

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Rosemary Frasher,
Appellant-Respondent,

v.

Thurman Frasher,
Appellee-Petitioner

September 3, 2021

Court of Appeals Case No.
21A-DN-246

Appeal from the Fayette Superior
Court

The Honorable Paul L. Freed,
Judge

Trial Court Cause No.
21D01-1808-DN-618

Crone, Judge.

Case Summary

- [1] Rosemary Frasher (Wife) appeals the trial court's decree dissolving her marriage to Thurman Frasher (Husband). Wife contends that the trial court erred in dividing the marital estate and in ordering her to pay Husband's mediation fees. We agree, and therefore we reverse and remand.

Facts and Procedural History

- [2] Husband and Wife were married in 1984. Husband petitioned to dissolve the marriage in 2018. The parties were ordered to mediation, which was unsuccessful. In October 2020, after a hearing, the trial court issued a dissolution decree. The court found that "both parties are retired and receive social security payments monthly[,]” and it ordered the “furniture and household items” to be divided equally and the marital residence to be sold, with the proceeds to be divided equally. Appealed Order at 1. The court denied Wife's request for spousal maintenance and ordered Husband's mediation fees to be paid out of Wife's share of the proceeds “due to refusal to participate in mediation.” *Id.*
- [3] Wife filed a motion to correct error, supported by citations to exhibits, in which she noted that she “is currently receiving Social Security Disability, as her sole source of income”; that Husband is receiving Social Security retirement benefits but is also “gainfully employed” by a public school system; and that “not a scintilla of evidence” was presented that she had refused to participate in

mediation. Appellant's App. Vol. 2 at 14, 15. The motion was deemed denied, and Wife appealed.

Discussion and Decision

[4] Initially, we note that Husband did not file a brief.

When an appellee fails to submit a brief, we do not undertake the burden of developing appellee's arguments, and we apply a less stringent standard of review. We may reverse if the appellant establishes prima facie error, which is error at first sight, on first appearance, or on the face of it. The prima facie error rule relieves this Court of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee.

Dumka v. Erickson, 70 N.E.3d 828, 830 (Ind. Ct. App. 2017) (quoting *Jenkins v. Jenkins*, 17 N.E.3d 350, 351-52 (Ind. Ct. App. 2014)).

Section 1 – Wife has established prima facie error regarding the division of the marital estate.

[5] Wife first contends that the trial court erred in purporting to divide the marital estate equally between the parties. Indiana Code Section 31-15-7-4(a) provides that the trial court in a dissolution action “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.” Marital property does not include Social Security disability benefits. *Severs v. Severs*, 837 N.E.2d 498, 501 (Ind. 2005).

- [6] Indiana Code Section 31-15-7-4(b) provides that the court “shall divide the property in a just and reasonable manner[.]” The court may do so by dividing the property in kind; “setting the property or parts of the property over to one (1) of the spouses and requiring either spouse to pay an amount, either in gross or in installments, that is just and proper”; “ordering the sale of the property under such conditions as the court prescribes and dividing the proceeds of the sale”; or ordering the distribution of pension benefits “that are payable after the dissolution of marriage, by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt.” *Id.*
- [7] “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.

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.

Id.

[8] “The party seeking to rebut the presumption of equal division bears the burden of proof of doing so, and a party challenging the trial court’s decision on appeal must overcome a strong presumption that the trial court acted correctly in applying the statute[.]” *In re Marriage of Marek*, 47 N.E.3d 1283, 1288 (Ind. Ct. App. 2016), *trans. denied*. “We will reverse a trial court’s division of marital property only if there is no rational basis for the award; that is, if the result is clearly against the logic and effect of the facts and circumstances, including the reasonable inferences to be drawn therefrom.” *Id.* at 1287. We will also reverse if the trial court has misinterpreted the law or disregarded evidence of factors listed in Section 31-15-7-5.

[9] Here, the trial court obviously determined that an equal division of the marital estate is just and reasonable and attempted to effect such a division by splitting the personal property and the real estate proceeds equally between the parties. But in doing so, the trial court disregarded the disparity between the parties' incomes: Wife receives approximately \$14,460 per year, and Husband receives approximately \$36,460.¹ We conclude that Wife has established prima facie error regarding the trial court's division of the marital estate, and therefore we reverse and remand. On remand, the court should reconsider Wife's request for spousal maintenance or her alternative request to divide the proceeds from the sale of the marital residence in her favor in lieu of a maintenance award and claims against the value of Husband's vehicle and PERF retirement account. *See* Ind. Code § 31-15-7-2 (outlining considerations for spousal maintenance).²

Section 2 – Wife has established prima facie error regarding the order to pay Husband's mediation fees.

[10] Wife also contends that the trial court erred in ordering her to pay Husband's mediation fees "due to refusal to participate in mediation." Appealed Order at 1. As she correctly observed in her motion to correct error, "not a scintilla of

¹ Wife has been disabled since the late 1980s and received approximately \$1,205 per month in disability benefits in 2018. Tr. Vol. 2 at 60; Ex. Vol. at 25. Husband received approximately \$1,780 per month in retirement benefits in 2020. Tr. Vol. 2 at 9. He also worked approximately 27.5 hours per week for the public school system at approximately \$10.56 per hour. *Id.* at 33.

² During the marriage, Wife gave Husband her debt-free Toyota Solara after his vehicle broke down. Wife then purchased a Mercedes, on which she owed approximately \$14,000 as of August 2018. Through his current employment, Husband has a PERF retirement account that was valued at \$304 as of August 2018. Ex. Vol. at 17.

evidence” was presented that she refused to participate in mediation.

Appellant’s App. Vol. 2 at 15. Accordingly, we reverse and remand with instructions to vacate that portion of the dissolution decree.

[11] Reversed and remanded.

Bailey, J., and Pyle, J., concur.