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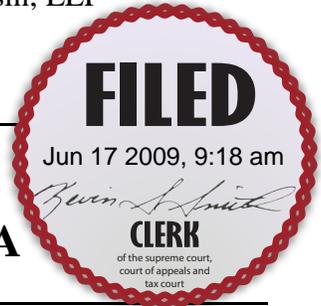
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**IN THE  
COURT OF APPEALS OF INDIANA**

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JAMES C. ASCOUGH,  
Appellant-Petitioner,

vs.

SUE ANN ASCOUGH,  
Appellee-Respondent.

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No. 79A02-0808-CV-775

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APPEAL FROM THE TIPPECANOE CIRCUIT COURT  
The Honorable Donald L. Daniel, Judge  
Cause No. 79C01-0611-DR-217

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**June 17, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

James C. Ascough (“Husband”), appeals the trial court’s decree that dissolved his marriage to Sue Ann Ascough (“Wife”), and raises the following restated issues:

- I. Whether the trial court’s unequal property division was an abuse of discretion under the circumstances before it; and
- II. Whether the trial court’s decree was internally contradictory and incomplete and, therefore, erroneous.

We vacate and remand.

### **FACTS AND PROCEDURAL HISTORY**

Husband and Wife wed in April 1958. During the course of their marriage, they raised two children. In July 2005, they separated, and Husband filed a petition for dissolution on November 15, 2006. Following the conclusion of the final hearing in June 2008, the trial court issued its Dissolution Decree (“Decree”) in July 2008, which dissolved their marriage and divided the marital property.

For forty years, Husband worked as a clinical psychologist at Wabash Valley Hospital. Approximately four years prior to the May 2008 final hearing, Husband resigned from his position at Wabash Valley Hospital and began part-time clinical work at a private practice, where he was still employed as of the final hearing. Wife worked during all but five years of the parties’ marriage, including twenty-eight years as a research assistant at Purdue University. Wife has a two-year college degree in medical technology, and, at one point, she also held an Indiana real estate license for six or seven years, but that expired about twelve to fifteen years ago. Wife handled most of the parties’ financial affairs, including management of two Florida condominiums.

Sometime in 2000, Wife's disabled brother, William Moss ("Bill"), came to Indiana from Arizona. Wife assisted her brother with his financial affairs and his health care issues. When Bill moved into a nursing home in West Lafayette, Wife put most of his money into a bank account jointly held in her name and Bill's name. Bill passed away in December 2005.

At the time of the final hearing, Husband received approximately \$1,886.00 per month in social security, and \$1,000.00 per week from his part-time employment. Wife received approximately \$943.00 per month in social security and \$366.00 per month from a Purdue Retirement Account.

As part of the dissolution, the parties asked the trial court to divide the marital assets, including real estate, bank accounts, retirement accounts, and life insurance policies, as well as personal property such as cars, a boat, and other personal belongings. As for the parties' real estate, the parties owned their Lafayette, Indiana marital residence and two Florida condominiums: (1) a two-bedroom unit; and (2) a fifty percent share of a one-bedroom unit, with Wife's friend owning the other fifty percent share. With regard to the one-bedroom condominium, both parties acknowledged that it would be difficult or simply not possible to sell it on the market since they only owned a fifty percent share of it and agreed that that property should be awarded to Wife. Husband and Wife asked the trial court to order that the two-bedroom condominium be put up for sale. As for the Lafayette marital residence, Husband requested it be sold, but Wife desired that it be awarded to her.

Also at issue was the division of the Charter One bank account, which included money that Wife contended was post-separation inheritance she received from her brother after he passed away in December 2005. Wife's expert testified at the final hearing that approximately \$84,274.76 in the Charter One account was traceable to Wife's brother Bill. Wife maintained that these monies were non-marital property or otherwise were post-separation inheritance, and she requested that \$84,274.76 be set-off to her. Husband contested the assertion that those monies constituted post-separation inheritance that should be considered non-marital property, arguing the entire balance in the Charter One account should be considered marital property subject to division.

In its July 2008 findings and conclusions, the court determined that the parties' economic circumstances and their earning capacity required an unequal division of the marital estate, with 42% (\$719,970.67) going to Husband and 58% (\$764,775.81) going to Wife. The court awarded Wife, among other things, the Indiana marital residence and the Florida one-bedroom condominium. It ordered the parties to sell their two-bedroom Florida unit. It did not make any specific finding with regard to Wife's Charter One account. In addition, to equalize the property distribution, the court ordered Husband make a payment to Wife in the amount of \$111,025.00, either from the sale of the two-bedroom condominium if sufficient proceeds are made, otherwise from his separate property, which payment was intended "to allow the wife to receive an investment return to substantially equalize the Social Security income of the parties post dissolution." *Appellant's App.* at 49. Husband was also ordered to pay Wife \$51,844.71 within sixty

days “[t]o balance the equities of the parties.” *Id.* at 51. Husband now appeals. Additional facts will be supplied as necessary.

## DISCUSSION AND DECISION

### I. Standard of Review and Applicable Statutes

In reviewing a trial court’s division of the marital estate, we assess whether the trial court abused its discretion. *Fobar v. Vonderahe*, 771 N.E.2d 57, 59 (Ind. 2002); *Eye v. Eye*, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006). An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute. *Hatten v. Hatten*, 825 N.E.2d 791, 794 (Ind. Ct. App. 2005), *trans. denied*.

Indiana Code section 31-15-7-4 states that the trial court must divide marital property in a just and reasonable manner, including property owned by either spouse prior to the marriage, acquired by either spouse after the marriage and prior to final separation, or acquired by their joint efforts. An equal division of marital property is presumed to be just and reasonable. Ind. Code § 31-15-7-5. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence of 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

(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.

Ind. Code §31-15-7-5.

Where a court deviates from an equal division, it must state its reasons. *Thompson v. Thompson*, 811 N.E.2d 888, 912 (Ind.Ct.App.2004), *trans. denied* (2005). Further, when ordering an unequal division, the trial court must consider all of the factors set out in Indiana Code section 31-15-7-5. *Eye*, 849 N.E.2d at 701.

## II. Division of Marital Estate

According to the Decree, the trial court awarded 58% of the marital estate to Wife and 42% to Husband.<sup>1</sup> *Appellant's App.* at 49. In challenging the distribution, Husband argues that the trial court erred in finding that the parties' disparate economic circumstances and Husband's greater earning ability justified an unequal split. In Finding Number 8, the court determined, in pertinent part:

Pursuant to IC § 31-15-7-5, the court has considered that each of the parties have been gainfully employed throughout most of the marriage and that the wife has been the primary overseer of the financial investments of the

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<sup>1</sup> Husband asserts the division is actually closer to 62% going to Wife and 38% to him. *Appellant's Br.* at 9, 16.

parties. The [C]ourt considers further the economic circumstances of each spouse including the ability of the husband to continue to obtain income into the future as a private practice psychologist and conversely the court has considered the practical inability of the wife to have substantial gainful employment. The Court has considered that the husband received \$1886 per month from Social Security, as well as private practice income and the wife receives \$943 per month from Social Security and no income from employment. The Court has also considered the fact that the property set over to husband is predominantly income producing while that set over to the wife is predominantly non-income producing. Based on the foregoing considerations, the court finds that an equal division of the marital property would not be just and reasonable[.]

*Appellant's App.* at 48. The trial court further determined that, "to balance the equities," a payment of \$111,025.00 from Husband to Wife, either from the sale of the two-bedroom condominium or from his separate property, "will allow the wife to receive an investment return to substantially equalize the Social Security income of the parties post dissolution," *id.* at 49, and will result in a 58% award to Wife and 42% award to Husband, "which is just and reasonable under the circumstances." *Id.* After careful consideration, we find the trial court's division to be an abuse of discretion.

We acknowledge that Husband, as a clinical psychologist for forty years, is equipped both by education and experience to have greater earning capacity than Wife. However, Husband, like Wife, is over seventy years old. The trial court's division fails to consider that Husband's earnings at the current rate are of an uncertain duration because of his age and will diminish in time. Husband maintains that, if his payment to Wife of \$111,025.00 is to equalize their retirement income earnings, "he would need to live for close to another twenty years." *Appellant's Br.* at 14. While we neither accept nor reject his calculations, we agree that the assumption he will work as a psychologist

indefinitely and at his current rate is inappropriate here. We also acknowledge that, as noted by Husband in his brief, there is nothing in the record before us to establish that Wife cannot work or that she has attempted to and has been unsuccessful in finding any employment in any capacity to subsidize her retirement income. Additionally, with regard to Wife's retirement income, Husband correctly recognizes that the trial court's Decree fails to include Wife's Purdue retirement income in the amount of approximately \$366.00 per month;<sup>2</sup> it only included the fact that she receives \$943.00 per month in Social Security. Consequently, the trial court's calculation of the discrepancy in the parties' monthly income is not accurate, nor is the resulting calculation of the amount Husband should pay to Wife in order to equalize the disparity.

Furthermore, the trial court failed to consider that Wife is receiving the marital residence, which will be free and clear of all debt once the two-bedroom Florida condominium is sold and the home equity loan on the Lafayette house is paid off, but Husband will have to incur or continue to incur housing expenses, which is relevant to determining the parties' respective economic circumstances and, ultimately, the property division.

While the disparity in the parties' earning ability does justify some deviation from the statutory presumption of an equal division, we find that the trial court's deviation is too great, is against the logic and effect of the circumstances before it, and constitutes an abuse of discretion.

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<sup>2</sup> Wife's retirement income was reflected in the proposed distributions at \$348.00 per month, but Wife testified that the amount increases annually, and she estimated the amount was approximately \$366.00 to \$375.00 per month as of the final hearing. *Tr.* at 127.

### **III. Inconsistent, Ambiguous, or Incomplete Decree Provisions**

In addition to challenging the court's unequal distribution, Husband appeals the trial court's failure to include or distribute the Charter One account in its division of property and also appeals certain other contradictory or incomplete provisions in the Decree. He asks us to reverse it and instruct the trial court to equally divide the marital estate.

Husband contends that the trial court erred by failing to distribute, or otherwise acknowledge in its distribution, the Charter One account in Wife's name. As of the date of filing of the dissolution petition (November 15, 2006), that account consisted of \$104,121.16. Wife's expert testified that approximately \$84,000.00 was traceable to Wife's brother. Specifically, Wife contends that \$84,274.76 is non-marital property and is hers by inheritance; Husband contests this assertion.

We are troubled by the Charter One account issue in a couple of respects. First, the trial court did not address the account at all. As a general matter, Indiana law considers inheritance as a marital asset that a court may, in its discretion, set aside to the inheriting person. *Stratton v. Stratton*, 834 N.E.2d 1146, 1153 (Ind. Ct. App. 2005). Here, though, Wife's brother died five months after the parties separated, so the trial court would have been within its discretion to treat the inheritance as non-marital property. Even so, the trial court should have considered it as it related to earnings and earnings potential. Ind. Code §§ 31-15-7-4, -5. Second, even accepting Wife's assertion that \$84,274.76 of the Charter One account was not subject to division as part of the marital estate, \$19,846.40 remained in the account as joint marital property, which was

not addressed or awarded to anyone in the Decree. Indeed, Wife expressly acknowledged that the \$19,846.40 was marital property. *Appellant's App.* at 6 (Wife's proposed distribution). Wife suggests that because the trial court listened to the evidence and reviewed the parties' proposed findings, there is a "strong presumption" that the trial court complied with the relevant statutes and that Husband failed to establish reversible error on this issue. *Appellee's Br.* at 14. We disagree and find the trial court's failure to address, at a minimum, the \$19,846.40 as marital funds was in error and requires the trial court's attention on remand. Ind. Code § 31-15-7-4; *see Dean v. Dean*, 439 N.E.2d 1378, 1384 (Ind. Ct. App. 1982) (where trial court failed to specifically mention in its decree that certain notes or dividends payable to husband, appellate court ruled error was harmless, but ordered trial court to modify its decree to reflect that it was awarding those assets to husband).

Next, Husband points out, and we agree, that the trial court's Decree contains inconsistent and contradictory provisions with regard to division of the proceeds of the two-bedroom Florida condominium after its sale. Paragraph 7d of the Decree states that the Florida two-bedroom condominium shall be sold and, after payment of (1) expenses of the sale, (2) a home equity loan on the Indiana marital residence, and (3) \$111,025.00 to Wife, if available after payment of the other two liabilities, the balance, if any, "shall be equally divided by the parties." *Appellant's App.* at 47. Paragraph 10, however, states that the net proceeds of the two-bedroom until shall be "divided with fifty-five percent to the Wife and forty-five percent to the husband." *Id.* at 49.

Although Wife claims these discrepancies are merely scrivener's error, we are not persuaded. As Husband asserts, these are not errors of simple language, but result in substantive error in the division of property. The language of Paragraphs 7 and 10 cause ambiguity and, in fact, conflict; therefore, trial court clarification is required.

Lastly, as we discussed in the prior section, the trial court failed to address or mention that Wife received a monthly retirement benefit from Purdue in the amount of approximately \$366.00 or more per month. This affected the trial court's determination of economic circumstances and, ultimately, its calculation of a sum payable to Wife from Husband to equalize their monthly earnings. These errors and omissions ultimately impact the division of the marital property and require correction.

Vacated and remanded for a redetermination of the distribution.

RILEY, J., and MATHIAS, J., concur.