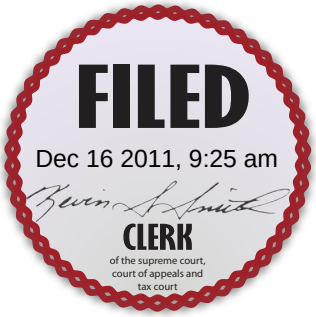

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IN THE
COURT OF APPEALS OF INDIANA

DIANA L. GIPSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 79A05-1103-DR-138
	)	
CRAIG G. GIPSON,	)	
	)	
Appellee.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-1008-DR-269

December 16, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Diane Gipson appeals the trial court's dissolution decree in her divorce from Craig Gipson. We remand.

Issues

The combined and restated issue before us is whether the trial court erred in the amount of rehabilitative maintenance it awarded to Diane and in its equal division of the marital estate.

Facts

The Gipsons married in 1973. Both parties graduated from high school, and neither party obtained a college degree. Craig began working for Bob Rohrman, an automobile dealer, in 1979. He started out as a car salesman but gradually worked his way up the ranks of the company. In 1992, Rohrman paid for Craig to attend a year-long training course through the National Automobile Dealers Association. In 1998, Craig was promoted to director of operations for Rohrman's Lafayette sales area, which essentially is a position directly below Rohrman himself. In this position, Craig receives a guaranteed salary of $6000 per month. He also is entitled to certain profit sharing bonuses. From 2005-2009, Craig's average annual income through salary and bonuses was $145,387. In 2010, however, due to Rohrman having a very profitable year, Craig received approximately $400,000 total in salary and bonuses, some of which reflected 2009 profit-sharing that was paid in 2010. Nearly $200,000 of this amount was put toward credit card debt and into a savings account.

The couple had two children during the marriage. Diane worked sporadically during the marriage at various jobs, but primarily stayed home to raise the children and be a homemaker. Craig specifically told Diane that he preferred for her not to work outside the home. Craig's job, especially in the earlier years, often required him to work very long hours while Diane stayed at home with the children. The most income that Diane earned during the marriage was in 1992, when she earned approximately $11,500 working as an office manager in an optometrist's office. After the parties' last child graduated from high school in 1999, Diane did not seek to return to full-time employment outside the home. The last year in which she worked at all outside the home was 2001, when she earned $341 at a food service position.

In August 2010, Craig filed for divorce, when both parties were in their late fifties. Towards the end of 2010, Diane underwent career counseling through the Lafayette WorkOne Center. Diane's counselor determined that her current academic level for math and reading was at a ninth grade level, which is typical for someone who has been out of school for many years. Diane and her counselor determined that she would need additional skills and training to obtain a job that would pay a living wage, although Diane had not disclosed that she had learned and performed various office administrative tasks at the optometrist's office. With the counselor, Diane created a career plan to eventually become a dental assistant. This would require Diane to first attend remedial education classes at the Lafayette Adult Reading Academy, then to attend Ivy Tech Community College for approximately a year and a half to two years in order to earn a dental

assisting degree. Diane was planning to begin attending Ivy Tech in the fall of 2011. She was eligible for a government-provided "displaced homemaker" grant of $3000 per year that would cover most of the cost of her tuition and books at Ivy Tech. Tr. p. 68.

The trial court conducted a final dissolution hearing on January 20, 2011. At the hearing, Craig agreed to make monthly payments of $378 to maintain health and dental insurance for Diane through COBRA for three years. There also was evidence presented that Diane currently was driving a leased 2008 Toyota, the lease for which would end in April 2011, and which carried an option to purchase for approximately $16,000 at that time.

On February 25, 2011, the trial court entered a final dissolution decree, accompanied by sua sponte findings and conclusions. Regarding division of the marital property, Diane had requested that it be split unevenly in her favor. Diane had also requested that Craig pay rehabilitative maintenance to her. The trial court entered the following pertinent conclusions regarding the marital estate and rehabilitative maintenance:

> 3. The court shall presume that an equal division of the marital property between the parties is just and reasonable. This presumption may be rebutted. I.C. 31-15-7-5. The court may consider such factors (a) contribution of each spouse toward the acquisition of the property; (b) extent to which the property was acquired by the parties; (c) economic circumstances of each spouse at the time of the disposition of the property; and (d) earnings or earnings ability of the parties. Id.

4. The evidence in this case reveals that during the marriage, the Husband worked as a car salesman and the Wife worked in managerial and clerical positions. Wife decreased her full time hours in to [sic] stay home and raise the children and voluntarily chose not to re-enter the work force after the children left the house. The parties only recently increased their net worth through year end bonuses and profit sharing from Husband's employment. The court finds that the parties contributed equally toward the accumulation of the marital assets and as such, a presumptive equal division of the assets is appropriate. However, the parties' current circumstances warrant deviation to the extent that the Husband shall pay a portion of the expenses necessary to re-establish the Wife as an independent person.

* * * * *

15. I.C. 31-15-7-2 provides that a court may award a spouse rehabilitative maintenance after considering such factors as the educational level of each spouse, whether interruption in education or training occurred during the marriage, the earning capacity of each spouse, and the time and expense necessary to acquire sufficient education to enable the spouse seeking maintenance to find appropriate employment. Here, the parties have the same education level as they did at the beginning of the marriage, with the exception of an auto dealer certification obtained by Husband paid through his employer. The Wife obtained skills as an office manager handling bookkeeping, scheduling, inventory, and vendor and customer relations and skills as a teacher assistant. She did not interrupt any formal education or training when she quit work to stay home full time. She did not pursue any additional training or employment after the children left the home and has shown no interest in doing so. Wife presented some evidence that she may need additional training but failed to disclose to her expert her previous work history and employment skills. There was no convincing evidence presented that indicates Wife cannot return to jobs similar to her previous employment.

> 16. There was sufficient evidence presented to justify some short term maintenance to allow Wife to update her skills through a program at the Reading Academy and to ensure Wife has health insurance. Accordingly, Husband is ordered to pay rehabilitative maintenance for benefit of Wife by maintaining payments as ordered in the October 15, 2010 Provisional Order for an additional 90 days from the date of this order or until Wife leaves the marital residence, whichever shall occur first. Husband is further ordered assume [sic] and pay all monthly payments necessary to provide Wife health insurance through a COBRA policy available through Husband's employer for a period of 36 months following the date of this order. Husband shall pay Wife's tuition obligation, net of her displaced homemaker's grant, directly to the [Lafayette Adult Reading Academy], in the approximate sum of $278.00. Husband shall also pay all sums necessary for the Wife to purchase her current vehicle when the lease expires in April 2011.

App. pp. 38-39, 41-42.

Although the trial court indicated in conclusion 4 that it was going to deviate from an equal division of the marital property, it split the property evenly. After accounting for debts assigned solely to Craig and an equalization payment he would be required to make to Diane, this resulted in each party being awarded approximately $350,000 in net assets. Over $300,000 of the amount awarded to Diane was liquid, including funds in the savings account and a separate Rohrman 401(k) plan that she would be able to access immediately, before reaching retirement age. Craig was awarded the marital residence. The trial court also ordered Craig to pay Diane's attorney fees. Diane now appeals.

Analysis

The trial court's dissolution order contained sua sponte findings of fact and conclusions thereon. Such findings control only the issues they cover, and a general judgment standard of review will control as to the issues upon which there are no findings. Farah, LLC v. Architura Corp., 952 N.E.2d 328, 333 (Ind. Ct. App. 2011). A general judgment entered with findings may be affirmed on any legal theory supported by the evidence. Id. As for the findings and conclusions the trial court did make, we must first determine whether the evidence supports the findings of fact, and second, whether those findings of fact support the conclusions thereon. Tracy v. Morell, 948 N.E.2d 855, 862 (Ind. Ct. App. 2011). "Findings will only be set aside if they are clearly erroneous." Id. Findings are clearly erroneous only if the record contains no facts to support them either directly or by inference, while a judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or conclusion is clearly erroneous, we must be left with the firm conviction that a mistake has been made. Id. Here, although the trial court's findings and conclusions were entered sua sponte, it is apparent that it intended to enter complete findings to resolve all of the issues between the parties. We will review this case accordingly.

Diane frames the first issue she raises as whether the trial court erred in its "decision to not award her rehabilitative maintenance." Appellant's Br. p. 3. Diane later acknowledges that Craig, in fact, was ordered to pay what amounts to maintenance. Specifically, Craig was ordered to pay for COBRA health and dental insurance for Diane for three years at $378 per month. Additionally, Craig was ordered to purchase the 2008

Toyota for Diane at the end of the lease in April 2011, which would cost approximately $16,000. Craig also was directed to pay the relatively de minimis amount of $278 toward Diane's continuing education. These payments, we believe, are appropriately framed as rehabilitative maintenance payments, unconnected with the division of the marital property, given that the trial court designated the payments as maintenance, they exceed the value of the marital estate, and they are future payments to be made from Craig's future income. See Webb v. Schleutker, 891 N.E.2d 1144, 1156 (Ind. Ct. App. 2008) (listing factors to distinguish maintenance from marital property division); see also In re Marriage of Coomer, 622 N.E.2d 1315, 1320 (Ind. Ct. App. 1993) (treating payments for COBRA insurance coverage that would be paid out of husband's future income as spousal maintenance to wife). We conclude that the issue in this case is more appropriately framed as whether the trial court ordered an inadequate amount of rehabilitative maintenance, not whether the trial court improperly failed to award any maintenance.

We review a trial court's decision regarding spousal maintenance for an abuse of discretion. Lloyd v. Lloyd, 755 N.E.2d 1165, 1171 (Ind. Ct. App. 2001). An abuse of discretion will be found if the trial court's decision is clearly against the logic and effect of the facts or reasonable inferences to be drawn therefrom, or if the trial court misinterprets the law, or if it disregards evidence of factors in the controlling statute. Mitchell v. Mitchell, 875 N.E.2d 320, 323 (Ind. Ct. App. 2007), trans. denied. We presume that a trial court properly considered the statutory factors in ruling on a request

for spousal maintenance. Lloyd, 755 N.E.2d at 1171. "Maintenance awarded by a trial court in the absence of an agreement between the parties consists of three types: incapacity maintenance for a spouse who cannot support himself or herself, rehabilitative maintenance for a spouse who needs additional education or training before seeking a job, and caregiver maintenance for a spouse who must care for an incapacitated child." Webb, 891 N.E.2d at 1155-56.

An award of rehabilitative maintenance, as sought by Diane, is governed by the following statutory language:

> After considering:
>
> (A) the educational level of each spouse at the time of marriage and at the time the action is commenced;
>
> (B) whether an interruption in the education, training, or employment of a spouse who is seeking maintenance occurred during the marriage as a result of homemaking or child care responsibilities, or both;
>
> (C) the earning capacity of each spouse, including educational background, training, employment skills, work experience, and length of presence in or absence from the job market; and
>
> (D) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment;
>
> a court may find that rehabilitative maintenance for the spouse seeking maintenance is necessary in an amount and for a period of time that the court considers appropriate, but not to exceed three (3) years from the date of the final decree.

Ind. Code § 31-15-7-2(3).

Even where there is evidence satisfying the statutory factors for spousal maintenance, a trial court is not absolutely required to order it. See Cannon v. Cannon, 758 N.E.2d 524, 527 (Ind. 2001) (addressing maintenance award based on ex-spouse's incapacity). However, in Cannon, our supreme court stated that if the statutory factors for awarding incapacity maintenance are satisfied, such maintenance "normally" should be awarded "in the absence of extenuating circumstances" directly relating to the criteria for awarding such maintenance. Id. The statutory factors for an award of rehabilitative maintenance are considerably different than those for incapacity maintenance. Still, we believe that an award of rehabilitative maintenance is appropriate under circumstances where the statutory criteria are clearly met.

We note that some of the trial court's findings and conclusions could be read as suggesting that Diane should have more proactively sought job training and employment after the couple's last child finished high school and left the home in 1999. We disagree with any such suggestion, or that it should be relevant with respect to the rehabilitative maintenance issue. There is no evidence that Craig believed Diane should have returned to work after the children completed high school, or that Diane had a desire to do so. Rather, the only evidence in the record is that Craig and Diane agreed that it was preferable for her to remain home.

Moreover, the parties had already been married for nearly thirty years when the last child completed high school, and Diane was apparently unaware that Craig was contemplating divorce until he called her in August 2010 with the news that he was going

to file for divorce. Thus, Diane was not on notice that she might have to provide for herself in the later years of her life until sometime in 2010, at the earliest. There certainly is no requirement that a spouse who has spent much of his or her married life raising children must seek to work outside the home after the children have moved out. To deny adequate rehabilitative maintenance to an ex-spouse on this basis would amount to penalizing that person for failing to anticipate that he or she would end up divorced at a later stage in life.

We also have qualms with the trial court's conclusion that Diane's experience as an office manager at the optometrist's office, where she last worked almost twenty years ago, would qualify her for a similar position today. First, there obviously has been a rapid change in office technology since the early 1990's. Second, Diane only earned a maximum of $11,500 annually in that position, and she testified that it did not provide her with benefits. It is difficult to consider such a position as providing a "living wage." We cannot say the record and other findings support the trial court's conclusion that Diane's nearly twenty-year-old office experience would be sufficient for her to quickly find a job by which she could support herself.

We acknowledge that requiring Craig to provide COBRA health and dental insurance to Diane for three years is not insubstantial. Nor is requiring Craig to purchase Diane's 2008 vehicle for her at the conclusion of the lease. These payments should alleviate Diane's health care and transportation concerns for the next several years while she continues her education and begins a new career path. As for the cost of that

education, it should almost entirely be paid for with government grants with the de minimis remainder to be paid by Craig.

Still, it is undisputed that Diane currently has no source of regular income from which she can pay her living expenses aside from health and dental insurance and her vehicle, including most notably for a place to live. It also is undisputed that Diane is now in her late fifties, has a high school diploma, and is attempting to re-enter the workforce after working outside the home only sporadically for the last nearly forty years, and with no such work at all in the past decade, by mutual agreement of the parties. There appears to be room here for an increase in the rehabilitative maintenance award.

One possible reason for not awarding Diane more substantial maintenance is that she also was awarded a significant amount of liquid assets as part of the marital property division, i.e., nearly $300,000 in such assets. Here, the issue of rehabilitative maintenance becomes necessarily intertwined with the property division. There is a presumption that an equal division of martial property between the parties is just and reasonable, but that presumption may be rebutted by evidence of the following:

> (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.

There is no evidence here of either party having received substantial gifts or inheritances before or during the marriage, nor of any misconduct or dissipation of assets by either party. The trial court also aptly noted that Diane's contributions during the marriage as a homemaker were just as valuable as Craig's work outside the home in creating the marital property. However, the trial court also confusingly stated that while an equal division of the property was appropriate, it believed a deviation from an equal division was warranted given "the parties' current circumstances . . . ." App. p. 39. We presume that the "circumstances" to which the trial court was referring would be the vastly disparate current earning abilities of the parties. Even if we were to disregard the $400,000 bonus Craig recently received as a possible one-time anomaly, he still has

averaged $145,387 in salary in recent years, versus Diane's zero in the previous nearly ten years and her one-year highest salary of $11,500.

Despite stating that it was going to deviate from an equal division of the property, the trial court in fact did not do so. It did award a modicum of rehabilitative maintenance to Diane, which is different from an unequal division of marital property. See Webb, 891 N.E.2d at 1156. Although Diane could utilize some of the liquid assets she received in the equal division of the marital property to support herself, Craig, given his substantial current income, will not likewise be required to access his equal portion of the marital property to support himself for any period of time. Thus, Diane effectively is ultimately going to be left with a lesser percentage of the marital property than Craig.

It does appear that the trial court recognized the vastly disparate current earnings potential of the parties and that it intended to compensate for that disparity, either through the division of marital property or the award of rehabilitative maintenance. However, the trial court's ultimate maintenance award, combined with the equal division of the marital property, does not adequately address that disparity. Moreover, we have rejected as legally inadequate two of the trial court's stated findings and/or conclusions for not awarding more maintenance to Diane. The trial court's properly supported findings clearly establish the vast current earning disparity between the parties and that Diane has met the criteria for an award of rehabilitative maintenance. We conclude that remand to the trial court is necessary to further consider that disparity.

Conclusion

We remand for the trial court to enter an order that further considers and addresses the vast earning disparity between the parties in a manner consistent with this opinion.

Remanded.

KIRSCH, J., and BRADFORD, J., concur.