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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL ARTHUR,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 28A01-0810-CV-507
	)	
TERRYL ARTHUR,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE GREENE SUPERIOR COURT
The Honorable Viola J. Taliaferro, Judge
Cause No. 28D01-0708-DR-352

July 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Michael Arthur appeals the order dissolving his marriage to Terryl Arthur. We remand with instructions to (1) clarify the parties' respective responsibilities for attorney fees; and (2) to either explain why the property was divided unequally or to order an equal division of the property.

FACTS AND PROCEDURAL HISTORY

Michael and Terryl were married on October 27, 1984. Prior to their marriage, Michael acquired a residence in Worthington. He later inherited two adjoining parcels of land. In 1996, Michael and Terryl mortgaged the residence and used the money to purchase a farm in Calvertville.

In 2006 or 2007, Michael and Terryl separated. Terryl continued to live in the residence, and Michael lived in a trailer on the farm. On August 23, 2007, Terryl filed for dissolution of marriage.

On March 14, 2008, Terryl filed a financial declaration. It indicates Terryl works for Boston Scientific and earns $411.00 per week. Michael is a millwright with Local 1003 in Indianapolis and earns $45,000.00 annually. Terryl obtained this figure from Michael's most recent tax return. Terryl valued the residence at $20,000.00. The mortgage on the residence is $48,000.00. She valued the adjoining lots at $5,000.00 total. She valued the farm at $45,000.00.

Michael did not submit a financial declaration. At an evidentiary hearing on August 28, 2008, he testified he is unemployed and gets work through the union's "out of work list." (Tr. at 50.) His name is put on a list, and when his "number comes up," he gets the next available job. (*Id.*) He works "all over the eastern half of the United

States." (*Id*.) Most of his jobs do not reimburse him for travel, lodging, or meals, but he can claim those expenses as a deduction. He testified he makes "quite a bit more" than Terryl, but after deducting expenses, "it gets a lot closer." (*Id*. at 51.) He claimed expenses of $9,700.00 in 2006.

Michael disagreed with Terryl's valuation of their properties. He believed the residence and the farm were each worth $60,000.00 and the two parcels adjoining the residence were each worth $3,500.00. He testified they owe approximately $3,500.00 in real estate taxes on the farm.

On September 30, 2008, the trial court issued an order dissolving the marriage and distributing the marital assets and debts. The trial court found Terryl has an annual income of $21,528.00 and Michael has an annual income of $45,000.00. The trial court valued the farm at $45,000.00 and awarded it to Terryl. The court valued the residence and adjoining property at $67,000.00 total and awarded them to Michael. The mortgage and delinquent property taxes were both assigned to Michael. After all the assets and debts were allocated, Michael received a net value of $75,404.50, or forty-five percent of the marital estate.[1] Terryl received a net value of $92,374.52, or fifty-five percent.

DISCUSSION AND DECISION

As a preliminary matter, we note Terryl has not filed a brief.

> When an appellee fails to submit a brief, we will not "undertake the burden of developing arguments for the appellee." In these situations, "[w]e apply a less stringent standard of review with respect to showings of reversible

[1] We note the trial court's order contains some mathematical errors. Using the values assigned to the assets and debts by the trial court, Michael's total assets should be $142,280.00, his total debts should be $66,875.50, and therefore his net assets were $75,404.50. Terryl's net assets should be $98,030.00, and her total debts were $5,655.48; therefore, her net assets were $92,374.52. This results in a 45/55 split.

> error, and we may reverse the trial court's decision if the appellant can establish prima facie error." In this context, prima facie error is defined as "at first sight, on first appearance, or on the face of it."

Tigner v. Tigner, 878 N.E.2d 324, 327 n.3 (Ind. Ct. App. 2007) (citations omitted).

Michael argues the trial court erred by dividing the marital estate unequally without stating a reason; the evidence does not support an unequal division; the court abused its discretion in its allocation of the real property, the mortgage, and the real estate taxes; and the trial court erred by including Terryl's attorney fees as a marital debt.

1. Unequal Division

There is a statutory presumption that an equal division of marital property is just and reasonable. *Chase v. Chase*, 690 N.E.2d 753, 755 (Ind. Ct. App. 1998).

> A trial court may deviate from this statutory presumption if a party presents relevant evidence to rebut the presumption. Relevant evidence includes evidence of (1) each spouse's contribution to the acquisition of property, (2) acquisition of property through gift or inheritance prior to the marriage, (3) the economic circumstances of each spouse at the time of disposition, (4) each spouse's dissipation or disposition of property during the marriage, and (5) each spouse's earning ability.

Id. (citing Ind. Code § 31-15-7-5). If the trial court determines the presumption has been rebutted, "the court must, in its findings and judgment, based on the evidence, state its reasons for deviating from the presumption of an equal division." *Id*. (quoting *In re Marriage of Davidson*, 540 N.E.2d 641, 646 (Ind. Ct. App. 1989)).

Contrary to Michael's assertion, there is evidence that could support an unequal division in favor of either party. On one hand, Michael owned the residence outright prior to the marriage, and he inherited two additional parcels. On the other hand, there

was evidence that Michael had a greater earning capacity.[2] However, Michael is correct that the trial court did not provide a rationale for awarding Terryl a larger portion of the marital estate. In this situation, we may not speculate as to the trial court's reasoning, nor may we reweigh the evidence. *See id*. Therefore, we remand with instructions to either follow the statutory presumption or set forth the rationale for deviating from the presumption. *See id*.

Given this disposition, we need not address Michael's argument that the trial court abused its discretion by awarding the farm to Terryl, while allocating both the mortgage and real estate taxes to Michael. The trial court may, on remand, choose to reallocate some of the assets and debts. It appears that both parties preferred the farm over the other real estate,[3] and we cannot say it is an abuse of discretion to award the farm to Terryl so long as the overall division of the marital estate is either equal or supported by an analysis of the statutory factors.

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[2] Michael did not specify his annual income, but offered only testimony that his income "gets a lot closer" to Terryl's after expenses. (Tr. at 51.) As Michael presumably knows how much he earns, the trial court might have discounted this testimony. If the $45,000.00 figure advanced by Terryl was inaccurate or misleading, Michael surely was capable of presenting evidence of his true income. The trial court's finding that Terryl earns $21,528.00 annually and Michael earns $45,000.00 annually is within the scope of the evidence presented at the hearing.

[3] Michael argues, "The parties' respective positions concerning the value of the residence strongly suggest that initially, both Husband and Wife had expected Wife to receive the residence and Husband the farm." (Appellant's Br. at 11.) On the contrary, it appears Terryl has consistently argued she should receive the farm. In her financial declaration, Terryl asserted the residence was worth $20,000.00, and she proposed that she should receive the farm and Michael should receive the residence. Michael proposed a settlement in which Terryl would receive the residence and he would continue to pay the mortgage; however, Terryl rejected that settlement because she was afraid Michael would not make the payments. At the hearing, Terryl offered into evidence several pictures demonstrating the poor condition of the residence and again represented that she wanted the farm rather than the residence. Michael acknowledged the pictures accurately reflected the condition of the residence, but asserted the residence was worth $60,000.00 based on an appraisal they received when they refinanced the mortgage. Terryl and Michael both submitted proposed orders after the hearing, and both suggested that the other should receive the residence.

2. Attorney Fees

The trial court's order states, "Each party shall be responsible for payment of his or her attorney fees." (Appellant's App. at 5.) However, the attached "Summary of Division of Marital Assets and Debts" lists "Wife's Attorney Fees" in the amount of $1,500.00 as one of the debts; Michael's attorney fees are not included. (*Id*. at 6.) Michael disputes whether Terryl's attorney fees may properly be considered a marital debt. *See Thompson v. Thompson*, 811 N.E.2d 888, 913 (Ind. Ct. App. 2004) ("Generally, the marital estate closes on the date the dissolution petition was filed, and debts incurred by one party after that point are not to be included in the marital estate."), *reh'g denied*, *trans. denied*. However, he does not appear to dispute that the trial court has authority to order him to pay Terryl's attorney fees. *See* Ind. Code § 31-15-10-1; *Hendricks v. Hendricks*, 784 N.E.2d 1024, 1028 (Ind. Ct. App. 2003). Because we cannot determine how to resolve the discrepancy in the trial court's order, we instruct the trial court to clarify the issue of attorney fees on remand.

Remanded.

BAKER, C.J., and BARNES, J., concur.