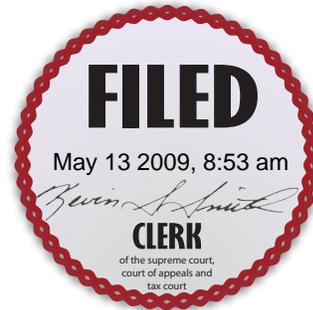


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN D. MICHAEL,

Appellant,

vs.

KATHY M. MICHAEL,

Appellee.

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No. 48A04-0809-CV-510

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Judge
The Honorable George Pancol, Master Commissioner
Cause No. 48D03-0707-DR-714

May 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

John D. Michael (“Husband”) appeals the trial court’s distribution of the marital estate in its order dissolving his marriage to Kathy Michael (“Wife”).

We affirm.

ISSUES

1. Whether the trial court erred when it included the parties’ residence as a marital asset subject to division.
2. Whether the trial court abused its discretion when it ordered an equal division of the marital estate.
3. Whether the trial court erred when it did not find that the marital estate included a debt to Husband’s mother in the amount of \$10,000.00.

FACTS

In 1958, Husband’s family bought real estate and in 1972, it completed the building of a house on it. Husband’s mother had the property listed for sale for approximately eighteen months and, after finding no buyer, Husband bought it in 1994 for \$95,000-\$100,000.¹

In 1999, Husband was employed as a delivery driver for Wonder Bread, and Wife was employed as a manager at Village Pantry. On November 3, 1999, the parties married. Immediately thereafter, Wife commenced giving Husband \$640 every other week for household expenses, which he deposited in a bank account in his name. From the account, he paid the mortgage, utilities, groceries, and other household bills. In

¹ Both Husband and his mother agreed that the price was in this range, but neither could be more specific.

addition, Husband and Wife would share restaurant, entertainment, and home improvement expenses. Each paid their respective medical and personal expenses.

A year after their marriage, Husband stopped working. He was unemployed for more than eighteen months before he began receiving Social Security disability benefits in 2000. However, Husband received money from renting adjacent land to a tenant farmer, and he raised and sold puppies as a hobby, according to Husband.

In the spring of 2006, the marital residence was damaged by fire. The property and insurance policy were titled in Husband's name, and he received the insurance proceeds and deposited the funds in his bank account. The house was razed, and a new house was built and furnished with the insurance proceeds. The parties moved into the new house in January of 2007.

On July 6, 2007, Wife moved from the marital residence. On July 18, 2007, Wife filed a petition for dissolution, and on August 30, 2007, Husband filed a counter-petition for dissolution.

On April 22, 2008, the trial court conducted an evidentiary hearing. An appraisal of the property valued it at \$140,840.00. Evidence was introduced which established that the mortgage balance on the marital residence as of June 21, 2007 was \$67,198.93. Also, an appraisal of the parties' personal property was admitted into evidence.

Wife testified that the mortgage payment (including taxes and insurance) was \$879.00, and that her bi-weekly \$640 payments² to Husband during the marriage had totaled \$111,456.00. Wife testified that after thirteen years of employment with Village Pantry, she managed to earn up to \$30,000 in one year. However, she was terminated on October 15, 2007 due to reorganization that eliminated some management positions. Wife testified that she applied “everywhere,” (tr. 98), for a job; but, having only a tenth-grade education, in January of 2008, she took the best position offered and was now earning \$7.95 an hour (\$1,017.60 monthly) at Wal-Mart.

Husband testified that his monthly income was \$1,260 from Social Security Disability and \$65 for the farm rent (*i.e.*, \$1,325 monthly). He testified that when he bought the property from his mother in 1994 for \$95,000-\$100,000, he paid her \$10,000 down and mortgaged the balance. He had “no idea” of the balance due on the mortgage when he married Wife in 1999, and “no idea” of whether his equity in the property was more than \$20,000 at that time. (Tr. 205, 206).

Husband and his mother testified that she had made personal loans to him in the year of 2006 or 2007. However, their testimony as to the details about such transactions was vague, equivocal, and frequently contradictory. Husband also expressed his personal disagreement with some of the values reported in the personal property appraisal report. However, other than his personal opinion, he presented no other evidence to support his assertions of values.

² Thus, if Wife was responsible for one half of the mortgage payment (*i.e.*, \$439.50), her bi-weekly \$640 payments would have provided more than the \$879.00 monthly mortgage expense and additional monies for other household and/or related expenses.

On June 25, 2008, the trial court issued its order dissolving the marriage and dividing the marital estate. The trial court noted “concerns raised as to Husband’s credibility with respect to the loan from his [m]other”; evidence contradicting some of Husband’s testimony; his inability to explain payments made from his personal bank account; the lack of evidence to support his disagreements with the personal property appraisal report; and, specifically, the trial court found, “that Husband was not completely forthcoming in his honesty throughout the testimony.” (App. 77). The trial court also found that “neither of the parties is in a wonderful financial situation at this time,” but that “Husband does have more income than does Wife” and that “given her education and training, it is not reasonable to expect that she will make much more.” (App. 76-77). The trial court accepted the appraised values of the personal property and the residence. It found that Husband had “\$40,000 of equity for his pre-marriage interest in the marital residence” and that “the value of the house to be divided [was] \$100,840.” (App. 78). It divided the personal property and the debts, and ordered Husband to pay Wife \$20,467.00 “in order to equalize” the division of the marital estate. (App. 79). After reviewing Wife’s motion to correct error, on June 25, 2008, the trial court “acknowledged” its “mathematical error” and amended the order to state that Husband must pay Wife the sum of \$41,577.00. (App. 86).

DECISION

At the outset, we note that our standard of review in dissolution cases is deferential; we may not reweigh the evidence or assess the credibility of witnesses.

Miller v. Miller, 763 N.E.2d 1009, 1011 (Ind. Ct. App. 2002). We consider only the evidence most favorable to the trial court’s disposition of marital property. *Id.*

1. House as a Marital Asset

Husband first argues that the trial court abused its discretion “by including the home purchased by Husband prior to the parties’ brief marriage as a marital asset.” Husband’s Br. at 11. Specifically, he notes that the marriage “last[ed] less than eight years,” that the “marital home was titled to Husband or a member of his family from 1958 to present, and Husband alone made mortgage payments on it prior to and during the marriage”; and that evidence “did not clearly establish that Wife’s contributions went to the mortgage payments because she testified that Husband used the money she gave him to pay for the groceries, phone, utilities, and her car payment.”³ We are not persuaded.

The trial court “must divide the property of the parties in a just and reasonable manner, and that includes property owned by either spouse prior to the marriage, acquired by either spouse after the marriage and prior to final separation of the parties, or acquired by their joint efforts.” *Miller*, 763 N.E.2d at 1011. In fact, the statute expressly directs that the property to be divided by the trial court includes property “owned by either spouse before the marriage.” Ind. Code § 31-15-7-4(a)(1).

In *Lung v. Lung*, 655 N.E.2d 607 (Ind. Ct. App. 1995), the husband had owned certain real property for thirty-nine years prior to the marriage, and the parties’ marriage

³ Wife testified that the payment for the Kia was \$89.00 per month, and that the payment for it was made by Husband from the account, but she also testified that Husband had frequently used it and that she alone had made the payments on another car.

lasted a mere seventeen months. Nevertheless, we affirmed the trial court's finding that the property was a marital asset. More recently, in *Grathwohl v. Garrity*, 871 N.E.2d 297, 302 (Ind. Ct. App. 2007), we found that the trial court had erred when it did not include in the marital estate property interests inherited by the parties. We remanded "for the trial court to include the parties' inherited property interests in the marital estate, to value those interests, and to recalculate the division of marital assets accordingly." *Id.* As a matter of law, the trial court was required to include the marital residence in the marital estate to be divided. Husband's argument to the contrary must fail.

Moreover, the parties lived on the marital property throughout their marriage. Wife contributed more than \$1,280 monthly for household expenses.⁴ For Wife to pay one-half of the monthly mortgage payment would amount to \$439.50; however, what Wife gave Husband was almost three times a one-half share of the \$879.00 monthly mortgage payment. Husband introduced no evidence to contradict her testimony, nor did he present evidence of other financial obligations of the parties that would have required Wife to contribute more to the parties' monthly expenses. Thus, the evidence established that Wife contributed substantially to the equity in the marital home, and Husband's rhetorical argument to the contrary is without merit.

2. Equal Division

⁴ Wife's testimony made clear that the payments were every two weeks. Thus, Wife made twenty-six payments per year for a total of \$16,640 (26 x \$640), rather than twelve payments of \$1,280, which would total \$15,360.

Husband next argues that the trial court “abused its discretion in failing to consider [his] disability and Wife’s greater earning capacity in its final disposition of property.” Husband’s Br. at 12. We disagree.

The party challenging the trial court’s property division bears the burden of proof. *Smith v. Smith*, 854 N.E.2d 1, 5 (Ind. 2006). That party must also overcome a strong presumption that the court considered and complied with the applicable statute. *Id.* at 5-6. The statute provides that the trial court “shall presume that an equal division of the marital property between the parties is just and reasonable.” I.C. § 31-15-7-5. “However, this presumption may be rebutted by a party who presents relevant evidence, . . . that an equal division would not be just and reasonable.” *Id.* Such relevant evidence includes the “economic circumstances of each spouse at the time the disposition of the property is to become effective.” *Id.* at (1).

Husband asserts that despite “thirteen years of managerial experience,” Wife “chose” to be employed at the lower pay and limited hours of the Wal-Mart job rather than “seek better employment.” Husband’s Br. at 12. However, the record does not support the inference that her current economic circumstances were a product of choice.

Wife testified that she had only a tenth-grade education. She further testified that after her termination by Village Pantry, she searched diligently for a job, applying at “Wal-Mart . . . K-Mart, . . . Kohl’s, you name it. [She] went everywhere, just applying” for retail positions. (Tr. 98). Wife also testified that she was living with her mother and could not afford a place of her own on her income.

The trial court found that “neither of the parties is in a wonderful financial situation at this time,” but that “Husband does have more income than does Wife” and that “given her education and training, it is not reasonable to expect that she will make much more.” (App. 76-77). The record supports the trial court’s finding, which implicitly concluded that Husband did not rebut the presumption of an equal division of the marital estate being just and reasonable. Therefore, Husband did not overcome the strong presumption that the trial court did not abuse its discretion when it divided the marital estate.

3. Loan from Husband’s Mother

Finally, Husband argues that the trial court erred when it included the \$10,000.00 loaned to him by his mother “as an asset” in the marital estate. Husband’s Br. at 13. However, he does not direct us to the trial court’s order in that regard, and we find no reference to the \$10,000.00 therein. Thus, it appears that as Wife notes, “the Court did not attribute the disputed \$10,000 loan as an asset or a liability of the marriage” but “simply excluded it from consideration in the final balance sheet.” Wife’s Br. at 11.

As already stated, the party challenging the trial court’s property division bears the burden of proof, and he must overcome the strong presumption that the trial court properly applied the law. *Smith*, 854 N.E.2d at 5, 5-6. Moreover, 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 marital property. *Miller*, 763 N.E.2d at 1011.

The trial court noted multiple instances of contradictory testimony concerning whether there had been loan(s) or gift(s) to Husband from his mother. Its order reflects the trial court's finding that the evidence was insufficient to establish the existence of either. Without reweighing the evidence or assessing witness credibility, we necessarily find that the testimony supports the conclusion that the marital estate did not include a loan or gift of \$10,000 from Husband's mother. Therefore, Husband's argument must fail.

We affirm.⁵

BAILEY, J., and ROBB, J., concur.

⁵ Wife's brief asks that we order an award of appellate attorney fees for Husband's "wholly frivolous appeal," which was pursued to "cost[] her more money." Wife's Br. at 15, 18. We decline.

First, although Husband's arguments did not prevail, they were not "utterly devoid of all plausibility." *Boczar v. Meridian St. Fdn.*, 749 N.E.2d 87, 95 (Ind. Ct. App. 2001) (quoting *Orr v. Turco Mfg. Co.*, 512 N.E.2d 151, 152 (Ind. 1987)). Second, as to the costs entailed in responding, Wife was not required to respond to arguments that she believed to have no legal merit; in fact, she cited no legal authority whatsoever in her substantive responses to the issues raised by Husband.