

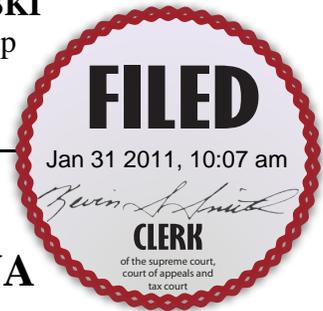
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ATTORNEY FOR APPELLANT:

**MARK S. LENYO**  
South Bend, Indiana

ATTORNEY FOR APPELLEE:

**ARIC J. RUTKOWSKI**  
Zappia, Zappia & Stipp  
South Bend, Indiana



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE THE MARRIAGE OF: )

SCOTT A. HESSER, )

Appellant-Respondent, )

vs. )

WENDY S. HESSER, )

Appellee-Petitioner. )

) No. 71A05-1004-DR-300

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APPEAL FROM THE ST. JOSEPH CIRCUIT COURT  
The Honorable Michael G. Gotsch, Sr., Judge  
Cause No. 71C01-0709-DR-00547

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**January 31, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

The marriage of Appellant-Respondent Scott A. Hesser (“Scott”) and Appellee-Petitioner Wendy S. Hesser (“Wendy”) was dissolved on March 23, 2010. Scott now appeals the division of marital property. We affirm.

## **Issues**

Scott presents five issues for our review, which we reorder, consolidate, and restate as:

- I. Whether the trial court properly determined the composition of the marital estate;
- II. Whether the trial court properly valued the parties’ vehicles; and
- III. Whether the trial court abused its discretion in dividing the marital estate.

## **Facts and Procedural History**

Scott and Wendy were married on July 28, 1990. Wendy petitioned to dissolve the marriage on September 26, 2007. After Wendy filed her petition for dissolution, the parties tried to reconcile the marriage in the spring of 2008, but they were ultimately unsuccessful. Scott and Wendy permanently separated in December 2008.

The trial court conducted a final hearing on January 8, 2010. At the hearing, both parties presented evidence concerning the existence and value of various assets and liabilities to be included in the marital estate, and agreed to use December 2008, the date of final separation, as the date to value marital property. The bulk of the parties’ arguments, however, concerned Wendy’s allegation that Scott dissipated a significant amount of marital assets on extramarital activities, including pornography, renting an apartment to entertain other women, and buying the services of a woman at the “Glo Worm Lounge.” Tr. 36-55;

Ex.1.<sup>1</sup> As a result of Scott's alleged dissipation, Wendy argued that she should receive seventy percent (70%) of the marital estate.

On March 23, 2010, the trial court entered findings of fact and conclusions thereon, and dissolved Scott and Wendy's marriage. The court determined that the marital estate should be divided unequally, and announced it was awarding 70% of the estate to Wendy. It also excluded from the marital estate certain debts in Scott's name, and held Scott personally responsible for his student loan debt. The trial court also valued the parties' respective vehicles each at zero dollars, and valued Scott's retirement fund at \$20,255.56. Scott now appeals the trial court's decision concerning all of these issues.

## **Discussion and Decision**

### Standard of Review

The division of marital property is committed to the sound discretion of the trial court. Breeden v. Breeden, 678 N.E.2d 423, 427 (Ind. Ct. App. 1997). However, the trial court's discretion is subject to the statutory presumption in favor of equal distribution. Newby v. Newby, 734 N.E.2d 663, 668 (Ind. Ct. App. 2000). Still, Indiana Code section 31-15-7-5 states the presumption for equal division of property may be rebutted with evidence of:

- (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.

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<sup>1</sup> Scott admits to spending \$1,104.40 on extramarital activities, but maintained that he spent the rest of the allegedly dissipated money on marital expenses.

(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.

If the trial court deviates from this presumption, it must state its reasons. Thompson v. Thompson, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004), trans. denied. A party who challenges the trial court's division of marital property must overcome a strong presumption that the court considered and complied with the applicable statute, and the presumption is one of the strongest presumptions applicable to our consideration on appeal. Woods v. Woods, 788 N.E. 2d 897, 900 (Ind. Ct. App. 2003).

We review a challenge to the trial court's division of marital property for an abuse of discretion, and, in so doing, 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. Granzow v. Granzow, 855 N.E.2d 680, 682-83 (Ind. Ct. App. 2006). We will reverse only if the judgment is clearly against the logic and effect of facts and the reasonable inferences drawn therefrom. Id. at 683.

Additionally, when the trial court issues findings and conclusions pursuant to Indiana Trial Rule 52, as it did here, the court on appeal shall not set aside the findings or judgment unless clearly erroneous. State Farm Mut. Auto Ins. Co. v. Leybman, 777 N.E.2d 763, 765

(Ind. Ct. App. 2002), trans. denied. We review the judgment by determining, first, whether the evidence supports the findings and, second, whether the findings support the judgment. Evans v. Med. and Prof'l Collection Servs., Inc., 741 N.E.2d 795, 797 (Ind. Ct. App. 2001). We consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we neither reweigh the evidence nor assess witness credibility. Id. However, appellate courts owe no deference to trial court determinations deemed questions of law. GKN Co. v. Magness, 744 N.E.2d 397, 401 (Ind. 2001).

Additionally, when the trial court issues findings and conclusions *sua sponte*, as it did in this case, the standard of review has one notable exception: 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 not made specific findings, in which case we may affirm on any theory supported by the evidence adduced at trial. Brinkmann v. Brinkmann, 772 N.E. 2d 441, 444 (Ind. Ct. App. 2002).

### I. Composition of the Marital Estate

In Indiana, the division of marital property is a two-step process. Thompson, 811 N.E.2d at 912. First, the trial court must determine what property is to be included in the marital estate, or marital pot. Id. Second, the trial court must divide the marital property under the presumption that an equal split is just and reasonable. Id. (citing Ind. Code § 31-15-7-5). Scott first argues that the trial court improperly determined the composition of the marital estate because it excluded a \$2,477.93 debt to G.E. Money, a \$8,797 debt to Beneficial Finance, a \$1,830 debt to Sprint, and a \$3,273.75 debt to Lowe's. Appellant's Br.

p. 15; App. 45-46. Scott also argues that the trial court erred in not including his student loan in the marital pot, and including his G.E. retirement account, which he maintains was liquidated prior to the final separation date. Appellant's Br. p. 15; App. 46.

*Debts to G.E. Money, Beneficial Finance, Sprint, and Lowe's*

Section 31-15-7-4 of the Indiana Code states that the dissolution court shall divide the property of the parties, whether owned by either spouse before the marriage, acquired by either spouse in his or her own right after the marriage and before final separation of the parties, or acquired by their joint efforts. Ind. Code § 31-15-7-4. Marital property includes both assets and liabilities. McCord v. McCord, 852 N.E. 2d 35, 45 (Ind. Ct. App. 2006), trans. denied. With certain limited exceptions, this "one-pot" theory specifically prohibits the exclusion of any asset from the scope of the trial court's power to divide and award. Thompson, 811 N.E. 2d at 912.

However, the marital estate generally closes on the day that the petition for dissolution is filed. Sanjari v. Sanjari, 755 N.E.2d 1186, 1192 (Ind. Ct. App. 2001). Therefore, property acquired by an individual spouse after the final separation date is excluded from the marital estate. Thompson, 811 N.E. 2d at 912. The parties here chose December 2008, the date of their final separation, as the valuation date for the marital assets and liabilities.

Scott argues that his debts to G.E. Money, Beneficial Finance, Sprint, and Lowe's should be included in the marital estate because he "testified to the existence of these debts and provided documents to verify these debts." Appellant's Br. p. 15. Specifically, regarding the loan from G.E. Money (which was, according to Scott, for the couple's

recreational vehicle (RV)), Scott testified that he has made \$2,477.93 in payments since December 2008. As for the Beneficial Finance loan, he presented evidence that the balance was \$8,797.09 as of November 27, 2009. As for the debt to Sprint, Scott offered into evidence a collections statement for \$1009.37 with a “service date” of March 26, 2009. He also admitted into evidence his own spreadsheet summary which states that he made \$820.74 in payments on his Sprint bill, therefore bringing the total liability for 2009 to \$1830.11. Finally, as to Lowe’s, Scott presented evidence of a \$3,273.75 debt with a billing date of June 26, 2009 and a due date of July 22, 2009.

All of this evidence points to the existence of debt after the agreed-upon date of valuation. The money paid to G.E. Money, by Scott’s own admission, occurred after December 2008, and he offered no documentation of a payment within the relevant time frame. The Beneficial Finance, Sprint, and Lowe’s statements are all dated after December 2008 and Scott has offered no evidence confirming the existence of these debts on the date of separation, nor does he offer evidence that these are bills for marital expenses. Scott’s arguments on appeal, then, essentially ask us to reweigh his evidence and judge his credibility, which we will not do. Accordingly, we see no reason to reverse the trial court’s decision to exclude these liabilities from the marital pot.

*Student Loan from Great Lakes*

Scott also argues that the trial court erred in excluding his student loan from the marital estate. We disagree; the trial court acknowledged the debt and included it in the marital pot, but effectively set it aside to Scott in its distribution.

While the systematic exclusion of any marital property from the pot is erroneous, Wallace v. Wallace, 714 N.E.2d 774, 780 (Ind. Ct. App. 1999), trans. denied., in dividing marital property, a court may divide the property in kind, set the property or parts of the property over to one spouse and order the other to pay a just and reasonable amount, order the sale of property and divide the proceeds, or order the distribution of certain benefits by setting aside a percentage of payments either by assignment or in kind. See Ind. Code § 31-15-7-4(b). Again, marital property includes both assets and liabilities. McCord, 852 N.E.2d at 45. Therefore, the statute grants the trial court the power to set aside a particular debt and assign its responsibility wholly to one party. See also J.M. v. N.M., 844 N.E.2d 590, 603 (Ind. Ct. App. 2006) (affirming a trial court’s decision to assign a student loan debt to one party “without offset to the marital estate”), trans. denied.

In its findings of fact, the court makes clear that it considered the parties’ student loans to be marital liabilities: “[e]ach party incurred student loans either prior to or during marriage.” App. 13. The court then sets aside the debt to Scott, explaining that “the Husband should be responsible for payment of student loans that were not paid by reimbursements received from his employer.” App. 14-15. Thereafter, the court divides the remainder of the estate on a 70/30 basis in favor of Wendy. App. 15-18. While the court’s decision to announce the 70/30 estate split before first setting aside Scott’s student loan debt is not a model of clarity,<sup>2</sup> that the trial court excluded this debt from its final calculation does

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<sup>2</sup> We note that no part of Indiana Code section 31-15-7-5 requires a dissolution court to affirmatively state, in terms of percentages, how it is dividing the marital estate. In dividing marital assets and debts, the dissolution court need only state its reasons for deviating from the presumption of equal division if it does so. Thompson,

not mean it improperly excluded this debt from the marital pot. See Maxwell v. Maxwell, 850 N.E.2d 969, 973 (Ind. Ct. App. 2006), trans. denied. Indeed, we presume the trial court followed the law and made all the proper considerations in making its decision. Id. Therefore, we are satisfied that the trial court properly included Scott's student loan in the marital estate.

#### *G.E. Retirement Account*

Finally, Scott argues that his G.E. Retirement Account should have been excluded from the marital estate because the parties had liquidated it. However, Wendy presented evidence that the G.E. retirement account had a value of \$21,955.56 on September 30, 2008. The trial court then accounted for the \$10,000 Scott pulled out of the account and Wendy's subsequent \$8,300 reimbursement of those funds. Subtracting the \$1700 difference from \$21,955.56, it arrived at a \$20,255.56 value for the account. We view the evidence in the light most favorable to the trial court's decision, and ignore Scott's request to reconsider the evidence he submitted to the contrary. Because there is evidence showing the existence and value of his GE account, and because, again, all marital property must be placed in the pot, we find that the trial court did not err in including Scott's retirement account.

#### II. Valuation of the Vehicles

Scott also contends that the trial court erred when it valued the parties' vehicles at zero for purposes of computing the overall marital pot. A trial court has broad discretion in valuing marital assets, and its valuation will only be disturbed if it abuses its 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 chosen valuation is within the range of values supported by the evidence, the court does not abuse its discretion. Balicki v. Balicki, 837 N.E.2d 532, 536 (Ind. Ct. App. 2005).

Both parties agreed that the Kelley Blue Book value of Wendy's Honda Odyssey is \$8300, with an outstanding loan balance of \$2,350.27. The difference in these amounts is \$5,949.73. Scott's Honda Accord is worth \$12,315.00, secured by a loan for \$13,129.48, giving him a negative balance of \$814.48. However, Wendy testified that her car was "a wash" as to its true market value given the manner in which the loan was handled and introduced evidence that she had no equity in her vehicle. Tr. 21; Ex. 1. She also testified that Scott has no equity in his car, and introduced evidence stating the same. Tr. 21; Ex. 1. Therefore, no equity (or zero dollars), was in the "range of values" in the evidence, and, having ultimately chosen zero dollars as the value of both vehicles, the trial court did not abuse its discretion.

### III. Division of Marital Property

Scott challenges the trial court's unequal division of marital property based on its finding that he dissipated assets. Specifically, Scott contends that, although he admittedly dissipated some assets, the court's deviation from the presumption of equal division greatly exceeded the amount he dissipated and was, therefore, improper. Also, having previously determined that the court included Scott's student loan in the marital pot, we again take up

that debt and examine whether the trial court acted properly in allocating it entirely to Scott.

Here, the court found that Wendy had rebutted the presumption of equal distribution by showing that Scott has dissipated a significant amount of assets. See I.C. § 31-15-7-5. Dissipation of marital assets is “the frivolous, unjustified spending of marital assets.” Goodman v. Goodman, 754 N.E.2d 595, 598 (Ind. Ct. App. 2001) (quoting In re Marriage of Coyle, 671 N.E.2d 938, 943 (Ind. Ct. App. 1996)). When assessing whether assets have been dissipated, the factors we consider are:

1. Whether the expenditure benefitted the marriage or was made for a purpose entirely unrelated to the marriage;
2. The timing of the transaction;
3. Whether the expenditure was excessive or *de minimis*; and
4. Whether the dissipating party intended to hide, deplete, or divert the marital asset.

Id. (citing Coyle, at 943).

Aside from the money that Scott admits were for extramarital activities, Wendy presented evidence that Scott held credit cards solely in his name, which he used to generate a significant amount (\$47,000) of credit card debt, and that she received no benefit from these charges. Scott hid his debt by keeping his credit cards solely in his name so that Wendy did not have access to account records. Wendy only found out about these cards when creditors began calling, threatening to place a lien on their house. Scott also intentionally wasted the family’s assets. When Wendy confronted Scott about the credit card charges, Scott stated that he knew he was destroying the family financially, and did not care. In addition to the credit card debt, Wendy also testified that Scott rented an apartment for three months in 2003, over her objection, where he entertained another woman.

As to Scott's student loan debt, the court explained its equal presumption deviation this way: "the Husband should be responsible for payment of student loans that were not paid by reimbursements received from his employer." App. 14. Wendy testified that Scott received reimbursements from his employer for those obligations. She explained that she was unaware that Scott was not paying off his student loans, although she knew of a \$3,000 keyboard purchase with the reimbursement funds. She added that, had he applied the money received from his employer, the loan would have been paid off.

Given all of this evidence regarding extramarital entertainment expenses and Scott's student loan, we do not find that the court erred in concluding that Wendy had rebutted the equal division presumption on the basis of estate dissipation. Again, Scott asks us to reweigh the evidence and judge the credibility of witnesses, which we decline to do. As such, he has not overcome the strong presumption that the trial court complied with the applicable statute, and therefore we will not reverse its decision.

### **Conclusion**

We find that the trial court did not err in determining the composition of the marital estate, valuing its assets, or dividing its property. Accordingly, the trial court's decision is affirmed.

NAJAM, J., and DARDEN, J., concur.