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IN THE COURT OF APPEALS OF INDIANA

Roy Michael Johnson,
Appellant-Petitioner,

v.

Samantha A. Johnson,
Appellee-Respondent

December 6, 2021

Court of Appeals Case No. 21A-DN-1003

Appeal from the Hancock Circuit Court

The Honorable R. Scott Sirk, Judge

Trial Court Cause No. 30C01-1701-DN-175

Crone, Judge.

Case Summary

[1] Roy Michael Johnson (Husband) appeals the trial court's findings of fact and conclusions thereon (Order) dissolving his marriage to Samantha A. Johnson (Wife). He contends that the trial court erred by including his accumulated leave in the marital pot and by excluding the children's college loans executed after the dissolution petition was filed. He also argues that the trial court erred

in determining that an unequal distribution of the marital estate was just and reasonable by considering his failure to contribute financially to Wife for the care for his minor children following the date of separation and by concluding that he dissipated assets. Lastly, he asserts that the trial court erred by awarding him half of his pension's survivor benefit, and that it is unclear whether the trial court awarded Wife attorney fees. Wife agrees that remand is necessary for the trial court to address these last two issues.

[2] We conclude that the trial court committed no error by excluding from the marital pot the college loans executed after the date of filing or by considering Husband's failure to financially support his children as a reason for determining that an unequal distribution of the estate is just and reasonable. However, we conclude that the trial court erred by including Husband's accumulated leave in the marital pot and by finding that Husband dissipated assets. Finally, we conclude that remand is necessary for the trial court to award Wife the full amount of the survivor benefit attached to Husband's pension and to clarify whether Wife is awarded attorney fees. Accordingly, we affirm in part, reverse in part, and remand with instructions to the trial court to remove Husband's accumulated leave from the marital pot, award Wife all of Husband's pension's survivor benefit, clarify whether it is awarding Wife attorney fees, and recalculate and redetermine a just and reasonable division of the marital estate.

Facts and Procedural History

[3] Husband and Wife were married in June 1990. At that time, they both worked for the United States Postal Service (USPS). Shortly after they were married,

they agreed that Wife would resign her position with the USPS to be a fulltime homemaker. Husband and Wife had a daughter (Daughter) born in 1994 and a son (Son) born in 1997. The family resided at 10422 Orchard Park (marital residence). Husband and Wife bought, sold, and managed residential real estate with the hope that the income would fund the children's post-secondary education and their retirement. Appealed Order at 5 (Finding 22). We refer to these properties as the New Street, Parker Avenue, 1218 Sterling Street, and 1234 Sterling Street properties. In 2002, Wife was diagnosed with cancer of the breast and lymph nodes. *Id*. (#20). She received chemotherapy, suffered multiple complications, and underwent multiple surgeries between 2002 and 2015.

[4] In June 2013, Husband moved out of the marital residence. Daughter was nineteen years old and enrolled in Ball State University that fall. Son was sixteen years old and remained in Wife's care. Husband was still employed at the USPS, but he stopped contributing any of his salary to the joint marital pot and did not contribute financially to Wife for Son's care. *Id*. at 7 (#35). Wife got a part-time job as a school bus driver and grossed $12,154.16. *Id*. at 6 (#31). Husband provided money and gifts directly to the children. *Id*. at 6 (#33). Husband cosigned loans for Daughter's college attendance and for Son when he started college in 2016. *Id*. at 7 (#36-38). Wife objected to cosigning the children's loans because she did not want to incur that debt and told Husband that she did not want him to cosign the loans. Tr. Vol. 2 at 157-58, 178, 208.

Husband did not ask Wife to cosign any college loans, and he made his decision independently to cosign the loans. *Id*. at 22, 157-58, 177-78.

[5] In 2013, when Husband moved out, Husband and Wife agreed that Wife would take over the care and control of the marital residence and the 1218 Sterling Street property, and Husband would take over the care and control of the New Street, Parker Avenue, and 1234 Sterling Street properties. Appealed Order at 5 (#23-24). Husband began living at the New Street property and sold the remaining two properties. *Id*. (#26).

[6] On January 30, 2017, Husband filed the dissolution petition. Husband's annual gross income for 2016 was $90,841.72. *Id*. at 6 (#29). Wife's annual gross income that year was $29,163.00. *Id*. (#31). At the time of filing, Husband had a Federal Employee Retirement Service (FERS) pension valued at $643,060.58 with a survivor benefit, and a FERS supplement valued at $69,587. *Id*. at 13 ("Marital Estate Spreadsheet"). Husband also had a thrift savings account (TSP). At the date of filing, Husband had accumulated leave of 3,369 hours. *Id*. at 7-8 (#42); Ex. Vol. 9 at 76. "While [Husband's] sick and annual leave [did] not result in additions to gross pay, they reflect[ed] the value of pay for time not worked." Ex. Vol. 9 at 76. Based on Husband's hourly wage, his accumulated leave reflected a value of $142,912.79. *Id*. For much of 2017, Husband voluntarily took paid leave to assist his elderly parents. Appealed Order at 7 (#41). At the end of 2017, he retired to care for his parents. *Id*. at 8 (#43). At the time of filing, the loan debt for the children's college education was $57,000

for Daughter and $23,977 for Son. *Id*. at 7 (#37-38). After the date of filing, Husband cosigned additional college loans for Daughter and Son.

[7] The trial court held a four-day dissolution hearing beginning in August 2020 and concluding in February 2021. At trial, Husband argued that he and Wife had an oral agreement that he would keep the TSP and pay for the children's college loans out of that fund. Tr. Vol. 2 at 157. Husband asked the trial court to include the entire college loan debt of $165,068.02[1] and allow his TSP to be used to pay that debt. *Id*. at 173-74. In April 2021, the trial court entered the Order, which reads in pertinent part as follows:

> 14. The Court finds that Husband has not met his burden that a valid contract existed between [him] and Wife on October 1, 2012, regarding the marital estate.
>
> ….
>
> 16. The Court will use Husband's date of filing for dissolution of marriage of January 30, 2017, for the purpose of assessing the "marital pot."
>
> ….
>
> 26. Between June of 2013 and January 20, 2017, Husband chose to reside and invest in [the New Street property]. Husband chose

[1] This amount represents the total of the loans cosigned by Husband both before and after the date of filing.

to sell the remaining properties he took care and control over for minimal profit.

27. From June of 2013 through January 30, 2017, Wife chose to invest in the remaining two properties that were in her care and control.

….

35. Husband chose to leave the marital home in 2013 when the parties' son was 16 years of age. Husband had a duty to continue to support his son until such time as he was emancipated. Husband admittedly did not provide child support to Wife for the care and support of [Son]. These facts support Wife's larger share of the marital estate.

….

42. As of January 27, 2017, [Husband] had accumulated 3,369 hours or $142,912.79 of paid leave (Respondent's Exhibit B.) The Court determines that the full sum of this paid leave was a marital asset at the time of Husband's filing for dissolution, therefore these funds are included in the marital pot.

….

50. The evidence presented rebuts the presumption of an equal division of the marital assets as prescribed by I.C. 31-15-7-4, therefore a division of property weighted in Wife's favor is warranted. While Husband's employment was the parties' primary source of household income from 1990-2013, Husband withdrew his paycheck from the joint marital pot and chose to only contribute to the family as and when he deemed appropriate. Husband's actions have caused a large depletion in

> the marital estate. Husband has dissipated and disposed of assets causing continued harm to the marital estate. Wife chose to invest in the assets she had care and control over and those assets are a significant part of the marital estate. The marital estate should be divided approximately as 58% to Wife and 42% to Husband.

Appealed Order at 4-9.

[8] Attached to the Order, is the Marital Estate Spreadsheet, which lists the assets in the marital estate, their value, and the manner of their distribution. The trial court awarded Wife the marital residence and the 1218 Sterling Street property and awarded Husband the New Street property. The trial court adopted the January 6, 2021 value of Husband's TSP of $331,143.95 and awarded Husband $82,785.99 and Wife $248,357.96. The trial court adopted the January 30, 2017 value of Husband's FERS pension of $643,060.58 and divided it equally between the parties. The trial court awarded Husband the entire value of his FERS supplement of $69,587. The trial court valued the survivor death benefit attached to Husband's FERS pension at $80,570.58 and awarded half to each party. The trial court included Husband's accumulated leave, valued on January 27, 2017, at $142,912.79, and awarded it to Husband. The trial court awarded Wife the investments that she had funded with money she had earned before the marriage and with a lump sum child support payment she had received from her ex-husband. Although Husband had asked that all the children's college loan debt be included in the marital estate, the trial court included only the debt incurred before the date of filing. The trial court calculated that the total value of the marital estate was $1,724,456.35, and

awarded Husband $717,930.55, or 41.63%, and Wife $1,006,525.80, or 58.37%. This appeal ensued.

Discussion and Decision

[9] The trial court entered findings of fact and conclusions thereon at Husband's request. Our standard of review is well established:

> Where the trial court has entered special findings of fact and conclusions thereon, our court will "not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A). Under our … two-tiered standard of review, we must determine whether the evidence supports the findings and whether those findings support the judgment. We consider the evidence most favorable to the trial court's judgment, and we do not reweigh evidence or reassess the credibility of witnesses. We will find clear error only if the record does not offer facts or inferences to support the trial court's findings or conclusions of law.

B.L. v. J.S., 59 N.E.3d 253, 258-59 (Ind. Ct. App. 2016) (citations and quotation marks omitted), *trans. denied*. We accept unchallenged findings as true. *McMaster v. McMaster*, 681 N.E.2d 744, 747 (Ind. Ct. App. 1997).

Section 1 – The trial court clearly erred by including Husband's accumulated leave in the marital pot but did not err by excluding the college loans executed after the date of filing.

[10] We begin by addressing Husband's arguments regarding the trial court's determination of the marital estate. In addressing such issues, this Court has observed,

> [I]n a dissolution action, all marital property goes into the marital pot for division, whether it was owned by either spouse before the marriage, acquired by either spouse after the marriage and before final separation of the parties, or acquired by their joint efforts. Ind. Code § 31-15-7-4(a). For purposes of dissolution, property means all the assets of either party or both parties. Ind. Code § 31-9-2-98. The requirement that all marital assets be placed in the marital pot is meant to insure that the trial court first determines that value before endeavoring to divide property. Indiana's "one pot" theory prohibits the exclusion of any asset in which a party has a vested interest from the scope of the trial court's power to divide and award. While the trial court may decide to award a particular asset solely to one spouse as part of its just and reasonable property division, it must first include the asset in its consideration of the marital estate to be divided. The systematic exclusion of any marital asset from the marital pot is erroneous.

Henderson v. Henderson, 139 N.E.3d 227, 232 (Ind. Ct. App. 2019) (quoting *Falatovics v. Falatovics*, 15 N.E.3d 108, 110 (Ind. Ct. App. 2014)). For purposes of determining the marital estate, property includes

> (1) a present right to withdraw pension or retirement benefits; [and]
>
> (2) the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested (as defined in Section 411 of the Internal Revenue Code) but that are payable after the dissolution of marriage[.]

Ind. Code § 31-9-2-98(b).

1.1 – The trial court clearly erred by finding that Husband's accumulated leave was a marital asset at the time of filing.

[11] In Finding 42, the trial court found that as of the date of filing, Husband had accumulated 3,369 hours of paid leave, which the court valued at $142,912.79 based on Husband's hourly wage. Appealed Order at 7-8; Ex. Vol. 9 at 76. The trial court found that this sum was a marital asset at the time of filing. Husband contends that the evidence does not support the finding that his accumulated leave was a marital asset subject to division.[2]

[12] Husband directs us to his uncontradicted trial testimony and supporting exhibit. Husband testified that his accumulated sick leave was not available as a cash payment but was added to his accumulated years of service for purposes of valuing his FERS pension. Tr. Vol. 2 at 171. In support, he offered Petitioner's Exhibit 42, a USPS newsletter, which explains sick leave conversion as follows:

> Saved sick leave can also benefit you at the end of your career. You can use your sick leave to boost your "annuity," which refers to the monthly payments that retirees receive that are, in part, based on their years of service.

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[2] Wife asserts that "Husband does not argue that the leave was not a marital asset subject to division at all and has accordingly waived any argument to that point." Appellee's Br. at 19. We disagree. Husband explicitly argues, "There is no evidence in the Record which supports language in paragraph 42 or [the trial court's] decision to 'award' that sum to Husband." Appellant's Br. at 29.

We note some confusion regarding the accumulated leave. The parties' arguments focus on Husband's sick leave, but the 3,369 hours referred to in Finding 42 is actually the total of Husband's sick leave and "annual" leave. *See* Ex. Vol. 9 at 76 (indicating sick leave of 3,153 hours and annual leave of 216 hours). However, given that the annual leave is a small percentage of the total value of Husband's accumulated leave and that the parties ignore it, we ignore it as well.

> Sick leave counts toward your years of service, but it doesn't count toward meeting eligibility for retirement.
>
> For example, if you are 60 years old with 20 years of service, and have one year of sick leave, your annuity would be calculated as 21 years of service.

Ex. Vol. 9 at 35 (emphasis omitted). Husband also directs us to Wife's Exhibit Z, a November 2017 USPS estimate of Husband's annuity, which explains that unused sick leave hours are added to the total years of service for purposes of computing the annuity. *Id*. at 140. We further note that Title 5 of the Code of Federal Regulations provides that "[f]or annuity computation purposes, the service of an employee who retires on immediate annuity or dies leaving a survivor entitled to annuity is increased by the days of unused sick leave to his credit under a formal leave system." 5 C.F.R. § 831.302. Wife does not direct us to any evidence that Husband's unused sick leave was available as a cash payment.

[13] We note that neither of the parties cites any case law specifically addressing whether accumulated leave is marital property subject to division. Our research has revealed one Indiana case and many such cases from other jurisdictions. In *Akers v. Akers*, 729 N.E.2d 1029 (Ind. Ct. App. 2000), another panel of this Court addressed this issue as one of first impression. There, the husband was a public school teacher, and as of the date of filing the dissolution petition, he had accumulated 201 unused sick days. His employment contract contained a retirement benefit clause that provided that he was entitled to receive payment

for a maximum of 187 of his unused sick leave days upon retirement. The trial court calculated that the husband's unused sick days had a maximum value of $11,687.50 and treated it as a marital asset subject to division. The husband appealed.

[14] The husband argued that the trial court erred in treating the unused sick days as a marital asset subject to division. In addressing his argument, the *Akers* court began by observing that although the retirement benefits clause in his employment contract provided for a cash payment based on 187 unused sick days, there was no evidence that the husband "had a *present* right to be paid for his sick days other than by becoming ill." *Id*. at 1032. The *Akers* court also noted that the husband testified that his teaching contract was subject to renegotiation, and thus "he could not foresee what contract provisions would be in effect at the time of his retirement." *Id*. The *Akers* court reasoned that "it was mere speculation for the trial court to assume that [the husband] would not suffer any illness and would retain at least 187 unused sick days at their current value until retirement." *Id*. (citing Ind. Code § 31-9-2-98).

[15] Importantly, the *Akers* court recognized the requirement that "only property in which a party has a vested interest at the time of dissolution may be divided as a marital asset." *Id*. at 1033. The court observed,

> While employees may accumulate sick leave days …, they may only use those days for a limited purpose. An employee must be sick or other conditions must be present before an employee has a right to use sick leave. As such, sick leave is not a benefit which automatically vests when earned.

Id. (quoting *Shorter v. City of Sullivan*, 701 N.E.2d 890, 892 (Ind. Ct. App. 1998), *trans. denied,* (1999)). The *Akers* court concluded that the husband's unused sick days had no present value, their value was "contingent and speculative in nature," and they were not capable of division as a marital asset. *Id*. (quoting *Mullins v. Matlock*, 638 N.E.2d 854, 856 (Ind. Ct. App. 1994), *trans. denied*). The *Akers* court reversed the trial court's treatment of the husband's unused sick days and remanded with instructions to recalculate the marital pot. *Id*. However, the *Akers* court noted that it might have "reached a different result had [the husband] possessed a vested interest in his unused sick days at the time of the dissolution, such as a present right to convert those days to cash."[3] *Id*. at n.5.

[16] Here, as of the date of filing for dissolution, Husband had no present right to convert his unused sick days to cash; indeed, Husband had no right to convert any unused sick days to cash even upon retirement. Husband's sick leave provided income protection in the event of a short-term illness, and he was entitled to use his sick days only for limited purposes. To the extent that his sick days might have been valued, that value would have to be based on the amount they would increase his pension, not his hourly wage. Even then, there is no way to predict how many sick days Husband would have when he retired.

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[3] Courts in other jurisdictions are split on whether accumulated leave is property subject to division in a dissolution proceeding. For an extensive discussion of the issue and review of court decisions across the United States see *In re Marriage of Cardona and Castro*, 316 P.3d 626, 631 (Colo. 2014). *See also* Brett R. Turner, 1 *Equitable Distribution of Property* § 5:11 (Property - Interests which may or may not constitute property) (4th ed. Dec. 2020 Update).

Based on the analysis in *Akers*, we conclude that Husband's accumulated sick leave was not a vested asset at the time of filing, and the trial court clearly erred by finding that it was a marital asset and including it in the marital pot. Therefore, we reverse and remand to the trial court to recalculate the value of the marital estate and reassess its division. *See Dewbrew v. Dewbrew*, 849 N.E.2d 636, 646 (Ind. Ct. App. 2006) ("The adjustment of one asset or liability may require the adjustment of another to avoid an inequitable result or may require the reconsideration of the entire division of property.").

[17] We observe that after the date of filing but before the marriage was dissolved, Husband took some sick leave and retired. He used his sick leave as an income replacement, and we do not consider his use of his sick leave a dissipation of assets. When Husband retired, he had unused sick days that were applied to his years of service to increase the value of his pension. The trial court directed that "Wife's interest shall be fifty percent (50%) of Husband's accrued monthly pension as of *the date of distribution*." Appealed Order at 10 (#56) (emphasis added). Therefore, Wife will receive half the value of the unused sick days remaining at Husband's retirement in the form of her pension distribution.

1.2 – The trial court did not err by excluding the children's college loans that Husband cosigned after the date of filing the dissolution petition.

[18] Husband contends that the trial court erred by excluding the college loans that he cosigned after the date of filing the dissolution petition. "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."

Thompson v. Thompson, 811 N.E.2d 888, 913 (Ind. Ct. App. 2004), *trans. denied* (2005) (emphasis added). Husband asserts that we should make an exception to this general rule for the following reasons: the children's enrollment in college was a family decision; Wife had repeatedly told the children that Husband would pay for their college; the children would not have been able to attend college if he had not cosigned the loans; and he funded the TSP to pay for their college.

[19] We observe that at trial, Husband argued that he and Wife had an oral agreement that he would keep the TSP and pay for the college loan out of that fund. Tr. Vol. 2 at 157. Husband asked the trial court to include the entire college loan debt of $165,068.02 and allow his TSP to be used to pay that debt. *Id*. at 173-74. The trial court rejected Husband's argument that he and Wife had an agreement. Appealed Order at 4 (#14).

[20] Our review of the record shows that Husband did not ask Wife to cosign any college loans, she did not want to take on college loan debt, she told him not to cosign the loans, and he made his decision independently to cosign the loans. Tr. Vol. 2 at 22, 157, 177-78, 207-08. Husband's argument is merely a request to reweigh the evidence, which we must decline. We find no error in the trial

court's exclusion of the college loan debt incurred by Husband after the date of filing.[4]

Section 2 –The trial court did not abuse its discretion in determining that an unequal division of the marital estate in Wife's favor was just and reasonable.

[21] Husband argues that the trial court abused its discretion in dividing the marital estate, claiming that it improperly considered that he failed to pay any child support after 2013 when he moved out of the marital residence and erroneously found that he dissipated marital assets. When a trial court divides the marital property, it begins with the presumption that an equal division between the parties is just and reasonable. Ind. Code § 31-15-7-5. However, that presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors:

> (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

[4] We decline to address the new argument in Husband's reply brief that Wife is estopped from claiming that the college loans are not marital debts. *See Moriarty v. Moriarty*, 150 N.E.3d 616, 631 n.10 (Ind. Ct. App. 2020) (stating that appellants may not raise new arguments in a reply brief), *trans. denied*.

(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. These statutory factors are to be considered as a whole, with no one factor necessarily justifying an unequal division. *Gish v. Gish*, 111 N.E.3d 1034, 1038 (Ind. Ct. App. 2018), *trans. denied* (2019).

[22] "If the court deviates from the presumptive equal division, it must state its reasons for that deviation in its findings and judgment." *Bock v. Bock*, 116 N.E.3d 1124, 1130 (Ind. Ct. App. 2018). A party challenging the trial court's division of the marital estate on appeal must overcome a strong presumption that the trial court considered and complied with the applicable statute. *Eye v. Eye*, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006). The division of marital assets lies within the sound discretion of the trial court. *Smith v. Smith*, 938 N.E.2d

857, 860 (Ind. Ct. App. 2010). We will reverse a trial court's division of marital property only if its division is clearly against the logic and effect of the facts and circumstances presented, including the reasonable inferences to be drawn therefrom. *In re Marriage of Marek*, 47 N.E.3d 1283, 1287 (Ind. Ct. App. 2016), *trans. denied*. "The court also abuses its discretion when it misinterprets or misapplies the law." *Bowles v. Bowles*, 721 N.E.2d 1247, 1249 (Ind. Ct. App. 1999). In reviewing the trial court's disposition of marital property, we will consider only the evidence most favorable to the trial court's decision and refrain from either reweighing evidence or judging witness credibility. *Smith*, 938 N.E.2d at 860. We will not substitute our judgment for that of the trial court even though the facts and reasonable inferences might support a different decision. *Love v. Love*, 10 N.E.3d 1005, 1012 (Ind. Ct. App. 2014).

2.1 – The trial court did not err in considering Husband's failure to contribute financially to Wife for Son's support as a factor in determining a just and reasonable division of the marital estate.

[23] In Finding 35, the trial court found that Husband did not provide child support for Son after 2013 even though Husband had a duty to do so, and "[t]these facts support Wife's larger share of the marital estate." Appealed Order at 7. Husband characterizes this finding as a retroactive award of child support and asserts that an order for child support cannot be retroactively modified. Appellant's Br. at 25. He further argues that there was no child support order in the first place and that Wife made a conscious choice not to bring a child support action against him between 2013 and 2017. We believe Husband's

characterization of the trial court's finding as a retroactive child support order does not accurately reflect the trial court's reasoning.

[24] In determining a just and reasonable division of marital property, the trial court must consider the contribution of each spouse to the acquisition of the property and the economic circumstances of each spouse at the time the disposition of the property is to become effective. Ind. Code § 31-15-7-5. Here, the trial court found that soon after they were married, Husband and Wife agreed that Wife would stop working and become a homemaker. Appealed Order at 4 (#17). Although Wife had some part-time jobs, Husband's salary was the primary support of the parties and their children. When Husband moved out of the marital residence in 2013, Wife did not receive financial assistance from him, and therefore she had to devote more of her own earnings to meet childcare expenses, which undercut her ability to independently save, invest, and improve her economic circumstances. Conversely, because Wife shouldered the responsibility for childcare, Husband was able to use the resources he otherwise would have devoted to childcare to increase his savings and investments and improve his economic circumstances. We have no difficulty concluding that these considerations, which are tied to Husband's failure to provide resources for childcare, are appropriate in determining a just and reasonable division of the marital estate. Accordingly, the trial court did not err in considering Husband's failure to provide child support as a factor in determining a just and reasonable division of the marital estate.

2.2 – The trial court abused its discretion in finding that Husband dissipated assets.

[25] Husband also challenges the trial court's finding that he dissipated assets. "Fault is not relevant in dissolution proceedings except as related to the disposition or dissipation of marital assets." *Troyer v. Troyer*, 987 N.E.2d 1130, 1139 (Ind. Ct. App. 2013) (quoting *In re Marriage of Coyle*, 671 N.E.2d 938, 942 (Ind. Ct. App. 1996)), *trans. denied*. We review findings of dissipation under an abuse of discretion standard. *Hardebeck v. Hardebeck*, 917 N.E.2d 694, 700 (Ind. Ct. App. 2009).

[26] "Dissipation generally involves the use or diminution of the marital estate for a purpose unrelated to the marriage and does not include the use of marital property to meet routine financial obligations." *Balicki v. Balicki*, 837 N.E.2d 532, 540 (Ind. Ct. App. 2005), *trans. denied*. "The test for dissipation is whether the assets were actually wasted or misused." *Id*. "Dissipation of marital assets includes the frivolous and unjustified spending of marital assets." *Grathwohl v. Garrity*, 871 N.E.2d 297, 303 (Ind. Ct. App. 2007).

> To determine whether dissipation has occurred, we consider the following factors:
>
> > 1. Whether the expenditure benefited the marriage or was made for a purpose entirely unrelated to the marriage;
> >
> > 2. The timing of the transaction;

> 3. Whether the expenditure was excessive or de minimis; and
>
> 4. Whether the dissipating party intended to hide, deplete, or divert the marital asset.

Kondamuri v. Kondamuri, 852 N.E.2d 939, 952 (Ind. Ct. App. 2006) (footnote omitted). "Dissolution courts may consider evidence of either pre- or post-separation dissipation." *Hardebeck*, 917 N.E.2d at 700. "[T]ransactions which occur during the breakdown of the marriage, just prior to filing a petition or during the pendency of an action, may require heightened scrutiny." *Coyle*, 671 N.E.2d at 943.

[27] Here, in Finding 50, the trial court found as follows:

> While Husband's employment was the parties' primary source of household income from 1990-2013, Husband withdrew his paycheck from the joint marital pot and chose to only contribute to the family as and when he deemed appropriate. Husband's actions have caused a large depletion in the marital estate. Husband has dissipated and disposed of assets causing continued harm to the marital estate.

Appealed Order at 9. We note that the trial court did not identify any particular transaction that constituted dissipation of assets. Husband's action in withholding his paycheck from the joint marital pot is a valid basis for dividing the marital estate unequally in Wife's favor, but that action standing alone does not fall within the definition of dissipation.

[28] Indeed, none of the findings identify any particular transaction that fits the criteria for dissipation. There are no findings that Husband wasted or misused assets or that he engaged in frivolous and unjustified spending. To the contrary, in Finding 26, the trial court found that between June 2013 and January 2017, Husband resided and invested in the New Street property. That property is a marital asset. Wife's expert valued the New Street property at $30,000 in 2012. Tr. Vol. 4 at 183. The trial court valued it at $75,000 at the time of dissolution. The increase in value shows that Husband's investment in the property benefited the marital estate. Furthermore, we note that Husband's FERS pension and TSP comprise over half of the marital estate.

[29] Wife directs us to the trial court's finding that Husband sold the remaining properties that he took care and control over for "minimal profit." Appealed Order at 5 (#26). She asserts that the "trial court appears to have treated the fire-sales of the investment properties as significant."[5] Appellee's Br. at 25. Husband argues that he sold the two properties over which he took control for at least as much as Wife's expert testified that they were worth. Reply Br. at 18. He cites evidence showing that in 2012, the Parker Avenue property had a mortgage debt of $25,174, Wife's expert valued it at $18,000, and he sold it for

[5] Wife also stresses that the trial court found that she "chose to invest in the assets she had care and control over and those assets are a significant part of the marital estate." Appealed Order at 9 (#50). While it is true that Wife kept the marital residence and the 1218 Sterling property as an investment, Wife testified that she wanted to keep the 1218 Sterling Street property because it did not have a mortgage, and she let Husband take the 1234 Sterling Street and Parker Avenue properties because they had mortgages on them. Tr. Vol. 3 at 77.

approximately $26,000. Tr. Vol. 2 at 47-48; Tr. Vol. 4 at 183. In 2012, the 1234 Sterling Street property had a mortgage of $19,148, Wife's expert valued it at $30,700, and Husband sold it for $29,000. Tr. Vol. 2 at 47; Tr. Vol. 4 at 183. Selling the properties for minimal profit when they were sold at prices either above or roughly equal to their value is not a waste or misuse of assets. In sum, the Order contains no findings regarding any actions taken by Husband that fit the criteria for dissipation, and the general allegation of dissipation in Finding 50 is insufficient. Therefore, we conclude that the trial court abused its discretion in finding that Husband dissipated assets, and we reverse that portion of the Order.

[30] Although we conclude that the trial court abused its discretion in finding that Husband dissipated assets, other findings made by the trial court support its determination that an unequal distribution of property in favor of Wife is just and reasonable. Wife became a homemaker after the parties were married, became ill with cancer, and has been unable to hold a full-time job. *Id.* at 5-6 (#20, 32). In 2013, Wife grossed $12,154.16, and in 2016 her income was $29,163. *Id.* at 6 (#31). In 2016, Husband's annual gross income was $90,841.72. *Id.* (#29). After 2013, Husband earned a significantly greater income than Wife but did not contribute to the joint marital pot. *Id.* at 7, 9 (#35, 50). The disparity in earnings capability and economic circumstances at

the time of separation also warrant an unequal division in Wife's favor.[6] However, we do not address specifically whether the division of 41.63% to Wife and 58.37% to Husband is just and reasonable. We think such an evaluation would be premature given that on remand, the trial court may need to reconsider its division of the marital estate to achieve a just and reasonable result.

Section 3 – The parties agree that two issues require remand.

[31] The parties agree that remand is necessary for the trial court to revisit two areas of concern. First, Husband and Wife agree that the Marital Estate Spreadsheet, which awards Husband half of the FERS pension survivor benefit, is inconsistent with Finding 56, in which the trial court awards Wife the survivor benefit. Appealed Order at 10. However, Husband and Wife are not in complete agreement regarding the proper course of action on remand. Wife asserts that remand is necessary for the trial court to clarify its decision. Husband contends that the uncontradicted evidence establishes that Wife will receive the full amount of the survivor benefit in the event that he dies before her. Appellant's Br. at 24 (citing Tr. Vol. 2 at 222; Ex. Vol. 9 at 158). He asserts that the treatment of the survivor benefit on the Marital Estate Spreadsheet is

[6] Husband states that he "has no objection to Wife retaining the items described in Findings 18, 19, 46, 47, 49, or 53." Reply Br. at 25.

clearly erroneous and remand is necessary for the trial court to award Wife the full amount of the survivor benefit.

[32] We observe that Wife does not dispute Husband's contention that there is no evidence in the record that Husband would ever be entitled to the survivor benefit. Failure to respond to an issue raised in an opposing party's brief is akin to failing to file a brief as to that issue. *Kelly v. Kelly*, 45 N.E.3d 31, 37 (Ind. Ct. App. 2015), *trans. denied* (2016). In such cases, we may reverse if the appellant presents a case of prima facie error, which means error at first sight, on first appearance, or on the face of it. *Id*. We conclude that Husband has carried his prima facie burden to show that Wife alone is entitled to receive the survivor benefit. Therefore, we remand to the trial court to revise the Marital Estate Spreadsheet to conform to Finding 56 and award Wife the full value of the survivor benefit.

[33] Second, we address Wife's request for attorney fees. The trial court made only two findings regarding attorney fees. Finding 51 sets forth the factors the court should consider in deciding whether to make an award of attorney fees. Appealed Order at 9. Finding 52 simply states that Wife testified that she withdrew $40,000 from one of her investment accounts to pay her attorney. *Id*. at 10. Based on these two findings, it is unclear whether the trial court granted or denied Wife's request for attorney fees. Therefore, we remand to the trial court with instructions to clarify whether it is awarding attorney fees to Wife and the reasons for its ruling.

[34] Based on the foregoing, we affirm in part, reverse in part, and remand with instructions to the trial court to remove Husband's accumulated leave from the marital pot, award Wife the full sum of the FERS pension survivor benefit, clarify whether it is awarding Wife attorney fees, and recalculate and redetermine a just and reasonable division of the marital estate.

[35] Affirmed in part, reversed in part, and remanded.

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