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IN THE
COURT OF APPEALS OF INDIANA

GARY E. MASAK,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 64A03-1011-DR-559
	)	
SHERRY E. MASAK,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
The Honorable James Johnson, Magistrate
Cause No. 64D01-0704-DR-3817

May 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Gary Masak appeals from the trial court's division of marital assets in his dissolution action against Sherry Masak. Gary presents two issues for our review, which we restate as the following three:

1. Did the trial court abuse its discretion in finding that an equal division of the marital estate was just and reasonable?

2. Did the trial court err in valuing the marital estate?

3. Did the trial court err in its calculation with regard to its equal division of marital property?

We affirm in part, reverse in part, and remand.

Gary became a widower when his first wife died in May 1997. Soon thereafter, Gary befriended his neighbor, Sherry Wilson, who was recovering from a kidney removal, and began visiting her on a daily basis. In August 1997, Gary asked Sherry to marry him. Sherry divorced her then-current husband in November 1997 and married Gary in February 1998. At the time of the marriage, Gary was fifty-three years old and Sherry was fifty years old. Sherry moved into the home Gary had purchased with his deceased wife. Gary had a minor son and Sherry had a minor daughter for whom she received child support, and both children resided in the home with Gary and Sherry. No children were born of the marriage.

Sherry sold her home from her prior divorce and used the monies received therefrom (approximately $8000 per the divorce decree from her previous husband) for marital purposes. Sherry also brought some furniture into the marital home. Sherry did not work outside of the home because Gary desired that she be a homemaker and raise his son and her daughter. Upon her marriage to Gary, Sherry lost most of the monthly pension benefits she

had been receiving per her prior divorce settlement. Indeed, her monthly pension benefits dropped from $1082 a month to $181 a month.

Less than a year after their marriage, Gary and Sherry sold the house Gary had shared with his deceased wife and such sale resulted in a gain of $196,012.11. Gary used $49,000 of that money as a down payment on a new marital residence. The new residence was in both Gary's and Sherry's names. This second house was later sold and another home purchased. A cash down payment of $154,115.35 was made on the third home. During these proceedings, Gary and Sherry sold the third marital residence, and, according to Gary, they equally shared the proceeds. Gary also maintains that he and Sherry also divided the proceeds from the sale of their second home.

During the marriage, Gary controlled all of the finances, including transferring, moving, and reinvesting some of his premarital funds. Sherry's name was never put on the accounts, including accounts created after they were married. Just prior to filing his petition for dissolution, Gary opened an account at Fifth Third Bank using the address of his deceased wife's father. Gary did not tell Sherry about this bank account and admitted that he did not want her to know about it. Gary also did not disclose this bank account on his original financial declaration form and admitted to owning it only after it was discovered by Sherry's attorney. At around the time he initiated these proceedings, Gary withdrew $10,000 from a joint account he shared with Sherry and did not tell her about it. On several occasions, Gary taunted Sherry by drawing a circle in the air with his finger and telling her that when they divorced, all she would get is "zero." *Transcript* at 62.

Just prior to the instant action, Gary retired from Ford and received a buyout of nearly $109,000 for his thirty-nine years of service. Gary is now retired and receives nearly $3000 a month from his Ford pension,[1] and Sherry, now 59 years old, earns approximately $180 per week cleaning houses.

Between themselves, Gary and Sherry equally divided their joint income tax refund check, a joint money market account, and their joint certificate of deposit. They also agreed upon an equal division as to their respective vehicles and their personal property. They disagreed, however, as to how to divide Gary's pension, retirement and investment accounts, and other benefits Gary acquired before and during their marriage.

On April 30, 2007, Gary filed the instant petition for dissolution of marriage[2] and requested an *equitable* distribution of the marital estate. Sherry filed a counter-petition in May 2007 and requested an *equal* distribution of the marital estate. The final hearing on the dissolution petitions took place on January 9, 2008 and July 17, 2008. Gary and Sherry were the only witnesses to testify and both submitted their respective exhibits regarding what they considered assets in the marital estate and both offered proposals for division thereof. Over two years later, on August 3, 2010, the trial court issued a dissolution decree, in which it identified the marital estate as follows:

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[1] In the two years between the final hearing and the issuance of the divorce decree Gary began receiving monthly social security benefits in the amount of $1762.54. The social security benefits offset the monies Gary received from his pension.

[2] The parties had twice before filed petitions for dissolution of their marriage, the most recent being when Sherry filed a petition for dissolution on May 20, 2005. Gary and Sherry reconciled and the petition was dismissed on February 2, 2006.

15. That the marital assets are found to be:

a. House sold- Net proceeds divided equally
b. Centier Bank checking and money-Net proceeds divided equally
c. Vehicles- Divided per agreement,
d. Personal property divided
e. Gary's pension was $2,927.25/mo now $1762.54 due to Social Security to age 62.
f. Husband's Ford Motor Flex Life 100%
g. Husband's deposit into his S11 account.

4/26/07	$4,575.09
5/7/07	$31,570.53

Resp Ex #7

h. Ford/Fidelity 5/1/07 $156,424.22
Pet Ex #1
i. Husband's Ameriprise IRA $41,313.93
Pet Ex #1
j. Husband's Roth IRA includes withdrawals $807,080.33
Pet Ex #20
k. Husband's SII Rock IRA 5/1/07 $14,020.09
Pet Ex #1
l. Wife's SII Roth IRA 5/1/07 $3,910.54
m. Wife's SII Roth IRA 8/1/07 $10,516.78

Fidelity Withdrawals by Husband:

3/5/07	$10,891.18
	$29,950.75
	$54,238.49
	$27,478.04
	$122,558.46
5/30/07	$12,215.32

Marital Estate Total $1,272,267.93

16. That no marital debt exists.

Appellant's Appendix at 5-6. The trial court concluded that there was no reason to deviate from "the equal division presumption of the law in this long term marriage", *id*. at 6, and set forth its division of the marital assets as follows:

Sherry 50% = $636,133.95 Gary 50%

QDRO on pension 50% (coverture (9/39)	
50% value Ford Motor Flex Life	
Ford/Fidelity	$156,424.22
Her Roth IRA SII	$3,910.54
Husband's SII IRA	$465,282.41
Her Roth	$10,516.78
Total=	$636,133.95

QDRO on pension 50% (coverture 9/39)	
50% value Ford Motor Flex Life	
Cash deposited into SII	$36,145.62
His Ameriprise IRA	$41,313.93
*H's S11 IRA	Remainder
H's S11 ROTH	$14,020.09
Total=	$636,133.95

*includes his withdrawals

Id. Gary filed a motion to correct error, which was deemed denied when the trial court neither ruled upon nor set the matter for a hearing within the appropriate time frame set forth in Ind. Trial Rule 53.3(A). Gary filed the instant appeal on November 3, 2010.

1.

Gary first argues that the trial court abused its discretion in dividing the marital assets because he claims he sufficiently rebutted the presumption that an equal distribution was just and reasonable. The division of marital assets lies within a trial court's sound discretion, and we will reverse only for an abuse of that discretion. *J.M. v. N.M.*, 844 N.E.2d 590 (Ind. Ct. App. 2006), *trans. denied*. An abuse of discretion occurs when a trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* When we review a challenge to the trial court's division of a marital estate, we may not reweigh the evidence or reassess the witnesses' credibility, and we will consider only the evidence most favorable to the trial court's disposition of the marital property. *Id.* We will consider the marital property division as a whole, not item by item. *See Eye v. Eye*, 849 N.E.2d 698 (Ind. Ct. App. 2006). Moreover, the party seeking an alteration of the trial court's decision must overcome a strong presumption that the trial court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions upon appeal.

J.M. v. N.M., 844 N.E.2d 590. "'On appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended by appellant before there is a basis for reversal.'" *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)).

Indiana law requires that marital property be divided in a "just and reasonable" manner and provides for the statutory presumption that "an equal division of the marital property between the parties is just and reasonable." Ind. Code Ann. § 31-15-7-5 (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011). This presumption may be rebutted, however, by evidence of each spouse's contribution to the acquisition of the property, the extent to which the property was acquired before the marriage or by inheritance, the economic circumstances of each spouse, the conduct of the parties relating to the disposition or dissipation of assets, and each spouse's earning ability. *Id.*; *Fobar v. Vonderahe*, 771 N.E.2d 57 (Ind. 2002).

Gary argues that the trial court's equal division was an abuse of discretion given that he entered the marriage with the vast majority of the assets, namely, the house from his first marriage, an American Express (a.k.a. Ameriprise) account, the Ford Fidelity account, and his thirty years of employment with Ford Motor Co. Gary compares his premarital assets with what Sherry brought to the marriage, i.e., some furniture and $8000 from the sale of the home she lived in with her ex-husband, in support of his argument that he was entitled to greater than fifty percent of the marital estate.

We find the striking factor in this case to be the earning ability and economic circumstances of the parties. At the time of the final hearing, Gary was retired and earning

nearly $3000 a month from his Ford pension. After Gary filed for divorce, Sherry, who had been a stay-at-home mom raising Gary's son and her own daughter and was now fifty-nine years old, could only find employment as a housekeeper, earning $180 per week. Sherry's only other income was monies received from her ex-husband's pension, which was reduced from $1082 a month to a meager $181 a month upon her marriage to Gary. In light of the economic circumstances and their earning abilities, we cannot say the trial court abused its discretion in equally dividing the marital estate.

Gary also asserts that weighing in his favor is that the nine-year marriage was "short." *Appellant's Brief* at 12. The trial court, however, specifically found that the marriage was a "long term marriage." *Appellant's Appendix* at 6. While not a long-term marriage of say forty years, we do not agree with Gary that a nine-year marriage is short. *Cf. Dahlin v. Dahlin*, 397 N.E.2d 606 (Ind. Ct. App. 1979) (characterizing a four-year marriage as short-term).

Sherry also presented evidence to the court that Gary had secreted accounts and had made withdrawals from their joint account without her knowledge and that Gary expressed his desire that she receive "zero" upon their divorce. *Transcript* at 62. Having considered all of the circumstances, with particular attention to the earning abilities of the parties, their respective financial positions, and Sherry's non-monetary contributions to the family unit, we cannot say that the trial court abused its discretion in finding that Gary had not rebutted the presumption that an equal division of property was just and reasonable.

Gary also argues that "[i]t is simply incongruous that the trial court would limit division of one asset to a coverture formula (the Ford Motor Pension), but divide all other

assets earned before the marriage 'equally.'" *Appellant's Brief* at 13. Here, the trial court divided Gary's pension according to a coverture formula thereby awarding each party fifty percent of 9/39 (representing the nine-year marriage in relation to Gary's thirty-nine years of employment with Ford Motor Company). The court, however, equally divided the Ford buyout monies Gary received and all other assets owned by Gary prior to the marriage. Gary cites no authority that required the trial court to divide the buyout and other assets in the same manner as it did Gary's pension. Rather, it is well-settled that while a trial court may set aside to one party the value of a marital asset where the other party made no contribution to its acquisition, it is not required to do so. *In re Marriage of Nickels*, 834 N.E.2d 1091 (Ind. Ct. App. 2005). The trial court concluded that Gary did not rebut the presumption of an equal division by presenting relevant evidence that an equal division was not just and reasonable. The equal division of Gary's Ford buyout was simply a way for the trial court to achieve its goal. We find no error in the trial court's equal division of the monies received by Gary as part of the Ford buyout or the equal division of other marital assets.

2.

Assuming an equal division was just and reasonable, Gary argues that the trial court erred in valuing the marital assets. Specifically, Gary maintains that the trial court created assets that did not exist and, in turn, skewed the court's intended equal division. In identifying the marital assets, the trial court included withdrawals totaling $134,773.78 that Sherry claimed Gary made from his Ford Fidelity account. Gary claims that the withdrawals were rolled into his SII accounts and argues that there is no evidence that he kept the

withdrawals for his benefit.[3] Gary maintains that the court's finding to the contrary essentially created another asset of the marital estate and constituted an impermissible double dipping from the value of his retirement accounts. Further, emphasizing that the trial court relied predominantly upon Sherry's exhibits setting forth the marital assets, Gary claims that the values associated with his withdrawals are not supported by the evidence. Gary argues that his documents are more accurate and thus, the court should have adopted his values of the marital estate. We will address each argument in turn.

We begin by noting that in support of his argument that there is no evidence that he converted funds, Gary directs us to the "[d]ocuments [he] entered into evidence", without specific references thereto.[4] *Appellant's Appendix* at 15. Gary also directs us to his Exhibit 1, which is a spreadsheet he prepared detailing his overall financial picture at the time of the dissolution and points out that his valuation of the marital estate prior to and just after he filed the petition for dissolution showed a $4000 decrease, which he attributed to market

[3] During the final hearing, Sherry presented evidence suggesting that Gary had dissipated assets and/or attempted to hide assets such that they would not be included in the marital estate. Implicit in the court's finding that the withdrawals constituted a marital asset and the court's award of such monies to Gary as part of his equal share of the marital estate is that Gary converted such funds to his own personal use.

[4] Here, we pause to note that many of the exhibits contained in the record are group exhibits containing numerous documents that are not sequentially numbered. Such has made our review extremely cumbersome.

fluctuations. Gary provides no explanation or citation to documents for the values contained in his spreadsheet. Indeed, the record is so vague and the volume of the exhibits without sequential numbering is so extensive that our ability to meaningfully review his claim in this regard has been hampered.[5]

With regard to the claim that Gary was converting marital funds, Sherry presented evidence that Gary withdrew funds and put such funds in new investments under his son's name. Gary was in charge of all of the finances during the marriage and Sherry was not privy to how Gary handled the money, including transferring, spending, or investing. Gary admitted that he opened a banking account and did not disclose such until Sherry discovered the account. Gary also admitted that he did not want Sherry to know about the account. Gary failed to inform Sherry that he withdrew $10,000 from a joint account around the time of the filing.

Sherry testified that Gary sought advice from a financial advisor who claimed that he could hide money. Gary repeatedly taunted Sherry, telling her that when they divorced, she would get "zero." *Transcript* at 62. Sherry also presented evidence that demonstrated that certain accounts decreased by nearly $200,000 soon after Gary filed for divorce. Gary maintains that such is evidence of his transferring money from one retirement account to his SII account. Gary, however, does not direct us to documents evidencing the trail of such monies. The trial court clearly found Sherry more credible and ultimately concluded that

[5] We further note that it was difficult to follow the transcript to the extent the parties only generally referred to documents during their testimony.

Gary converted marital funds. Hence, the trial court included some withdrawals as part of the marital estate and then awarded such withdrawals to Gary as part of his share of the marital estate. We will not second-guess the trial court's conclusion in this regard.

Gary also argues that the trial court should have relied upon his exhibits in valuing the marital estate because Sherry's exhibits contain numerous errors. It is clear that the trial court relied substantially on the information provided by Sherry in Respondent's Exhibits 22 and 23. In these exhibits Sherry identified what she asserted to be the assets of the marriage and her proposed division thereof. Implicit in the court's order is that the court found Sherry to be more credible and her interpretation of the information admitted into evidence to be a more accurate reflection of the marital estate. In setting out some of the withdrawals as a marital asset and then awarding such to Gary, the court demonstrated its finding that Gary had converted marital funds to his personal use.

We do, however, acknowledge an irregularity in the values Sherry assigned to Gary's withdrawals in that those values do not correspond with Sherry's own exhibits. For instance, the trial court identified the following withdrawals as assets of the marital estate:

Fidelity Withdrawals by Husband:

3/5/07	$10,891.18
	$29,950.75
	$54,238.49
	$27,478.04
	$122,558.46
5/30/07	$12,215.32

Appellant's Appendix at 6. Records of account activity for Gary's Ford SSIP account do not have a transaction amount corresponding to the value of $10,891.18. The record indicates

that there were 10,891.182 units of a particular investment priced at $2.75 and that the transaction amount was $29,950.75, which amount corresponds with the value of the second withdrawal identified by the court. It seems to us that the 10,891.18 number is not a monetary value and should not have been added to the marital estate and attributed to Gary as a withdrawal. We further note that the $27,478.04 value is listed on the account records, but such value is identified as a "Realized G/L", not a withdrawal. To include such as part of the marital estate and then set such over to Gary as being withdrawn for his own benefit was in error. On remand, the trial court is directed to correct such errors.

Gary argues that it was error for the trial court to not assign a value to that portion of his SII IRA account awarded to him as part of the court's division of assets. The court identified Gary's Roth IRA as having a value of $807,080.33. The court awarded Sherry $465,282.41 from such account and the remainder, presumably with any gains or losses, to Gary. The court also included nearly $135,000 in withdrawals the court attributed to Gary to this value of Gary's portion of the marital estate. That the court only indicated that the "remainder" of his Roth IRA was awarded to Gary is not grounds for reversing the trial court's division of marital assets. *Appellant's Appendix* at 6.

In terms of the value of the "remainder", Gary asserts that the trial court merely assumed that the remainder of his Roth IRA, when added to his other awards, would constitute his equal share of the total marital estate. Gary characterizes the court's distribution in this regard as a "fantasy." *Appellant's Brief* at 17. In this case, we are inclined to agree. In cases where an asset has a stated value and one party is awarded a certain sum, determining the remainder to be awarded to the other party should not be a

difficult task. Here, however, it is unclear what values the trial court relied upon in dividing Gary's SII Roth IRA. The court's numbers simply do not add up. For Gary's Roth IRA, including withdrawals, the trial court accepted the value given thereto by Sherry. We cannot, however, discern the source of such value. Thus, an award of the "remainder" of Gary's Roth IRA does not leave us convinced that Gary was awarded an equal share of the marital estate as the court stated its intention to do. The trial court is directed to clarify its order in this regard.

3.

Gary argues that the trial court erred in its calculation of the marital estate. Sherry acknowledges that the trial court's calculation of the total marital estate was in error. As set forth above, the trial court valued the total marital estate (including the amounts identified in the previous paragraph that were in error) at $1,272,267.93. The sum of the assets identified by the court is actually $1,204,185.29. The trial court therefore overstated the value of the marital estate by $68,082.64 prior to making an equal division thereof. Given this mathematical error and the errors previously identified (i.e., the error in accounting for the withdrawals), the trial court may have overstated the marital estate by as much as $106,451.86. This is not de minimus. Furthermore, because the trial court set over to Gary nearly $38,000 of monies that were erroneously deemed withdrawals, we cannot say that the errors were harmless. We therefore remand to the trial court to correct the errors identified herein, recalculate the marital estate, and divide the property in accordance with its conclusion that an equal division of the marital estate was just and reasonable.

Judgment affirmed in part, reversed in part, and remanded.

BAILEY, J., and BROWN, J., concur.