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ATTORNEYS FOR APPELLANT:

DAVID W. STONE IV
Stone Law Office & Legal Research
Anderson, Indiana

TODD A. GLICKFIELD
Glickfield, Glickfield & Elliott
Marion, Indiana

ATTORNEY FOR APPELLEE:

MARTIN A. HARKER
Kiley, Harker & Certain
Marion, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LORENE KITTS,)
)
Appellant-Petitioner,)
)
vs.) No. 27A02-0810-CV-896
)
HOWARD K. KITTS,)
)
Appellee-Respondent.)

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0712-DR-922

June 17, 2009

MEMORANDUM DECISION-NOT FOR PUBLICATION

KIRSCH, Judge

Lorene Kitts (“Lorene”) appeals the trial court’s division of marital property in her dissolution with Howard K. Kitts (“Howard”). Lorene raises the following restated issue: whether the trial court abused its discretion by making an equal division of the marital estate.¹

We reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Howard and Lorene married on December 29, 1976. No children were born of the marriage. Howard worked for approximately three years after they were married, and retired in 1980. The parties separated in September of 2007, and Lorene petitioned for dissolution in November of 2007. At the time of the final hearing, Howard was 90 years old, and Lorene was 88 years old.

Each of the parties owned separate residences at the time of their marriage. Lorene brought into the marriage a residence in Kokomo, which was rented to tenants, and eventually sold in 1990 netting \$16,000.00 in proceeds. Howard brought into the marriage a residence from his prior marriage consisting of a house and approximately 90 acres of farm land. The parties resided in this house during the term of their marriage. The mortgage on this residence was obtained in 1959 and not paid in full until 1990, during the term of the marriage.

Sometime after the mortgage had been paid in full, Howard transferred the marital residence to his children. As part of that transfer, Howard retained a life estate in all of the

¹ Howard also seeks appellate attorney fees for his defense of this appeal. Because our decision is adverse to Howard, we do not reach this issue.

property, including the right to receive the farm rental income. Howard received that farm rental income for approximately ten years before he began gifting all of the farm income to his children. Howard did not tell Lorene about the transfer of the property or about his gifting of the farm income to his children.

At the time of the final hearing, Howard was receiving \$1,092.00 per month in income from Social Security and General Motors pension income of \$682.92 per month. In addition, he has the farm income. Lorene is retired and receives \$454.00 per month in income from Social Security.

Howard made a request for findings of fact. The final hearing was held on May 1, 2008, and the decree of dissolution was entered on June 13, 2008. Lorene now appeals.

DISCUSSION AND DECISION

When, as here, a trial court enters findings of fact and conclusions thereon pursuant to Ind. Trial Rule 52(A), we apply a two-tiered standard of review; first we determine whether the evidence supports the findings, and second, whether the findings support the judgment. *Davis v. Davis*, 889 N.E.2d 374, 379 (Ind. Ct. App. 2008). In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. *Id.* We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. *Id.* Those appealing the trial court's judgment must establish that the findings are clearly erroneous. *Id.* Findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. *Id.* We do not defer to conclusions of law, however, and evaluate

them *de novo*. *Id.*

The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of that discretion. *Normes v. Normes*, 884 N.E.2d 886, 888 (Ind. Ct. App. 2008). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances presented. *Id.* When we review a challenge to the trial court's division of marital property, we may not reweigh the evidence or assess the credibility of witnesses, and we will consider only the evidence most favorable to the trial court's disposition of marital property. *Id.*

Indiana Code section 31-15-7-5 provides that a trial court shall presume that an equal division of the marital property between the parties is just and reasonable. The court may deviate from the statutory presumption of equal distribution if a party presents relevant evidence to show that an equal division would not be just and reasonable. *Normes*, 884 N.E.2d at 888. Such evidence may include evidence of: (1) each spouse's contribution to the acquisition of property; (2) acquisition of property through gift or inheritance prior to the marriage; (3) the economic circumstances of each spouse at the time of disposition; (4) each spouse's dissipation or disposition of property during the marriage; and (5) each spouse's earning ability. Ind. Code § 31-15-7-5; *Normes*, 884 N.E.2d at 888.

A. Earning Ability of the Parties

Lorene argues that the trial court erred when it found that Howard did not dissipate assets of the marriage when he transferred the farm to his children. More compelling in our opinion, however, is the disparity in the earning ability of the parties and their contributions

to the marriage. This was a thirty-year marriage with a significant disparity in the earnings of the parties at the time of final separation. Lorene receives \$454.00 per month in income from Social Security, compared to Howard's receipt of \$683.00 per month in income from Social Security and a pension from General Motors of \$1,092.00 per month, in addition to the income from renting the farm.

The trial court found the value of the marital assets at the time of the final hearing to be \$98,158.86 with debts of \$275.00. The marital debts were distributed to Howard. We hold that in light of the significant income disparity between the parties that an equal division of the marital assets is neither just, nor reasonable and that the trial court abused its discretion in ordering an equal division. We remand with instructions to re-distribute the marital estate providing that Lorene is entitled to receive eighty per cent (80%) of the marital estate and Howard, twenty per cent (20%).

B. Maintenance

Lorene next contends that the trial court abused its discretion by failing to enter a maintenance award in her favor. Lorene testified that she had several prescriptions that were not covered by Medicare, Social Security, or Medicaid, and that she would like for Howard to continue to provide health insurance coverage for her needs. In light of our decision to remand for a re-distribution of the marital estate, we believe that Lorene will have sufficient property to support herself rendering maintenance unnecessary.

C. Pension

Lorene finally argues that the trial court erred by using the coverture fraction value of Howard's GM pension when dividing the marital estate. In the list of marital assets and their division between the parties, the trial court listed the GM pension with a value of \$3,786.05. Lorene suggests that the trial court should have used \$29,610.44, the present value of the accrued pension benefits as of the date of separation. Lorene argues that by using the coverture fraction value of the pension, the trial court made an unequal division of the assets.

The record reveals that Lorene's counsel asked Lorene at trial if she was asking "the Court for half the value of the coverture of the pension," to which she replied, "Yes." *Tr.* at 23. Furthermore, Lorene's counsel noted that Howard had not testified to any of his exhibits. *Tr.* at 98-99. Lorene's counsel stipulated to the admissibility of exhibits "A" through "S" at the close of the evidence. Exhibit "J" contained the valuation of the pension, including the coverture fraction value of the pension.

A party may not take advantage of an error that he commits, invites, or which is the natural consequence of his own neglect or misconduct. *Berman v. Cannon*, 878 N.E.2d 836, 839 (Ind. Ct. App. 2007). Invited error is not subject to review by this court. *Id.* In this case, Lorene accepted the coverture fraction value of the pension at trial. Consequently, we do not find that the trial court abused its discretion in the treatment of Howard's GM pension because Lorene invited the error.

Reversed and remanded with instructions.

NAJAM, J., concurs.

BAKER, C.J., concurs in part and dissents in part with separate opinion.

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No. 27A02-0810-CV-896

BAKER, Chief Judge, concurring in part and dissenting in part.

Although I agree with the majority’s resolution of the division of Howard’s pension, I must respectfully dissent from the majority’s conclusions regarding dissipation, division of the marital estate, and maintenance.

As for dissipation, as the majority notes, there are four factors to be considered and weighed: (1) whether the expenditure benefited the marital enterprise or was made for a purpose entirely unrelated to the marriage; (2) whether the transaction was remote in time and effect or had occurred just prior to the filing of a divorce petition; (3) whether the expenditure was excessive or de minimis; and (4) whether the dissipating party had the intent to hide, deplete, or divert the marital asset. Pitman v. Pitman, 721 N.E.2d 260, 264 (Ind. Ct. App. 1999). Furthermore, the non-dissipating party’s participation in or consent to the expenditure is a relevant consideration. Bertholet v. Bertholet, 725 N.E.2d 487, 500 (Ind. Ct. App. 2000).

I agree that the expenditure was not de minimis, that it did not benefit the marital

enterprise, and that Howard hid the transaction from Lorene until after it had occurred. But the transaction occurred seventeen years before Lorene filed the petition to dissolve the marriage. Furthermore, Lorene testified at trial that the matter of the transfer was openly discussed in her presence and she did not object. Tr. p. 96. The trial court found that Lorene admitted that Howard “always told her that he would leave the farm to his children to fulfill a promise he had made to his first wife before she died. [Lorene] never objected to this plan.” Appellant’s App. p. 6-10. Given that there is ample evidence for and against a finding of dissipation, I believe that the majority has impermissibly reweighed that evidence and assessed witness credibility. Because I believe that there is sufficient evidence in the record to support the trial court’s conclusion that no dissipation occurred, and I depart from the majority on this issue.

Next, the majority sua sponte redistributes the marital estate—a remedy that Lorene did not even request. The division of marital assets lies within the trial court’s sound discretion, Nornes v. Nornes, 884 N.E.2d 886, 888 (Ind. Ct. App. 2008), and there is a statutory presumption in favor of an equal division of marital property, I.C. § 31-15-7-5. I believe it apparent that there is insufficient evidence supporting the majority’s decision to reverse the trial court and bypass the statutory presumption in favor of an equal division of assets, especially in light of the fact that Lorene did not request this result. Therefore, because I believe that the majority again reweighed the evidence, I must dissent.²

² I also note that the majority makes its own calculation that Lorene is entitled to 85% of the marital estate. Inasmuch as it has elected to make its own factual determination, I believe it should at least provide numerical and mathematical support for its division of the estate.

Finally, the majority awards spousal maintenance to Lorene, finding that she is incapacitated. I.C. § 31-15-72. Whether or not a spouse is incapacitated requires the factfinder to weigh evidence and assess witness credibility. Here, Lorene presented no evidence at trial that she was incapacitated aside from a heart attack that had occurred four years before the petition was filed and the fact that she was on medication. If these facts sufficed to establish incapacity, there would be far, far more people eligible for spousal maintenance than the General Assembly intended. As in Matzak v. Matzak, 854 N.E.2d 918, 921 (Ind. Ct. App. 2006), Lorene “presented no medical evidence to support her claim of incapacity. We have no reports from treating or examining physicians. We have no expert testimony. We have no [other relevant medical] tests.” Lorene herself did not even testify about her physical or mental conditions.

Under these circumstances, I believe it was improper for the majority to conclude that the evidence in the record—of which there was none, including on the cost of the insurance coverage she is requesting—sufficed to find an abuse of discretion and reverse. Even more disconcerting is the majority’s decision to award Lorene more than she requested—she merely asked that Howard continue to pay for her to remain on his health insurance plan; the majority has gone several steps farther and, on no basis whatsoever that I can see, made its own calculations and ordered Howard to pay her monthly maintenance of \$660 for the rest of her life. Thus, I would affirm the trial court in this—and every—regard.