MEMORANDUM DECISION

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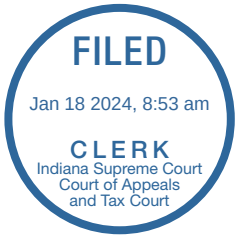

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IN THE COURT OF APPEALS OF INDIANA

Phillip Zimmerman,
Appellant-Defendant,

v.

Lisa Zimmerman,
Appellee-Plaintiff.

January 18, 2023

Court of Appeals Case No. 23A-DN-1233

Appeal from the Allen Circuit Court

The Honorable Ashley N. Hand, Judge

Trial Court Cause No. 02C01-2103-DN-272

Memorandum Decision by Judge Bailey
Judges May and Felix concur.

Bailey, Judge.

Case Summary

[1] Phillip Zimmerman ("Husband") appeals the trial court's order dissolving his marriage to Lisa Zimmerman ("Wife"). Husband raises one issue for our review, namely, whether the court clearly erred when it divided the marital estate evenly. We affirm.

Facts and Procedural History

[2] Husband and Wife met in 2011. At the time, Wife was living in a home on Ludwig Road in Allen County. Following the dissolution of his prior marriage, Husband lived in a room at a friend's house. In early 2012, Husband began living with Wife at her home on Ludwig Road, though he still maintained his room at his friend's house. In December of that year, Husband formed Zimmerman Septic Services, Inc. ("Zimmerman Septic"), and he is the sole owner of that business.

[3] When the parties met, Wife was employed by a doctor earning $13.50 per hour. In early 2013, she left that job and began working for Husband at Zimmerman Septic earning minimum wage. Wife worked as an office manager, handling the advertising and accounting as well as preparing estimates for customers.

[4] In July 2014, Husband purchased a home on Holly Ridge Run, and both Husband and Wife moved into that home together. Husband paid the down

payment and made all of the mortgage payments. Husband and Wife then married on January 15, 2016. On August 3, 2018, Wife sold her home on Ludwig Road on a land contract for $80,000. *See* Ex. Vol. 6 at 105. The purchaser paid $40,000 to Wife for the downpayment and made monthly payments thereafter.[1] Wife gave a portion of the down payment to her daughter for a down payment on a home on Oak Street, and Wife cosigned the mortgage with her daughter for that house. She used the remainder to pay off the mortgage on the Ludwig Road home. At some point during the marriage, Husband and Wife purchased a "campground site" in Pierceton as well as a camper. Tr. Vol. 2 at 26.

[5] In March 2019, Husband formed a company called Zimmerman Equity LLC ("Zimmerman Equity"). On September 17, Zimmerman Equity acquired real property on Lewis Road for the purpose of constructing a new building for Zimmerman Septic. Once the construction was complete, Zimmerman Septic moved its offices into the building on Lewis Road.

[6] Husband filed a petition to dissolve his marriage to Wife on March 10, 2021, and Wife filed a counter petition on April 14. At the time of the separation, Husband earned over $64,000 per year, and Wife earned almost $19,000 per year. Husband remained in the home on Holly Ridge Road, and Wife moved

[1] The land contract called for monthly payments of $1,000. *See* Ex. Vol. 6 at 105. However, Wife testified that the purchaser paid her $10,000 every month. *See* Tr. Vol. 2 at 148.

into an apartment. After that time, Wife received the final payment on the Ludwig Street home.

[7] The trial court held a three-day fact-finding hearing on the petitions for dissolution in December 2022 and January 2023. During the hearing, both parties testified as to their assets and presented evidence of those assets' values. Both parties sought a deviation from the presumption of an equal division of assets. Following the hearing, the court entered findings of fact and conclusions thereon dissolving the parties' marriage. In relevant part, the court concluded as follows:

> 84. Both parties are requesting that the Court deviate from the presumption [of an equal division of assets]. Wife requests the Court disproportionately divide the marital estate in her favor by awarding her Oak Street and divide the balance of the marital estate equally. Husband is requesting the Court disproportionately divide the marital estate in his favor.
>
> 85. The first statutory factor considers each spouse's contribution to the acquisition of the property, regardless of whether the contribution produced income. Indiana Code § 31-15-7-5(1). The Court finds that both parties worked during the marriage and contributed to the acquisition of the property. This statutory factor does not favor an unequal division in either parties' [sic] favor.
>
> 86. The second statutory factor considers the extent to which the property was acquired by each party before the marriage or through inheritance or gift. Indiana Code § 31-15-7-5-(2). The Court concludes this is a long-term relationship when considering the parties' cohabitation and marriage. Both parties brought assets into the marriage. Wife brought her interest in Ludwig

Road. Husband brought a mini-excavator, red work truck, and started Zimmerman Septic. This statutory factor does not favor an unequal division in either parties' [sic] favor.

87. The third statutory factor considers the economic circumstances of each party at the time when the disposition of the property is to become effective. Indiana Code § 31-15-7-5(3). Here, Husband testified that he believes the parties' present economic circumstances were substantially similar. The Court finds in 2021, Husband earned $64,832.52 and Wife earned $18,772.60. The majority of Wife's income was Unemployment Compensation. This is during the year when Husband fired Wife from Zimmerman Septic. Wife is now employed full-time and earning approximately $50,000.00 per year. The Court finds that neither party is struggling to meet their respective regular expenses at this time.

88. The fourth statutory factor considers the conduct of the parties during the marriage as related to the disposition or dissipation of their property. Indiana Code § 31-15-7-5(4). Neither party offered sufficient evidence of frivolous or unjustified spending of marital assets or otherwise any bad behavior by a spouse related to the use or misuse of marital assets. . . .

89. The fifth statutory factor considers the earnings or earning ability of the parties as related to a final division of property and a final determination of the property rights of the parties. Indiana Code § 31-15-7-5(5). Here, the parties have stipulated that neither party suffers from any physical or mental impairment affecting his or her ability to work and earn income. Husband is gainfully employed and earning an income. Upon consideration of the testimony and evidence presented at trial, the Court finds that the earnings or earning ability of the parties is not equal. Husband has a greater earning capacity but that factor alone is

not sufficient for this Court to rebut the presumption of an equal division of the marital estate.

90. The parties cohabitated for approximately four (4) years before their marriage. In *Chestnut v. Chestnut*, 499 N.E.2d 783 (Ind. Ct. App. 1986), husband and wife cohabitated for approximately two (2) years before their marriage.[2] Here, the Court has considered the actions of the parties during the four (4) year period of cohabitation in distributing the marital assets. It would be against public policy to ignore the parties' contributions during the period before marriage since they are eventually married.

* * *

92. After consideration of the arguments made by the parties regarding the division of the marital estate, the Court finds that neither party has rebutted the statutory presumption and finds that a fifty-fifty division of the marital estate is just and reasonable.

Appellant's App. Vol. 2 at 33-36. The court then evenly divided the assets and debts between Husband and Wife. This appeal ensued.

Discussion and Decision

[2] In its finding, the trial court found that the husband and wife in *Chestnut* had cohabited for two years. However, they cohabited for four years prior to the marriage. *See id*. at 784 (outlining that they began living together in 1979 and married in 1983).

[8] Husband appeals the trial court's dissolution decree. In its order, the trial court entered findings of fact and conclusions thereon. In such circumstances, our standard of review is well settled:

> 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*.

[9] Husband contends that the court erroneously divided the marital assets. The division of marital property is a two-step process in Indiana. *Estudillo v. Estudillo*, 956 N.E.2d 1084, 1090 (Ind. Ct. App. 2011). First, the trial court determines what property must be included in the marital estate. *Id*. After deciding what constitutes marital property, the trial court must then divide the marital property under the presumption that an equal split is just and reasonable. Ind. Code § 31-15-7-5.

[10] Husband specifically contends that the court erred when it did not deviate from the presumption of an equal division. Pursuant to Indiana Code section 31-15-

7-5, one party can produce evidence of the following, among other things, to demonstrate 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 the 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.

[11] The party challenging the trial court's property division bears the burden of proof. *Smith v. Smith*, 194 N.E.3d 63, 72 (Ind. Ct. App. 2022). 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*.; *see also* I.C. § 31-15-7-5. 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. *Smith*, 194 N.E.3d at 72. Thus, we will reverse a property distribution only if there is no rational basis for the award. *Id*.

[12] Here, the court considered all of the statutory factors and determined that a deviation from the presumption of an equal division was not just and reasonable. On appeal, Husband concedes that the economic circumstances of the parties and the earning or earning potential of the parties do not favor either party. However, he asserts that the remaining factors—the contribution of each spouse to the acquisition of the property, the extent to which property was acquired by each spouse before the marriage, and the conduct of the parties during the marriage as related to the property disposition—all favor an unequal distribution in his favor. We address each argument in turn.

Contribution of Each Spouse

[13] Husband first contends that the court's finding that both parties contributed to the acquisition of property "is not supported by the evidence presented at trial[.]" Appellant's Br. at 11. He contends that the evidence demonstrates that he acquired most of the property, including the Holly Ridge Run home, Zimmerman Septic, Zimmerman Equity, and his IRA. And he asserts that

"there is no evidence or findings that the parties had any joint financial accounts, debts, or titled assets except" the property at the campground. *Id*. And, because of the "overwhelming findings of [his] sole contributions," he maintains that the first statutory factor favors an unequal division of the assets. *Id*. at 12.

[14] However, Husband disregards the evidence of the assets that Wife brought to the marriage. Indeed, at the time the parties began their relationship, Wife owned the home on Ludwig Road, for which she paid all of the bills. And Husband lived at the home with Wife from early 2012 through July 2014. In addition, Wife left her job working for a doctor to take a minimum-wage job at Zimmerman Septic. Stated differently, Wife voluntarily reduced her income in order to help Husband's business. Further, Husband acknowledged at the hearing that he "paid all [his] bills and she paid all her bills." Tr. Vol. 2 at 24. And there is no dispute that the parties jointly acquired the property at the campground along with a camper. *Id*. at 26 (Husband testifying that the property in Pierceton was a "campground site that we had purchased and put a camper there."). Contrary to Husband's argument, the evidence shows that Wife contributed to the acquisition of marital property. As such, the court did not clearly err when it concluded that this factor favored neither party.

Extent to which Property was Acquired by Each Spouse Before the Marriage

[15] Husband next asserts that the court erred when it concluded that the second statutory factor did not favor either party because the court "ignored" certain

property that Husband contends he brought to the marriage, including an IRA, a property on Goshen Road, an R/C car collection, and the down payment for Holly Ridge Road.[3] Appellant's Br. at 12. This factor requires the court to consider the extent to which property was acquired by each spouse before the marriage. I.C. § 31-15-7-5(2).

[16] First, we acknowledge that, in its conclusion regarding this factor, the court only cited Wife's Ludwig property and Husband's excavator, truck, and Zimmerman septic. *See* Appellant's App. Vol. 2 at 33. However, it is clear that, while the court only identified those items in this finding, the court's recitation was not intended to be an exhaustive list of the property acquired by either party prior to the marriage. Indeed, in its findings of fact, the court clearly identified other items as marital property, including items that the parties acquired before the marriage. Specifically, the court identified as marital property the Holly Ridge Road property, which Husband acquired before the marriage; Husband's personal property, including both appraised and non-appraised items that Husband testified included items dating back to his childhood; Husband's IRA account, which Husband stopped contributing to in 2011; and Zimmerman Septic, which Husband started in 2012. Regarding the Goshen Road property, the evidence shows that Husband sold that and used the proceeds to purchase the property on Lewis Road, which is the only asset

[3] Husband does not make any contention that the court failed to include these items in the marital pot. Rather, he contends that the court failed to consider those items only as it relates to the court's consideration of the second statutory factor. *See* Appellant's Br. at 13.

owned by Zimmerman Equity and which served as the basis for the court's valuation of Zimmerman Equity. *See* Tr. at 48-49; *see also* Appellant's App. Vol. 2 at 26. Thus, we cannot agree that the court ignored those items which Husband brought into the marriage.

[17] Rather, it is clear that the court considered the full picture of what both parties brought into the marriage or acquired while in a relationship but prior to their marriage and nonetheless concluded that the second statutory factor did not favor either party. Husband has not overcome the strong presumption that the court correctly followed the law and made all the proper considerations.

[18] Still, Husband also contends that the court erred when it "factored into its consideration the length of the relationship." Appellant's Br. at 13. Specifically, Husband asserts that the court "misapplied" this Court's holding in *Chestnut v. Chestnut*, 499 N.E.2d 783 (Ind. Ct. App. 1986), when it considered the length of the parties' relationship to "offset" the second statutory factor. *Id*.

[19] In *Chestnut*, the parties lived together for four years before they married. 499 N.E.2d at 784. At the time the parties married, the husband contributed 90% of the assets while the wife contributed only 10%. *Id*. at 785. When the court dissolved the marriage, it evenly divided and distributed the marital property. *Id*. On appeal, this Court held that the trial court had not erred when it evenly divided the property, despite the short duration of the marriage. *Id*. at 786. In so holding, the Court noted that the husband and wife had cohabitated for four years, during which the wife had worked six days per week and performed

"homemaking duties." *Id*. at 787. This Court determined that it was "within the trial court's discretion to consider this evidence when distributing the marital assets" and that it would "be against public policy to ignore [the wife's] contribution during the period prior to marriage since she and [the husband] eventually married." *Id*. The court further held that, even if her "contribution during premarital cohabitation is ignored," the trial court still did not abuse its discretion because her contribution as a homemaker and to the husband's business "justif[ied] the court's division." *Id*.

[20] On appeal, Husband contends that the court misapplied *Chestnut* because, unlike in *Chestnut*, the court here did not "make any findings of fact as to the parties[']contribution during this period of cohabitation." Appellant's Br. at 13. Husband is correct that, in its conclusion number 86, which discussed the second statutory factor, the trial court did not make a specific finding regarding the parties' contributions during the period of cohabitation before they married. *See* Appellant's App. Vol. 2 at 33. However, the court made other findings as to the parties', and specifically Wife's, contributions prior to their marriage. In particular, the court found that, from January 2012 to June 2014, the parties lived together at Wife's home on Ludwig Road. *See id*. at 20. And the court also found that Wife left her job making $13.50 per hour to work for Husband's business earning only minimum wage. *See id*. at 21.

[21] In other words, the court entered specific findings that Wife made contributions during the period of cohabitation—including allowing Husband to live at her house and giving up a higher paying job to help Husband with his company.

We therefore hold that the court did not misapply *Chestnut* and that, as in that case, it was "within the trial court's discretion to consider this evidence when distributing the marital assets." *Chestnut*, 499 N.E.2d at 787. The court did not clearly err when it found that the second factor did not favor either party.

Conduct of the Parties

[22] Finally, Husband contends that the court erred when it concluded that the fourth statutory factor—the conduct of the parties—did not favor an unequal division in his favor. Husband does not dispute the court's determination that neither party "offered sufficient evidence of frivolous or unjustified spending of marital assets[.]" Appellant's App. Vol. 2 at 34. But he maintains that the court should have considered the $70,000 Wife received from the sale of the Ludwig Road property prior to the dissolution because Wife used a portion of it to pay off her own mortgage and gifted a portion to her daughter. He acknowledges that Wife's actions did not "amount[] to a dissipation of assets," but he nonetheless asserts that Wife used it for her "sole use" and thus that the court should have considered this under the fourth factor. Appellant's Br. at 15.

[23] However, again, while the court did not make a specific reference in its conclusion number 88 regarding this factor, the court clearly considered Wife's actions as they pertained to the sale of the Ludwig Road property. Specifically, the court found that Wife sold the home on Ludwig Road in 2018 and that she used a portion of the proceeds to help her daughter buy a home. *See* Appellant's App. Vol. 2 at 21. 23. But the court then included one-half of the

value of the home Wife purchased with her daughter on Oak Street as a marital asset. *See id*. at 27. In other words, the court recognized that Wife sold the Ludwig Road property and used that money to obtain a one-half interest in the home on Oak Street and properly included that house as a marital asset. Again, Husband has failed to overcome the strong presumption that the court properly considered all of the necessary factors, and we cannot say that the court erred when it concluded that the fourth statutory factor did not favor Husband.

Conclusion

[24] The court properly considered all of the necessary factors and concluded that an equal division of the assets was just and reasonable. Husband has not met his burden to show that the court erred in reaching that conclusion. We therefore affirm the trial court.

[25] Affirmed.

May, J., and Felix, J., concur.