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**IN THE
COURT OF APPEALS OF INDIANA**

BARBARA STAPLES,)
)
Appellant-Petitioner,)
)
vs.) No. 49A04-0806-CV-357
)
SYLVESTER STAPLES,)
)
Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John F. Hanley, Judge
The Honorable Christopher Haile, Magistrate
Cause No. 49D11-0606-DR-26567

April 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Barbara Staples appeals the trial court's distribution of property in its decree of dissolution. For our review, Barbara raises three issues, which we consolidate and restate as whether the trial court's distribution of property amounts to an abuse of discretion. Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

Barbara and Sylvester Staples were married on August 3, 1985. The marriage produced two children, both of whom are emancipated but continue to reside at the marital residence. Sylvester filed for divorce on June 27, 2006. On August 3, 2006, the trial court entered a preliminary order requiring Barbara to vacate the marital residence before October 1, 2006, and ordering Sylvester to pay Barbara \$500.00 per month in spousal maintenance until October 1, 2006, and \$1000.00 per month for an additional three months thereafter. Sylvester made all of the maintenance payments as ordered. After a failed attempt at mediation, the trial court held a final hearing and issued its decree of dissolution on May 14, 2008. The decree, in relevant part, states:

The Court specifically finds almost the entire testimony of Barbara Staples to not be credible.

The Court finds that Barbara Staples dissipated at least twenty-three thousand dollars and was unable to account for the money.

The Court finds that Sylvester Staples has been obligated to repay with interest this sum.

* * *

The Court finds that the value of [the marital residence] is \$285,000.00 and that the debt on said property is approximately \$322,000.00.

The Court finds that Sylvester Staples should be awarded the real property and be responsible for all obligations thereon including mortgages, utilities, and taxes.

The Court finds that Sylvester Staples shall pay the balance of the loan from National City Bank which represents funds dissipated by Barbara Staples.

The Court finds that Sylvester Staples has paid the following debts without contribution from Barbara Staples: Beneficial loan in the amount of approximately \$8,100.00; \$1,866.00 on the daughter's credit cards; \$2400.00 cash advance taken by Barbara Staples after the dissolution action was filed; Kittles Furniture in the amount of \$5,000.00; Plasma TV in the amount of \$1,900.00; Empire carpet in the amount of \$2,803.00; son's college tuition in the amount of \$3,600.00; and a paycheck in the amount of \$1,127.53 wrongfully endorsed by Barbara Staples.

* * *

The Court finds that the parties should have all personal property in their possession.

The Court finds that Sylvester Staples should retain all interest in his retirement and pension benefits.

The Court finds that to the extent the above division of the marital estate is not equal that is [sic] equitable given the parties [sic] contributions to the acquisition of property; the debts paid and to be paid by Sylvester Staples; and the dissipation of assets by Barbara Staples.

Appellant's Appendix at 3-5. Barbara now appeals.

Discussion and Decision

I. Standard of Review

The distribution 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). Therefore, we review such decisions only for an abuse of discretion and will reverse only if the judgment is clearly

against the logic and effect of the facts and the reasonable inferences to be drawn from those facts. Leonard v. Leonard, 877 N.E.2d 896, 900 (Ind. Ct. App. 2007). We may not reweigh the evidence or assess the credibility of witnesses, and we consider only the evidence most favorable to the trial court's disposition of the marital property. Id. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Webb v. Webb, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007).

II. Distribution of Property

Barbara points to several alleged errors in the trial court's distribution of property: the award to Sylvester of his retirement and pension benefits; the failure to equally divide the marital property between Barbara and Sylvester; the failure to address Barbara's disability and lack of earning capacity; the finding that Barbara dissipated marital assets; the denial of Barbara's request for attorney fees; and the fundamental unfairness of the division of property in light of the "Doctrine of Necessaries." See Appellant's Brief at 1.

We begin our discussion of the division of property by pointing out that the marital estate consists primarily of debt. The debt owed on the marital residence exceeds its appraised value by \$37,000.00. In addition, the trial court listed other debts owed totaling \$43,203.00. Thus, the total liabilities of the marital estate are at least \$80,203.00. The trial court ordered Sylvester to pay all of the marital debt. Each party received his or her own vehicle, neither of which was subject to a loan.

A. Retirement and Pension Benefits

Barbara correctly points out that vested retirement pension benefits are considered part

of the marital estate. See Ind. Code § 31-9-2-98(b). However, this fact does not require the trial court to divide the benefits equally. See Coffey v. Coffey, 649 N.E.2d 1074, 1077 (Ind. Ct. App. 1995) (“Having said that [the husband’s] pension benefit is part of the ‘marital pot,’ ... [c]learly, the court was not required to split the pension 50-50 between [husband and wife].”). A trial court is required to divide all marital property in a “just and reasonable manner.” Id. Further, a “trial court shall presume that an equal division of the marital property between the parties is just and reasonable.” Ind. Code § 31-15-7-5. However, this presumption may be rebutted by evidence that an equal division would not be just and reasonable, including evidence of “the conduct of the parties during the marriage as related to the disposition or dissipation of their property.” Id.

Here, Sylvester and Barbara were married for nearly twenty-one years. At the date of final separation, Sylvester had been earning his pension for approximately forty-three years. A presumption then arises that Barbara would be entitled to one-half of the value of Sylvester’s pension benefits as of the date of final separation. No specific evidence was submitted by either party regarding the value of Sylvester’s pension benefits. However, the trial court awarded the entire pension benefit to Sylvester finding that such an award was equitable in light of the parties’ contributions to the acquisition of the property, the debts paid and to be paid by Sylvester, and the dissipation of assets by Barbara. The evidence supports the trial court’s finding.

Sylvester incurred over \$80,000.00 in debt in the division of property. In addition, Sylvester had to withdraw an additional \$8,000 from his 401(k) account to pay another

household debt. Barbara counters by arguing that her reduced earning capacity as a result of her disability merits at least an equal division. We note, however, that Barbara produced no evidence of her alleged disability other than her own testimony, which the trial court found almost entirely not credible. We will not reweigh the evidence or judge the credibility of witnesses. Therefore, we hold that the trial court did not abuse its discretion when it refused to award Barbara any portion of Sylvester's retirement benefits.

B. Equal Division of Property

Barbara next argues that the trial court abused its discretion when it failed to equally divide the marital property. As discussed above, the marital "property" consists almost entirely of debt. By her own admission, Barbara has far less earning potential than Sylvester. Therefore, the trial court ordered Sylvester to bear the burden of repaying all of the marital debt, and assigned none of the debt to Barbara. Thus, to the extent the trial court unequally divided the marital property, such an unequal division favors Barbara. With respect to personal property, the trial court ordered that each party shall retain "all personal property in their possession." Appellant's App. at 4. The evidence shows that Barbara removed a considerable amount of personal property from the marital residence prior to the final hearing. In addition, Barbara does not point to any specific property (other than the pension benefits described above) that the trial court failed to award her. As such, we discern no abuse of discretion in the trial court's distribution of property.

C. Barbara's Disability and Earning Capacity

Third, Barbara argues that the trial court erred when it failed to take into consideration

her disability and reduced earning capacity. One of the factors a trial court may consider in determining whether an equal division of property would not be just and reasonable is “[t]he economic circumstances of each spouse at the time the disposition of the property is to become effective” and “the earnings or earning ability of the parties.” Ind. Code § 31-15-7-5.

During the marriage, Sylvester had been the primary wage earner and Barbara had remained at home to care for the family. In its preliminary order, the trial court ordered Sylvester to pay Barbara \$500 per month in maintenance while she continued to live in the marital residence and \$1000 per month for three months after the date by which the trial court ordered her to vacate the marital residence. Presumably, the trial court recognized Barbara’s continued need for financial support for a reasonable period of time until she could find a means of supporting herself. See Ind. Code § 31-15-4-8 (trial court may issue an order for temporary maintenance in such amounts and on such terms that are just and proper).

In order to award maintenance in the final dissolution decree, however, the trial court needed to find one of the following: 1) that Barbara is physically or mentally incapacitated to the extent that her ability to support herself is materially affected; 2) that Barbara is the custodian of a child whose physical or mental incapacity requires her to forego employment and she lacks sufficient property to provide for her needs; or 3) that Barbara interrupted her own education, training, or employment to undertake homemaking or child care responsibilities and will incur time and expense to acquire sufficient education or training to enable her to find appropriate employment. Ind. Code §§ 31-15-7-1 and -2. Factor number

two is not applicable here because both of the children of the marriage are now emancipated.

With respect to physical or mental incapacitation, although Barbara argues that she is disabled, she presented no evidence of such disability to the trial court other than her own testimony, which the trial court found to be almost entirely not credible. Similarly, although Barbara fulfilled the homemaking/child care role for most of the marriage, Barbara provided no evidence that as a result of foregoing her own education and training opportunities, she is now unable to find appropriate employment. On the contrary, the evidence demonstrates that Barbara was employed at various times throughout the marriage.

Finally, to the extent that the trial court determined that Barbara's potential earning capacity should be a factor meriting an unequal distribution of property, such a determination is supported by the trial court's order requiring Sylvester to repay all of the marital debt and assigning no debt to Barbara. Therefore, we cannot say that the trial court abused its discretion by failing to consider Barbara's disability and reduced earning capacity.

D. Dissipation of Marital Assets

Fourth, Barbara argues that the trial court abused its discretion when it determined that she had dissipated marital assets. On August 9, 2005, Barbara, with Sylvester's signature, opened a \$25,000.00 home equity line of credit. Barbara immediately withdrew the entire \$25,000.00 and deposited it into a checking account in her name only. During her deposition, Barbara testified that she used the \$25,000.00 to fund various home improvement projects including purchasing lamp posts, installing a fence, installing new flooring, electrical work, installing a new air conditioning unit, painting and wall-papering, and having trees

removed from the property. However, at trial, Sylvester produced invoices and receipts showing that all of these projects had been completed prior to Barbara withdrawing the \$25,000.00. Although Barbara maintained that she spent the money on the marital residence and other valid expenses, she could not testify to any specific projects or amounts or produce any receipts for such work. The trial court found “that Barbara . . . dissipated at least twenty-three thousand dollars and was unable to account for the money.” Appellant’s App. at 3. The evidence – or, in this case, lack of evidence – supports the trial court’s findings. Therefore, the trial court did not abuse its discretion when it determined that Barbara dissipated marital assets.

E. Attorney Fees

The trial court may order a party in a dissolution proceeding to pay a reasonable amount of the costs and attorney fees of the other party. Ind. Code § 31-15-10-1. This statute affords the trial court broad discretion in assessing attorney fees, but does not mandate their assessment. Thomas v. Abel, 688 N.E.2d 197, 202 (Ind. Ct. App. 1997). We will not disturb the trial court’s decision absent an abuse of that discretion. In making its decision to award attorney fees, the trial court must consider the resources of the parties, their economic condition, the ability of the parties to engage in gainful employment and to earn adequate income, and such factors that bear on the reasonableness of the award. Thompson v. Thompson, 696 N.E.2d 80, 84 (Ind. Ct. App. 1998). The trial court was well aware of the parties’ respective economic circumstances and of the amount of debt it was already imposing upon Sylvester in the dissolution decree. Therefore, we cannot say that the trial

court abused its broad discretion in denying Barbara's request for attorney fees.

F. Doctrine of Necessaries

Finally, Barbara argues that the trial court "failed to evaluate [her] debts and expenses under the doctrine of necessities." Appellant's Br. at 14. When there is a shortfall between a dependent spouse's necessary expenses and separate funds, the doctrine of necessities imposes limited secondary liability upon the financially superior spouse for repayment of the credit debt incurred by a dependent spouse. See Bartrom v. Adjustment Bureau, Inc., 618 N.E.2d 1, 8 (Ind. 1993). The doctrine of necessities ceases to apply when the marriage is dissolved; however, "[w]here temporary maintenance has been awarded, ... the doctrine of necessities may not be used to enlarge that liability, even if the award is insufficient for the recipient's maintenance." Id. at 9.

Assuming without deciding that the doctrine of necessities should apply in this case, Barbara's argument must fail because the trial court ordered Sylvester to repay all of the marital debt and assigned none of the debt to Barbara. Barbara has not produced evidence of any additional debt she owes that should fall under the doctrine of necessities and the doctrine of necessities cannot be applied to any debts she may incur after the dissolution decree. Therefore, we find no abuse of discretion in this regard.

Conclusion

The trial court did not abuse its discretion when it divided the marital property

between Barbara and Sylvester.

Affirmed.

CRONE, J., and BROWN, J., concur.