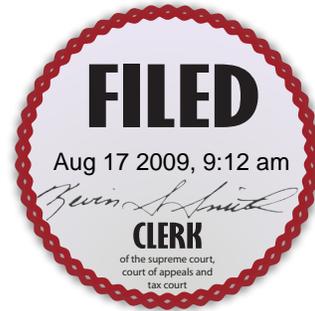


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

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**IN THE
COURT OF APPEALS OF INDIANA**

MICHELLE SMOUT,)
)
Appellant-Petitioner,)
)
vs.) No. 76A03-0901-CV-14
)
STEVEN SMOUT)
)
Appellee-Respondent.)

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause No. 76C01-0710-DR-406

August 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Michelle Smout (Wife) appeals the trial court's dissolution decree, dissolving her marriage to Steven Smout (Husband). On appeal, Wife argues the trial court abused its discretion in deviating from the statutory presumption of an equal division of marital property in favor of Husband.

We reverse and remand.

Husband and Wife were married on July 12, 1997, and separated on or about December 18, 2005. Wife filed a petition for dissolution on October 26, 2007. No children were born of the marriage.

The trial court held a final hearing on October 21, 2008, at which Husband did not appear. During the hearing, Wife requested the trial court equally divide the marital estate. On October 28, 2008, the trial court entered a final decree of dissolution, in which the trial court set off to Wife the student loan in her name by deducting that amount from Wife's equal portion of the remaining marital estate, thereby rendering an unequal division of the marital estate. Wife filed a motion to correct error challenging the trial court's treatment of the student loan debt. The trial court denied Wife's motion on December 10, 2008. Wife now appeals.

Initially, we note that Husband did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing arguments on the appellee's behalf and we apply a less stringent standard of review with respect to showings of reversible error. *Zoller v. Zoller*, 858 N.E.2d 124 (Ind. Ct. App. 2006). That is, we may reverse if the appellant establishes prima facie error, which is an error at first sight, on first appearance, or on the face of it. *Id.*

We review a trial court's division of a marital estate for an abuse of 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.* In reviewing a trial court's division of a marital estate, we consider only the evidence most favorable to the trial court, and we may not reweigh the evidence or reassess the credibility of witnesses. *Id.* A trial court's discretion in dividing marital property is to be reviewed by considering the division as a whole, not item by item. *Fobar v. Vonderahe*, 771 N.E.2d 57 (Ind. 2002).

“The division of marital property in Indiana is a two-step process.” *Thompson v. Thompson*, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004), *trans. denied*. First, the trial court determines what property (i.e., assets and liabilities) must be included in the marital estate. *Thompson v. Thompson*, 811 N.E.2d 888. After determining what comprises the marital estate, the trial court must then divide the marital property under the statutory presumption that an equal division of marital property is just and reasonable. *Id.*; Ind. Code Ann. § 31-15-7-5 (West, Premise through 2008 2nd Regular Sess.) (“[t]he court shall presume that an equal division of the marital property between the parties is just and reasonable”). “[T]his presumption may be rebutted by a party who presents relevant evidence . . . that an equal division would not be just and reasonable.” I.C. § 31-15-7-5; *see also Nornes v. Nornes*, 884 N.E.2d 886, 888 (Ind. Ct. App. 2008) (“court may deviate from the statutory presumption of equal distribution if a party presents relevant evidence to show that an equal division would not be just and reasonable”). Such evidence may include 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. *Nornes v. Nornes*, 884 N.E.2d 886 (citing I.C. § 31-15-7-5).

In Wife's petition for dissolution and during the final hearing, Wife requested an equal division of the marital estate. In the dissolution decree, however, the trial court divided the marital property on an unequal basis in favor of Husband. The trial court explained the unequal division as follows:

[G]ood cause does exist to deviate from the presumptively correct statutory 50-50 division of marital assets and marital debts. Wife incurred a student loan debt payable to Great Lakes in the amount of \$29,835.00. Wife, by advancing her education, has enhanced her future earning capacity. This enhanced future earning capacity will inure solely to the benefit of Wife. The Court, therefore, finds that Husband shall pay to Wife the sum of \$18,053.06 as a property equalization adjustment ($\$47,888.06^{[1]} - \$29,835.00 = \$18,053.06$).

Appendix at 10. The trial court therefore set off to Wife the entire liability associated with her student loan. The resulting distribution is that Husband received over eighty percent of the net marital estate.

Here, Husband presented no evidence demonstrating that an equal division of the marital estate was not just and reasonable. Indeed, Husband did not even appear at the final hearing or submit any evidence opposing an equal division. During the final hearing, Wife

¹ The trial court determined, and Wife does not dispute, that, without regard to set off of the student loan in Wife's name, an equal division of the marital estate would have required Husband to make a monetary contribution to Wife of \$47,888.06.

did not testify with regard to the student loan. The only evidence pertaining thereto was a reference to the \$29,835.00 student loan with Great Lakes in Wife's name contained in Wife's exhibit setting forth the assets and liabilities of the marriage. There was no evidence before the trial court demonstrating that Wife solely benefited in terms of a higher earning capacity from the obligation labeled as Wife's student loan. To be sure, there was no evidence as to how the money was spent, the type of educational institution or program Wife attended, or whether Wife attained a degree. The court's determination was thus based solely on the label attached to a debt in Wife's name. *Cf. Nornes v. Nornes*, 884 N.E.2d 886 ("trial court erred by assigning the Wife's student loans on the basis that Wife has the degree and she should now pay for it"). Under these circumstances, Wife has established prima facie error in the trial court's assignment of the student loans in Wife's name on the basis that Wife solely benefited therefrom in terms of an enhanced earning capacity.

We certainly understand the trial court's reasoning and might have been compelled to affirm had there been *any* evidence to support the trial court's finding with regard to this obligation. There was absolutely no evidence, however, before the court justifying deviation from the statutory presumption of an equal division of the marital estate by setting off to Wife the entire amount of the student loan obligation.² *Cf. Galloway v. Galloway*, 855 N.E.2d 302 (Ind. Ct. App. 2006) (noting that even in light of Wife's testimony why her pension should be set off to her in its entirety, Wife presented no evidence to rebut the

² As to the economic circumstances of the parties at the time of dissolution, we note that the evidence presented at the hearing indicates Husband had a much greater earning ability. Wife's exhibit provides that Husband earned \$25.00 per hour as a carpenter and that she earned \$9.00 per hour as a chiropractic assistant.

statutory presumption of an equal division). We therefore reverse that part of the trial court's dissolution decree setting off to Wife the entire student loan obligation and remand to the trial court with instructions to divide the marital property to achieve a 50-50 property split.

See Nornes v. Nornes, 884 N.E.2d 886.

Judgment reversed and remanded.

NAJAM, J., and VAIDIK, J., concur.