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IN THE
COURT OF APPEALS OF INDIANA

KATHLEEN GROTHE,	)	
Appellant-Petitioner,	)	
vs.	)	No. 49A04-0906-CV-313
YOUNG PARK,	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn L. Moberly, Judge
Cause No. 49D05-0608-DR-34369

October 1, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Kathleen Grothe appeals the trial court's property distribution in the dissolution of marriage to her former husband, Young Park. We affirm.[1]

Issues

Grothe raises several issues, which we consolidate and restate as whether the trial court abused its discretion in dividing the marital assets. Additionally, Park argues that he is entitled to appellate attorney fees under Indiana Appellate Rule 66(E).

Facts

Park and Grothe were married in November 2001, and Grothe filed a petition for dissolution of marriage in August 2006. The parties have no children together.

Grothe is fifty-eight years old and is an accountant. Prior to their marriage, Grothe had approximately $275,000.00 in pre-marital assets. At the start of their marriage, Grothe earned a salary of $90,000.00, but at the time of the dissolution, Grothe was earning $75,000.00 per year with health insurance and eligibility for a retirement plan in two years.

Park is sixty-eight years old and is the semi-retired owner of a martial arts school. Prior to their marriage, Park also owned commercial property where his martial arts school was located. Park paid for the commercial property prior to his marriage to Grothe, and the commercial property was valued at $280,000.00. At the time of their marriage, Park had almost $93,000.00 in equity in his residence. During their marriage, Grothe cashed in

[1] Grothe failed to request that the court reporter prepare the transcript or that the transcript be transferred from her original appeal. Although she placed portions of the transcript and exhibits in her supplemental appendix, her failure to provide the entire transcript and exhibits has hampered our review of this matter.

$78,604.17 from a 401(k) and, after paying taxes and penalties, used $62,516.24 to make improvements to Park's residence. Park receives Social Security retirement benefits of $150.00 per week and has health insurance through Medicare. Park earns approximately $200.00 per week at his business after deducting business expenses. He has had medical and dental issues over the past few years resulting in approximately $3,000.00 per year in expenses, which he anticipates will continue.

After a hearing, the trial court issued findings of fact and conclusions thereon, which Grothe appealed to this court. This court remanded, concluding that "inconsistencies between the trial court's findings and its conclusions render[ed] the trial court's decision clearly erroneous." Grothe v. Park, No. 49A02-0710-CV-914, slip op. at 5 (Ind. Ct. App. July 2, 2008). We directed the trial court to enter new findings and conclusions and to "give due consideration to the contributions of [Grothe] of her pre-marital assets and post-marital earnings." Id.

On remand, the trial court entered sua sponte findings of fact and conclusions thereon as follows:[2]

* * * * *

CONCLUSIONS OF LAW

* * * * *

[2] Originally, this case was heard by the Honorable Gary L. Miller. On remand, this case was heard by the Honorable Robyn L. Moberly.

6. The Court finds that there are reasons to rebut the fifty-fifty division of marital assets and allocation of indebtedness as being fair and equitable in the factual circumstances surrounding these parties' marriage. Such reasons are as follows:

   a. The parties are involved in a relatively short-term marriage in later stages of their lives. The parties were married less than five (5) years prior to filing of pending Petition and dated only for about two (2) years before marriage and did not reside together.
   b. The parties did not produce any children of this marriage.
   c. Park brought into the marriage a substantial asset of commercial property which was purchased in 1970 and was paid off prior to the marriage.
   d. The residence at 8660 Fall Cree[k] Road was purchased in 1990 and possessed substantial equity prior to the marriage. The fair market value of the residence on November 17, 2001 was $150,000.00 and the mortgage loan balance was $57,057.07. Park possessed equity in the house at the time of the marriage.
   e. Grothe brought her own substantial assets into the marriage including personal property, bank accounts, and investment accounts.
   f. At the time of dissolution, Grothe possessed substantially greater earnings income potential than Park. Park is self-employed and has no employer related benefits for retirement, health insurance, vacation, sick, or similar types of benefits.

7. Park has no substantial abilities to acquire future retirement benefits. Park is sixty-nine (69) years old. Park advised Grothe prior to marriage that he viewed Commercial Building as his retirement investment and Grothe acknowledged Park's sentiments and views.

8. Remodeling of the former marital residence was initiated by both parties due to their desire to enlarge and update the house. The marital residence's value from November 17, 2001 to present increased from $150,000.00 to $239,000.00 ($89,000.00).

9. Grothe has no substantial participation in Park's business or the maintenance or development of such business. Park began his business in 1967 and Grothe was employed through other businesses.

10. The Court finds that Park has successfully rebutted the presumption of a fifty-fifty division of marital assets and allocation of the indebtedness in the factual circumstances of the parties' marriage so as to justify the noted division and allocation set forth in this Entry as being fair and equitable.

JUDGMENT

* * * * *

2. The property of the parties shall be divided a[s] follows:

ASSETS TO GROTHE

Nissan automobile	$10,800.00
National City acct. 9285	3,162.70
National City acct. 3078	499.47
National City acct. 6537	45,804.51
TIAFF CREFF acct.	115,758.54
Merrill Lynch IRA 8403	148,228.57
Charles Schwab acct. 1603	22.95
Crown Hill 401(k)	600.00
Merrill Lynch 7105	1,030.36
Miscellaneous jewelry	5,000.00
Longaberger baskets	400.00
Fenton Glass Collection	475.00
Cash payment from Park	16,711.73
TOTAL ASSETS:	**$348,493.83**

DEBTS TO GROTHE:

* * * * *

TOTAL DEBTS:	**$17,636.00**

ASSETS TO PARK:

Marital Residence	$239,000.00
Ford Truck	7,000.00
Mercedes Benz	12,000.00
Real Estate – Washington Street	280,000.00

National City Bus. acct. 9368	2,143.77
National City Bus. acct. 4029	711.45
National City Bus. acct. 3610	3,633.00
TOTAL ASSETS:	**$544,488.22**
DEBTS TO PARK:	

* * * * *

TOTAL DEBTS:	**$29,243.61**

* * * * *

5. Grothe's monetary contribution to the additions and improvements to the marital home increased the value of the home more than the actual amount of her contribution. As stated previously, Grothe contributed a total of $62,516.24 (excluding her taxes and penalties for early withdrawal of her 401(k) which the court finds was her election to liquidate). The Court finds that the construction of the storage barn was due to Grothe's need for storage and not an item that was for the benefit of Park. Therefore, the court has not considered Grothe's contribution toward that storage barn in compensation for her contributions to the enhancement of the house. Since Park shall receive the marital residence and the enhanced value, he should reimburse her the amount of her contribution represented by the National City account 6537 set over to Grothe above plus the payment of $16,711.73. Therefore, Park shall pay Grothe $16,711.73 at the rate of $1600 per month until paid in full plus Park shall pay Grothe 6% simple interest on the unpaid balance of the amount owing Grothe. . . .

* * * * *

Appellant's App. pp. 17-21. Thus, Grothe received marital assets worth $330,857.83 (39% of the marital assets), and Park received marital assets worth $515,244.61 (61% of the marital assets). Grothe now appeals.

Analysis

I. Division of Marital Property

Grothe argues that the trial court abused its discretion by failing to order an equal division of marital assets. In making its division of assets, the trial court issued sua sponte findings. Sua sponte findings control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id. When a trial court has made special findings of fact, we review sufficiency of the evidence using a two-step process. Id. First, we must determine whether the evidence supports the trial court's findings of fact. Id. Second, we must determine whether those findings of fact support the trial court's conclusions. Id.

Findings will only be set aside if they are clearly erroneous. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made. Id.

Indiana Code Section 31-15-7-4 governs the disposition of property in dissolution actions and requires that the trial court "divide the property in a just and reasonable manner."

Ind. Code § 31-15-7-4(b). In an action for dissolution of marriage, the trial court shall divide the property of the parties whether:

> (1) owned by either spouse before the marriage;
>
> (2) acquired by either spouse in his or her own right:
>
> (A) after the marriage; and
>
> (B) before final separation of the parties; or
>
> (3) acquired by their joint efforts.

I.C. § 31-15-7-4(a). Moreover, the court shall presume that an equal division of marital property between the parties is just and reasonable, and the trial court may only deviate from an equal division when that presumption is rebutted. I.C. § 31-15-7-5. The presumption "may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:"

> (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
>
> (2) The extent to which the property was acquired by each spouse:
>
> (A) before the marriage; or
>
> (B) through inheritance or gift.
>
> (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to:

(A) a final division of property; and

(B) a final determination of the property rights of the parties.

Id. The trial court's division of marital property is "highly fact sensitive and is subject to an abuse of discretion standard." Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2002). We "will not weigh evidence, but will consider the evidence in a light most favorable to the judgment." Id.

Although Grothe raises numerous arguments regarding the trial court's order, the crux of her argument is that the trial court should have divided the marital property equally and that the statutory presumption of an equal division was not rebutted. In particular, Grothe argues that the trial court failed to take into account her substantial pre-marital assets, her post-marital earnings, her payment related to the home improvements, and the fact that Park's income is similar to hers. We conclude that the trial court clearly considered these issues in making the unequal division.

First, as for consideration of Grothe's pre-marital assets, the trial court specifically noted that "Grothe brought her own substantial assets into the marriage including personal property, bank accounts, and investment accounts." Appellant's App. p. 17. During the hearing, Grothe estimated that she had slightly more than $275,000.00 in pre-marital assets,

while Park had at least $372,000.00 in pre-marital assets. Even based on Grothe's estimates, Park had almost $100,000.00 more than Grothe in pre-marital assets.

Further, the trial court made extensive findings about Grothe's contribution of $62,516.24 to improvements made to the marital residence. Grothe argues that the trial court should have given her credit for $78,604.00 rather than $62,516.24. However, the trial court noted that she withdrew $78,604.00 from a 401(k) to fund the improvements, and it "exclud[ed] her taxes and penalties for early withdrawal of her 401(k) which the court [found] was her election to liquidate." Id. at 20. The trial court was within its discretion to exclude the taxes and penalties from consideration in determining Grothe's monetary contribution to improvements at the residence.

As for their respective incomes, Grothe contends that her income is not "substantially different" from Park's income and that Park earned $74,000.00 or $81,744.00 in 2006. Appellant's Br. p. 22. However, Park clarified in his testimony that those figures were gross business income and that his actual income after paying business expenses was substantially less.[3] The evidence presented at the hearing indicates that Grothe earns $75,000.00 per year as an accountant while Park is semi-retired and earns $200.00 per week at his business and $150.00 per week for Social Security retirement benefits.

Finally, as for Grothe's post-marital income, she argues that the trial court failed to follow our directive from the first appeal in this case to "give due consideration to the

[3] In her reply brief, Grothe argues that Park's testimony regarding his net income is "questionable" given his expenses paid and his savings acquired during the marriage. Appellant's Reply Br. p. 5. However, this is simply a request that we reweigh the evidence and judge Park's credibility, which we cannot do.

contributions of [Grothe] of her . . . post-marital earnings." Grothe, slip op. at 5. According to Grothe, we required the trial court to consider her contributions of $26,000.00 per year to household expenses. We do not read this statement regarding Grothe's post-marital earnings as a requirement that the trial court consider Grothe's contributions to household expenses as a determinative factor in dividing the marital property. Moreover, during their marriage, Grothe and Park split the household expenses, with Park paying the mortgage, property taxes, insurance, and utilities. Thus, Park also paid a substantial amount of household expenses during the marriage.

Ultimately, the trial court determined that the presumption of an equal division of marital assets had been rebutted. The trial court based its determination on the short length of the marriage, the lack of children produced by the marriage, the substantial pre-marital assets of both parties, and Grothe's substantially greater earning potential. Under the facts of this case, we find that the trial court properly considered the factors in Indiana Code Section 31-15-7-5 and arrived at a just and equitable property division.[4]

II. Appellate Attorney Fees

Park argues that he is entitled to appellate attorney fees due to procedural and substantive bad faith of Grothe in bringing this appeal. Indiana Appellate Rule 66(E) provides: "The Court may assess damages if an appeal, petition, or motion, or response, is

[4] Grothe's reliance on Eye v. Eye, 849 N.E.2d 698 (Ind. Ct. App. 2006), is misplaced. In Eye, the trial court's written findings failed to address the factors of Indiana Code Section 31-15-7-5. 849 N.E.2d at 703. Here, despite Grothe's arguments to the contrary, we conclude that the trial court's findings addressed her pre-marital and post-marital contributions to the marital estate in its findings.

frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees. The Court shall remand the case for execution."

"[S]uch an award is discretionary and may be ordered when an appeal is replete with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." Carter-McMahon v. McMahon, 815 N.E.2d 170, 179 (Ind. Ct. App. 2004). "However, we must use extreme restraint when exercising our discretionary power to award damages on appeal because of the potential chilling effect upon the exercise of the right to appeal." Id. at 179-80.

Bad faith on appeal may be classified as "substantive" or "procedural." Wallace v. Rosen, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002). Substantive bad faith "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." Id. However, "[t]he sanction of appellate damages for lack of merit should be applied only when the party's contentions and arguments are utterly devoid of all plausibility." Carter-McMahon, 815 N.E.2d at 179-80. Procedural bad faith occurs if a party "flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, omits and misstates relevant facts appearing in the record, and files briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court." Wallace, 765 N.E.2d at 201.

In arguing that Grothe engaged in procedural bad faith, Park points to Grothe's lack of consistent citation to the record, her failure to file the entire transcript and exhibits with this court, and various misstatements in her recitation of the facts. Although Grothe's lack of

citation to the record and failure to file a motion to transfer the transcript from the prior appeal to the current appeal hampered our review, we cannot say that the violations were "flagrant" or "calculated to require the maximum expenditure of time." Id.

As for substantive bad faith, Park argues that Grothe's arguments are misleading and "a mere reworking of her brief filed in Park I." Appellee's Br. p. 50. Although Grothe's arguments on appeal were unsuccessful, we cannot say that the arguments were "utterly devoid of all plausibility." Carter-McMahon, 815 N.E.2d at 179-80. Consequently, we deny Park's request for appellate attorney fees under Indiana Appellate Rule 66(E).

Conclusion

The trial court did not abuse its discretion by making an unequal division of the marital assets. Moreover, we deny Park's request for appellate attorney fees. We affirm.

Affirmed.

NAJAM, J., and KIRSCH, J., concur.