



## Case Summary and Issues

James Hess appeals the trial court's division of property following the dissolution of his twelve-year marriage to Debra Hess. On cross appeal, Debra appeals the trial court's award of a 4% annual interest rate on the property settlement judgment as well as what Debra alleges is the trial court's failure to specifically explain the denial of her request for \$30,000.00 in attorney fees. Concluding that 1) the trial court did not abuse its discretion in distributing the parties' property; 2) Debra asked the trial court to order a 4% interest rate on the judgment; and 3) the trial court's findings disclosed a valid basis for its failure to award Debra \$30,000.00 in attorney fees, we affirm.

## Facts and Procedural History

James and Debra Hess were married in 1991 and have three children. James has both a bachelor's degree and a master's degree in agricultural economics from Purdue University, and is a farmer in Vermillion County. Debra has a degree in elementary education and taught school until the parties' first child was born in 1994. Debra was a stay-at-home mom for the following nine years.

On July 30, 2003, Debra withdrew \$24,500.00 from the parties' joint account at the First National Bank of Chrisman. In August 2003, she filed a petition for dissolution. The dissolution hearing was held in August 2004, November 2004, and August 2005. Testimony at the hearing revealed that James and Debra acquired several pieces of property during their marriage. At the time of the filing, they owned 405 acres. Two hundred and twelve of these acres were acquired by gift or inheritance from James' parents and grandparents during the course of the parties' marriage.

Following the hearing, the trial court found that the net value of the marital estate was \$1,319,566.80. The court awarded \$646,676.94 to Debbie, and \$646,676.94, including all of the farmland, to James, for an equal distribution of the marital property. The trial court explained as follows in making this distribution:

3. Indiana Law requires the trial court [to] divide the properties in a just and reasonable manner. Ind. Code 31-15-7-4(b); Fobar v. Vonderahe, 771 N.E.2d 57, 58 (Ind. 2002). “The Court shall presume that an equal division of the marital property between the parties is just and reasonable.” Ind. Code 31-15-7-5; Fobar, 771 N.E.2d at 57, 58.
4. In determining whether a deviation is appropriate, the Court must examine the relevant evidence concerning “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 the assets and each spouse’s earning ability.” Ind. Code 31-15-7-5; Fobar, 771 N.E.2d at 59. Although Jim inherited and was gifted certain pieces of real estate, they were acquired during the marriage. There was little evidence of value. Debbie will have the responsibility of providing a home for the three children. Debbie’s ability to earn income is limited. By agreement of the parties, Debbie quit her job teaching to remain at home to raise the children, thus making her ability to now find employment and earn more than a beginning teacher’s salary difficult. Jim will receive a farm that shows a history of generating an average net profit of \$151,140.25 per year over the last four years. Jim’s ability to earn income is far greater than Debbie’s. There is no reason to deviate from the 50/50 presumption. The disparity in income balances any inheritance or gift.

Appellant’s App. at 18.

Further, the court explained the specific details of the distribution as follows:

21. Jim shall pay Debbie an initial lump sum payment in the amount of \$100,000.00 by March 1, 2006. Thereafter, the remaining balance in the amount of \$528,615.25 shall be reduced to a money judgment, and bear interest, starting January 1, 2007, at the rate of four percent (4%) interest per annum over thirteen (13) years. Said Judgment shall be in favor of Debbie and against Jim. Commencing on March 1, 2007, and

continuing thereafter on or before the first day of March, each year for a period of thirteen (13) years, Jim shall pay to Debbie the sum of \$51,274.72, including principal and interest. The final payment, due March 1, 2019, shall be \$51,274.72. In the event of a default by Jim, the unpaid balance shall be accelerated and become immediately due and owing to Debbie in full with attorneys fees and costs and the interest on the unpaid amount shall be increased to the legal rate for Judgments.

Id. at 24.

In addition, the court awarded James the First National Bank of Chrisman joint account, which the court valued at \$24,889.14. The trial court noted in its findings that Debra had removed \$24,500.00 from this account for maintenance and support when she left James and filed the dissolution petition. The court awarded custody of the three children to Debra and ordered James to pay her \$514.00 per week in child support. Lastly, the court concluded that each party was to be responsible for his or her attorney fees. James appeals the property division, and Debra raises two issues on cross-appeal.

### Discussion and Decision

#### I. Property Division

We apply a strict standard of review to a court's distribution of property on dissolution. Hyde v. Hyde, 751 N.E.2d 761, 765 (Ind. Ct. App. 2001). The division of marital assets is a matter within the sound discretion of the trial court. Id. The party challenging the trial court's property division bears the burden of proof. Id. That party must overcome a strong presumption that the court complied with the applicable statute and considered the evidence on each of the statutory factors. Id. We will reverse a property distribution only if there is no rational basis for the award. Id. Although the circumstances

may have justified a different property distribution, we may not substitute our judgment for that of the dissolution court. Id.

The division of marital property is governed by Indiana Code section 31-15-7-5. Generally, there is a presumption that an equal distribution of marital property is just and reasonable. Id. However, there are factors that can serve to rebut the presumption of equally dividing the marital estate. Id. at 766. In particular, Indiana Code section 31-15-7-5 provides:

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this 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.

Here, James argues that the trial court erred in equally distributing the marital estate and failing to set over to him the land that he received through gifts and inheritance from his parents and grandparents. Specifically, he claims that he rebutted the presumption of an equal division with evidence of the gifts and inheritance. In support of his argument, James directs us to Scott v. Scott, 668 N.E.2d 691 (Ind. Ct. App. 1996), and Castaneda v. Castaneda, 615 N.E.2d 467 (Ind. Ct. App. 1993).

Although the courts in Scott and Castaneda affirmed setting over the respective party's inheritance because the funds were never co-mingled with the marital assets, both of those cases recognize that although a trial court must include the inheritance in the marital pot, the decision of whether to set over the inheritance to a party is discretionary. Scott, 668 N.E.2d at 708; Castaneda, 615 N.E.2d at 469. Also, in each of those cases, this court affirmed a trial court's decision to set over an inheritance. In this case, on the other hand, the trial court determined that the land acquired through gift and inheritance should not be set over to James because he failed to meet his burden to show that a deviation from an equal division was warranted. Rather, the trial court determined that there was no reason to deviate from the 50/50 presumption because the disparity in the parties' income balanced the gifts and inheritance. This decision, which considered the statutory factors, was not an abuse of discretion. See Hyde, 751 N.E.2d at 761 (holding that the trial court did not abuse its discretion in failing to set aside wife's inheritance where she failed to meet her burden to show that a deviation from an equal division was warranted).

James also argues that the trial court erred in distributing the marital property because it improperly valued the Chrisman Bank joint account at \$24,889.14. According to James,

the account should have been valued at \$450.00 because Debra withdrew \$24,500.00 from the account before she filed the dissolution petition.

Our review of the evidence reveals that Debra withdrew \$24,500.00 from the account in July 2003 and filed for dissolution in August 2003. Because the account had a balance of only \$450.00 at the time Debra filed the petition, there was only \$450.00 of marital property in the account to be distributed. See Granzow v. Granzow, 855 N.E.2d 680, 684 (Ind. Ct. App. 2006) (holding that the determinative date when identifying marital property subject to division is the date the petition for dissolution is filed). The trial court therefore erred in valuing the account at \$24,889.14.

However, not every error in the division of marital assets warrants reversal. Elkins v. Elkins, 763 N.E.2d 482, 486 (Ind. Ct. App. 2002). In Elkins, we held that the erroneous inclusion of an asset in the marital estate was harmless error where inclusion of the asset meant the wife received 57.5 percent of the marital estate and removal of the asset meant she received 56.5 percent of the estate. Based upon the facts and circumstances of the case, we concluded that the difference in the parties' comparative shares (e.g. Diana Elkins' share with and without including the asset) was de minimus, the error was harmless, and reversal was not warranted.

Here, as in Elkins, the difference between James' share with and without including the bank account in the marital estate and distribution is 1 percent which is de minimus under the facts of the case. We further note that Debra used the \$24,500.00 that she withdrew from the Chrisman account to support her three children during the year after she filed the dissolution petition. The trial court did not enter a child support order until May 6, 2004. Based upon

the facts of the case, we find the trial court's error to be harmless, and reversal is not warranted.

## II. Interest Rate

On cross-appeal, Debra argues that the trial court erred in imposing a 4% interest rate on the judgment. According to Debra, this was error because, pursuant to Indiana Code section 24-4.6-1-101, the statutory interest rate on civil judgments is 8%. However, our review of the evidence reveals that Debra's Proposed Findings of Fact, Conclusions of Law, and Judgment that was filed with trial court on September 15, 2005, provided in two separate conclusions that the judgment would bear interest at the annual rate of 4%.<sup>1</sup> The trial court did exactly as Debra requested and imposed a 4% annual interest rate. Thus, any alleged error in the interest rate is invited error, which is not reviewable on appeal. See Shipley v. Keybank Nat'l Ass'n, 821 N.E.2d 868, 879 (Ind. Ct. App. 2005) (holding that Shipley waived any argument regarding the trial court ordering him to pay fees to the court clerk where Shipley had requested this relief in his summary judgment motion).

## III. Attorney Fees

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<sup>1</sup> Specifically, Conclusion of Law Number 11 provides that "the Judgment shall bear interest at 4% so long as paid in accordance with this order."

Cross-Appellee's Appendix at 16.

Conclusion of Law Number 25 provides in part as follows:

Jim shall pay Debbie an initial lump sum payment in the amount of \$100,000.00 within thirty (30) days from the date of this Decree. Thereafter, the remaining balance in the amount of \$639, 741.24 shall be reduced to a money judgment, at the rate of four percent (4%) interest per annum . . . . In the event of default by Jim, the unpaid balance shall be accelerated and become immediately due and owing to Debbie in full with attorneys fees and costs and the interest on the unpaid amount shall be increased to the legal rate for Judgments.

Id. at 20.



Also on cross-appeal, Debra argues that the trial court erred in failing to specifically explain the denial of her request for \$30,000.00 in attorney fees. Indiana Code section 31-15-10-1(a) provides:

The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment.

We review a trial court's decision regarding attorney's fees and costs under this statute for an abuse of discretion. Maxwell v. Maxwell, 850 N.E.2d 969, 975 (Ind. Ct. App. 2006), trans. denied. Some of the factors a court should consider when deciding whether to require one spouse to pay the attorney fees and costs of the other spouse include the parties' relative resources, the ability to engage in gainful employment, and the ability to earn an adequate income. Id. Other factors to consider include the amount of assets awarded to the parties, and which party initiated the action. Id. The legislative purpose behind the award of attorney fees and costs under Indiana Code section 31-15-10-1 is to provide access to an attorney to a party in a dissolution proceeding who would not otherwise be able to afford one. Id.

Although it is generally true that a court need not list specific reasons for awarding or not awarding attorney fees in a dissolution action, that rule is inapplicable where, as here, one party has specifically requested findings and conclusions under Trial Rule 52. See id. A trial court must, upon request, make complete special findings sufficient to disclose a valid basis for the legal result reached in the judgment and to provide the parties and reviewing courts with the theory upon which the case was decided. Id.

In the Maxwell case, we found that the trial court's findings and conclusions contained no indication that the court considered the multiple factors that are relevant to a decision of whether to award attorney fees and costs in a dissolution action. Id. We therefore remanded the case to the trial court for further consideration of the issue. Id.

Here, however, our review of the trial court's findings and conclusions indicates that the trial court considered the multiple factors that are relevant to this decision. Specifically, the court considered that Debra has a teaching degree and teaching experience, which indicate her ability to engage in gainful employment and earn adequate income. In addition, the court considered that James was ordered to pay Debra \$628,615.25 over the course of fourteen years. James' initial lump sum payment to Debra of \$100,000.00 was due by March 1, 2006, two months after the court issued its order. Debra clearly had the liquid assets to pay her attorney fees whereas James did not after making the lump sum payment. Lastly, it was Debra who filed the dissolution petition. The trial court's findings in this case clearly disclose a valid basis for the court's failure to award Debra \$30,000.00 in attorney fees. We therefore find no error.

### Conclusion

The trial court did not abuse its discretion in distributing the parties' property. Further, Debra asked the trial court to order 4% annual interest on the judgment and cannot now complain about this rate. Lastly, the trial court's findings disclose a valid basis for its failure to award Debra attorney fees.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.

