MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Marriage of:

Andrew J. Hoesli,

Appellant-Respondent,

v.

Jamie L. Hoesli,

Appellee-Petitioner.

April 1, 2022

Court of Appeals Case No. 21A-DC-2001

Appeal from the Perry Circuit Court

The Honorable Nathan A. Verkamp, Special Judge

Trial Court Cause No. 62C01-1801-DC-3

Tavitas, Judge.

Case Summary

[1] Andrew Hoesli ("Husband") appeals the trial court's division of property in his dissolution of marriage from Jamie Hoesli ("Wife"). During the dissolution proceedings, Wife received substantial distributions from the stocks of a business, which were owned as joint tenants with the rights of survivorship with Husband. The trial court awarded ownership of the stocks to Wife "retroactively" to the date of filing of the petition for dissolution and the full amount of the distributions Wife received. The trial court did not list the distributions as marital assets and then purported to divide the marital estate equally.

[2] Husband argues that the trial court erred by awarding those distributions to Wife. We conclude that, because the stocks were jointly owned, the distributions received during the proceedings were marital assets that should have been included in the marital estate. Accordingly, we reverse and remand for the trial court to include the distributions in the marital estate and either: (1) divide the marital property pursuant to the rebuttable presumption of an equal division; or (2) set forth its rationale for an unequal division of the marital estate.

Issues

[3] Husband raises two issues.[1] We find one issue dispositive and restate it as, whether the trial court abused its discretion when the trial court did not include the distributions on jointly owned stocks issued after the petition for dissolution was filed.

Facts

[4] Husband and Wife were married on June 8, 2002. Two children were born to the marriage: N.H. was born in April 2004, and E.H. was born in July 2006. The family resided in Tell City, Indiana.

[5] Husband held various employment during the marriage, and in 2013, Husband acquired a 48% ownership of the Greenhouse, LLC ("Greenhouse"). Husband's uncle, Michael Hoesli, owned the remaining 52% ownership interest. Husband did not provide funds toward the acquisition but assumed joint responsibility of the debt with Michael. Wife did not participate in the ownership or operation of Greenhouse. After the filing of the petition for dissolution of marriage, Husband became the full owner of Greenhouse after Michael gave Husband his 52% ownership with the agreement that Husband take on the debt of the business.

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[1] Husband also argues that the trial court abused its discretion when it valued the marital estate as of the date the petition for dissolution was filed. Given our resolution of Husband's first issue, we need not address the valuation date argument.

[6] Wife is a licensed funeral home director and embalmer. In 2016, the parties purchased a 50% interest in 1,000 shares of capital stocks in Huber Funeral Home ("Huber") and two associated real estate properties with Julie and Jeff Bishop as the remaining 50% owners. The two couples intended that both Wife and Julie would be responsible for the daily operations of Huber, which is reflected in the Shareholder's Agreement in Section 4.1: "Julie and [Wife] will provide services to the Corporation on a full-time basis." Ex. Vol. I p. 140. Husband, Wife, and the Bishops are the shareholders and "sole directors of the Corporation." *Id.*

[7] The transaction involved several agreements. First, Wife and Husband entered into an Agreement for the Purchase and Sale of Capital Stock, which involved the purchase of fifty shares of capital stocks in Huber for $40,000. Wife and Husband with the Bishops entered into a Contract for Conditional Sale of Real Estate and Capital Stock ("Contract") for: (1) the remaining shares of Huber for $720,000.00; and (2) two properties—the Tell City property for $600,000.00 and the Cannelton property for $200,000.00.

[8] Wife and Husband obtained a $100,000 loan from Hoosier Hills Credit Union, used $40,000.00 to purchase the original fifty shares of Huber stocks, and used the balance of $60,000.00 as a down payment for their remaining 450 shares. The remainder of the purchase price was financed through the sellers. Pursuant to the Contract, Wife and Husband were obligated to pay the sellers $2,866.00 per month for twenty years on the property loan and $2,149.00 per month for twenty years on the loan for the stocks. All payments were made by the Huber

business account for both couples' loan obligations. Stock certificates were issued to Wife and Husband reflecting their ownership of 500 shares of Huber stocks as "joint tenants with right of survivorship." Ex. Vol. I pp. 148, 180.

[9] Wife received an annual salary from Huber of $70,000.00 in 2017; $60,000.00 in 2018; and $75,000.00 in both 2019 and 2020 from Huber. Husband did not receive a salary from Huber but was paid to perform work as needed according to Wife. Husband testified that, prior to the parties' separation, he "would help dress bodies . . . and help put them in caskets." Tr. Vol. III p. 122. He would provide other help as needed including getting ready for visitations, vacuuming, cleaning, and performing landscaping. Wife and Husband received one distribution from Huber in 2017, prior to their separation.

[10] The parties physically separated on September 16, 2017, and Wife filed a Petition for Dissolution of Marriage on January 2, 2018. On January 31, 2018, the trial court approved the parties' Agreed Provisional Order. The Agreed Provisional Order outlined the parties' temporary agreement to run the businesses until the trial court determined the final distribution of the marital estate as follows:

> 6. BUSINESSES:
>
> a. The Petitioner/Wife shall be entitled to exclusive possession of the parties' interest in Huber Funeral Home. The wife's exclusive possession of the parties' interest in the Huber Funeral Home *will have no effect on the Respondent's ownership rights and obligations as a shareholder in said corporation*.

b. The Respondent/Husband shall be entitled to exclusive possession of the parties' interest in The Greenhouse & Bouquets, LLC.

c. The businesses herein will be managed and operated in the ordinary course without significant modification or changes in the business plans. No investment or expenditure in excess of $25,000.00 shall be made without the other party's consent.

d. The parties agree to exchange monthly operating statements for the business they are in possession of within 10 days after the end of each month. The operating statements shall consist of a summary of income and expenses for the month and an end of month statement of assets and liabilities.

* * * * *

9. RESTRAINING ORDER: Each party is restrained and enjoined from transferring, encumbering, concealing, selling or otherwise disposing of any joint property of the parties or asset of the marriage except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the Court . . . .

Appellant's App. Vol. II pp. 36-38 (emphasis added).

[11] After the parties separated, in addition to her salary, Wife received cash distributions[2] from Huber for 2018, 2019, and 2020 that totaled $285,637.40. The Bishops received like amounts of distributions. Huber also paid the loan payments for both couples and the federal and state taxes owed by the couples on the income. These distributions were taken from Huber's checking account. Wife's K-1 forms reflect the following for the relevant years: $234,477.00 for 2018; $312,758.00 for 2019; and $336,965.00 for 2020.

[12] Wife placed the $285,637.40 in cash distributions in her savings account and paid her attorney fees, house repairs necessary to sell the marital residence, and the loan for her vehicle; Wife had $38,000 left from those distributions at the time of the final hearing. Since the parties' separation, Husband has not received any portion of these distributions from Huber.

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[2] Indiana Code Section 23-1-20-7 defines "distribution" as:

> (a) "Distribution" means a direct or indirect transfer of money or other property (except a corporation's own shares) or incurrence or transfer of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares under IC 23-1-28. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.
>
> (b) The term does not include:
>
> (1) amounts constituting reasonable compensation for past or present services or reasonable payments made in the ordinary course of business under a bona fide retirement plan or other benefit program; or
>
> (2) the making of or payment or performance upon a bona fide guaranty or similar arrangement by a corporation to or for the benefit of its shareholders.
>
> However, the failure of an amount to satisfy subdivision (1), or of a payment or performance to satisfy subdivision (2), is not determinative of whether the amount, payment, or performance is a distribution.

[13] The parties have filed multiple petitions for contempt and other motions in this contentious dissolution proceeding.[3] On October 4, 2019, among other motions, Husband filed a petition to modify the Agreed Provisional Order and a motion requesting an order Establishing the Final Separation date for Valuation of Assets and Determination of Debt Balances. Wife filed objections to Husband's motions. A hearing was held on the pending motions on November 27, 2019, and the trial court's order was entered on December 23, 2019. The parties agreed that: (1) the marital estate was closed "as of January 2, 2018"; (2) Husband's acquisition of an additional 52% ownership of the Greenhouse after the dissolution petition was filed was excluded from the marital estate; and (3) all additional issues raised by the pleading would be "taken up at the final hearing." Appellee's App. Vol. II pp. 2-3.

[14] Husband filed his motion for special findings of fact and conclusions thereon, which the trial court granted. The final hearing was held on June 17 and 18, 2021. The trial court dissolved the marriage on June 18, 2021, took the remaining matters under advisement, and ordered the parties to submit proposed findings of fact and conclusions thereon pursuant to Trial Rule 52(A). The trial court issued the Final Decree of Dissolution of Marriage on August 12, 2021.

[15] The trial court found:

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[3] Husband also filed a separate civil action seeking his shareholder share of the distributions.

> 96. Based on all the factors surrounding this matter, the contributions made by the parties, and the actions of the parties while this matter has been pending *the presumption of an equal division of the marital property is appropriate*. The date of valuation of the marital estate shall be the date of filing January 2, 2021 [sic].
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> * * * * *
>
> 11. [Wife] is the sole and exclusive owner of the Huber Capital Stock and Property, retroactive to January 2, 2018, free and clear of any claim by [Husband]. [Wife] shall be solely responsible for all indebtedness associated with Huber and shall hold [Husband] harmless therefrom.
>
> 12. All K-1 funds and dividend distributions from January 2, 2018, to present from Huber are the sole and exclusive possession of Petitioner, free and clear of any claim by Respondent.

Appellant's App. Vol. II pp. 28-30. Similarly, the trial court found that Husband was the sole owner of Greenhouse, "retroactive to January 2, 2018," and that Husband was responsible for any debt from Greenhouse. *Id.* at 30. The "Marital Balance Spreadsheet" attached to the decree of dissolution of marriage did not list the Huber distributions as an asset of the marital estate. The trial court purported to divide the marital property equally and ordered Wife to pay Husband an equalization payment of $29,624.48. Husband now appeals.

Analysis

[16] Husband appeals the trial court's division of property in the dissolution action. The trial court's findings of fact and conclusions thereon were entered pursuant to Indiana Trial Rule 52(A), which "prohibits a reviewing court on appeal from setting aside the trial court's judgment 'unless clearly erroneous.'" *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). "When a trial court has made special findings of fact, as it did in this case, its judgment is clearly erroneous only if (i) its findings of fact do not support its conclusions of law or (ii) its conclusions of law do not support its judgment." *Id.* (citing *Estate of Reasor v. Putnam Cnty.*, 635 N.E.2d 153, 158 (Ind. 1994)). "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Id.*

[17] "The party challenging the trial court's property division bears the burden of proof." *Smith v. Smith*, 854 N.E.2d 1, 5 (Ind. Ct. App. 2006). "That party must overcome a strong presumption that the court complied with the statute and considered the evidence on each of the statutory factors." *Id.* "The presumption that a dissolution court correctly followed the law and made all the proper considerations when dividing the property is one of the strongest presumptions applicable to our consideration on appeal." *Id.* "Thus, we will reverse a property distribution only if there is no rational basis for the award." *Id.*

[18] "It is well settled that in 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." *Falatovics v. Falatovics*, 15 N.E.3d 108, 110 (Ind. Ct. App. 2014). Specifically, Indiana Code Section 31-15-7-4(a) provides:

> (a) In an action for dissolution of marriage under IC 31-15-2-2, the 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.

For purposes of dissolution, property means "all the assets of either party or both parties." Ind. Code § 31-9-2-98.

[19] "'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.'" *Falatovics*, 15 N.E.3d at 110 (quoting *Montgomery v. Faust*, 910 N.E.2d 234, 238 (Ind. Ct. App. 2009)). "'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.'" *Id.* (quoting *Wanner v. Hutchcroft*, 888 N.E.2d 260, 263 (Ind. Ct. App. 2008)). "[T]he determinative

date when identifying marital property subject to division is the date of final separation, in other words, the date the petition for dissolution was filed." *Webb v. Schleutker*, 891 N.E.2d 1144, 1149 (Ind. Ct. App. 2008); *see also Smith*, 854 N.E.2d at 6 ("The marital pot generally closes on the date the dissolution petition is filed.").

[20] Pursuant to Indiana Code Section 31-15-7-4(b), the trial court "shall divide the property in a just and reasonable manner . . . ." We "presume that an equal division of the marital property between the parties is just and reasonable." I.C. § 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.

[21] In general, "[w]hile 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." *Falatovics*, 15 N.E.3d at 110. "The systematic exclusion of any marital asset from the marital pot is erroneous." *Id.*

[22] Here, Husband and Wife owned the Huber stocks as joint tenants with the right of survivorship. The jointly owned stocks were clearly a marital asset as of the date of filing the petition for dissolution. In the Agreed Provisional Order, the parties agreed that Wife was entitled to exclusive possession of the interest in Huber. They agreed, however, that Wife's exclusive possession of the parties' interest in the Huber "will have no effect on [Husband's] ownership rights and

obligations as a shareholder in said corporation." Appellant's App. Vol. II p. 37. After the petition for dissolution was filed but prior to the dissolution of the marriage, Wife received $285,637.40 in distributions as a result of the Huber jointly owned stocks. Despite their joint ownership of the stocks, Husband did not receive any of the distributions.

[23] In the trial court's decree, the trial court first found that "an equal division of the marital property is appropriate" and the "date of valuation of the marital estate shall be the date of filing January 2, 2021 [sic]." *Id.* at 28. The trial court then awarded Wife the Huber stocks and property "retroactive to January 2, 2018." *Id.* at 30. The trial court also awarded Wife the distributions Wife received after January 2, 2018. Although the trial court specifically awarded the distributions to Wife, the "Marital Balance Spreadsheet" attached to the decree of dissolution of marriage did not list the Huber distributions as an asset of the marital estate.

[24] Husband argues that the award of the distributions earned during the pendency of the proceedings to Wife was inconsistent with their joint ownership of the stocks. Husband, moreover, argues that the award violated the terms of the Agreed Provisional Order. Husband contends that the trial court abused its discretion by awarding Wife sole ownership of the distributions at issue.

[25] Wife contends that the award of the distributions to her was proper because the distributions were acquired after the petition for dissolution was filed and the marital estate was closed on the date of the filing of the petition for dissolution.

Wife contends that "[p]roperty acquired by either spouse in his or her own right after the final separation should not be considered as a marital asset subject to division." Appellee's Br. p. 14. Alternatively, Wife argues that, if the distributions were marital property, the trial court's division of assets was proper because: (1) the distributions were directly attributable to her work at Huber; (2) Wife spent the distributions funds on attorney fees, mortgage payments, property taxes, health insurance, repairs to the marital residence; and (3) Husband's behavior increased Wife's expenses.

[26] Confusingly, in his Reply Brief, Husband agrees that the distributions were not marital property "having been made after the final separation date and the closure of the marital estate." Appellant's Reply Br. p. 7. Husband contends that the trial court, however, had "no jurisdiction or authority" to award ownership of the distributions to Wife. *Id.* at 8.

[27] We disagree with both of the parties. We addressed a similar issue in *Smith*, 854 N.E.2d at 6-7. There, at the time the petition for dissolution was filed and the marital pot closed, the parties jointly owned ten rental properties. The trial court considered the rental income, received after the petition for dissolution was filed, as a marital asset. On appeal, we agreed with the trial court and held that, because the wife and husband owned the rental properties jointly, income earned from such joint property after the petition for dissolution was filed was properly considered as a marital asset.

[28] In *Ehle v. Ehle*, 737 N.E.2d 429 (Ind. Ct. App. 2000), the trial court awarded the wife half of the parties' stocks in a joint account. A dispute arose concerning the stocks. The trial court later reopened and modified the parties' property disposition and ordered that the husband transfer to the wife "half of the stock in the joint account plus all dividends and growth that had accrued to that half since the date of separation, including the two for one stock split . . . ." *Ehle*, 737 N.E.2d at 436. This Court affirmed the trial court's revised disposition.

[29] We also take guidance from *Hudson v. Hudson*, 176 N.E.3d 464 (Ind. Ct. App. 2021), *trans. denied*, in which the husband farmed land owned by both the husband and wife during the pendency of the dissolution proceedings. Husband argued that "all of the income produced by the farm for that year should go to him, but that he should not have to pay rent for the half of the tillable acreage that belonged to Wife at the time." *Hudson*, 176 N.E.3d at 479. The trial court awarded husband the income from the farming operations during the pendency of the proceedings. *Id.* (noting that "the real estate produced income in 2020 entirely through one party's efforts and investment without the other's participation"). The trial court, however, awarded the wife $20,575.03—one-half of the fair-market rent for the land. We affirmed the trial court's division of the marital property.

[30] Here, we begin by noting our concern with the trial court's "retroactive" award of marital property to Wife. Husband and Wife owned the stocks as joint tenants with the rights of survivorship. We have held that joint tenancy with rights of survivorship of property continues "until the termination of the

marriage." *Lutz v. Lemon*, 715 N.E.2d 1268, 1271 (Ind. Ct. App. 1999).[4] The trial court's final decree, instead, awarded the stocks to Wife *retroactively* to the date of the filing of the petition for dissolution. A legal mechanism does not exist to award property retroactively.

[31] Indiana Code Section 31-15-7-4(b) allows the trial court to divide the marital property by:

> (1) division of the property in kind;
>
> (2) 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;
>
> (3) ordering the sale of the property under such conditions as the court prescribes and dividing the proceeds of the sale; or
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> (4) ordering the distribution of benefits described in IC 31-9-2-98(b)(2) or IC 31-9-2-98(b)(3) that are payable after the dissolution of marriage, by setting aside to either of the parties a

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[4] This Court held in *Anacomp, Inc. v. Wright*, 449 N.E.2d 610 (Ind. Ct. App. 1983), that:

> The law provides that the right to receive dividends is an incident of stock ownership which applies equally to stock and cash dividends. 19 Am.Jur.2d Corporations § 890 at 370 (1965). The general rule is stated that "whoever owns the stock in a corporation at the time a dividend is declared owns the dividend also. . . ." *Bright v. Lord*, (1875) 51 Ind. 272, 276; 6 I.L.E. Corporations § 102 at 506 (1958); 19 Am.Jur.2d Corporations § 890 at 371 (1965). In the words of another authority, "[s]tock dividends, like cash dividends, belong, in the absence of an agreement to the contrary, to the holders of stock at the time when the dividend is payable, and without regard to the source from which, or the time during which, the funds to be divided among the stockholders were acquired." (Footnote omitted.) 11 W. Fletcher, Cyclopedia of Corporations § 5359 at 739 (Perm.Ed.1971).

Amacomp, 449 N.E.2d at 616-17; *see generally* 6 IND. LAW ENCYC. *Corporation*s § 58.

> percentage of those payments either by assignment or in kind at the time of receipt.

[32] The statute does not provide for the retroactive transfer of property in a dissolution. Although the trial court may set the value of marital property based upon an earlier date, the trial court may not *retroactively* transfer ownership of marital property. *Cf. Becker v. Becker*, 902 N.E.2d 818, 820 (Ind. 2009) ("A trial court has discretion to make a modification of child support relate back to the date the petition to modify is filed, or any date thereafter."). Rather, the transfer of marital property, if so ordered by the trial court, occurs when the trial court issues its final decree.

[33] Husband, as a joint owner of the stocks, was entitled to share in the distributions, even during the pendency of the dissolution proceedings. As in *Smith*, the distributions earned from the jointly owned stocks should have been considered a marital asset. Accordingly, we conclude that the trial court's retroactive award of the Huber stocks to Wife and the exclusion of the distributions from the marital estate was improper.

[34] When the distributions are considered, the trial court's division of marital property was not an equal division as its findings indicate; rather, the division becomes a 28% - 72% split in favor of Wife. The trial court's decision to divide the marital pot equally was not based upon the proper determination of the marital estate. We have observed that "knowing the numerical split of the entire estate might alter the trial court's view of the appropriateness of its property division." *Falatovics*, 15 N.E.3d at 111. In such a circumstance, we

remand for the trial court to include the distributions in the marital estate and either: (1) divide the marital property pursuant to the rebuttable presumption of an equal division; or (2) set forth its rationale for an unequal division of the marital estate.[5] *See, e.g., Morey v. Morey*, 49 N.E.3d 1065, 1072 (Ind. Ct. App. 2016) ("If the trial court determines that a party has rebutted the presumption of an equal division of the marital pot and decides to deviate from an equal division, then it must state its reasoning in its findings and judgment.").

Conclusion

[35] The trial court erred by issuing a retroactive possession of property and excluding the Huber distributions from the marital estate. Accordingly, we reverse and remand for the trial court to include the distributions in the marital estate and either: (1) divide the marital property pursuant to the rebuttable

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[5] We acknowledge our Supreme Court's recent decision in *Roetter v. Roetter*, 182 N.E.3d 221, No. 21S-DC-568, 2022 WL 713363 (Ind. Mar. 10, 2022). In *Roetter*, the trial court considered all of the property in the marital estate, set aside certain assets, and then ordered an unequal division of the remaining assets. On appeal, the Court noted: "The better approach, we believe, would have been for the trial court to include all assets and liabilities in the divisible marital pot, rather than setting aside those assets and liabilities at issue before dividing the estate." *Roetter*, slip op. p. 11. The Court then held:

> But, in the end, a trial court's judgment is "tested by its substance rather than by its form." *Shafer v. Shafer*, 219 Ind. 97, 104, 37 N.E.2d 69, 72 (1941) (internal quotation marks omitted). So long as it expressly considers all assets and liabilities, and *so long as it offers sufficient findings to rebut the presumptive equal division*, a trial court need not follow a rigid, technical formula in dividing the marital estate and we will assume that it applied the law correctly. *See Luttrell* [v. *Luttrell*, 994 N.E.2d 298, 305 (Ind. Ct. App. 2013), *trans. denied*]. That's precisely what happened here.

Id. (emphasis added). We conclude that *Roetter* is distinguishable. In *Roetter*, the trial court expressly ordered an unequal division of assets and entered findings to justify the unequal division. Here, the trial court expressly found that an equal division of assets was warranted and did not offer findings to rebut the presumption of an equal division of marital assets. In such a circumstance, we cannot say that exclusion of marital assets from the marital estate was harmless error.

presumption of an equal division; or (2) set forth its rationale for an unequal division of the marital estate.

[36] Reversed and remanded.

Bradford, C.J., and Crone, J., concur.