.]'s computer[,] bed sheets, all sorts of whatever you need to outfit a college dorm[,] sheets, beds[,] a comforter, there's a little television set[, and] clothes, tons of clothes." (*Id.* at 138.)

Because the evidence supports the findings and the findings support the trial court's conclusion the marital estate should not be divided equally, I would not hold the court abused its discretion. Accordingly, I would affirm the judgment of the trial court.