

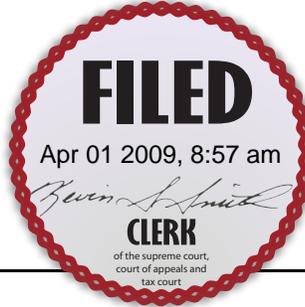
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

**C. RICHARD MARSHALL**  
Columbus, Indiana

ATTORNEY FOR APPELLEE:

**MICHAEL L. ROGERS**  
North Vernon, Indiana



---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

JOHN E. HENDRIX, )  
 )  
Appellant-Respondent/Cross-Appellee, )  
 )  
vs. )  
 )  
MARY E. HENDRIX, )  
 )  
Appellee-Petitioner/Cross-Appellant. )

No. 40A05-0811-CV-684

---

APPEAL FROM THE JENNINGS SUPERIOR COURT  
The Honorable Joseph W. Meek, Special Judge  
Cause No. 40D01-0601-DR-9

---

**April 1, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

John E. Hendrix (“Husband”) appeals from the “Amended Decree of Dissolution” (“Amended Decree”) following remand from a previous appeal, and Mary E. Hendrix (“Wife”) cross-appeals.<sup>1</sup> We affirm in part, reverse in part, and remand with instructions.

## Issues

Because Wife’s claim must be resolved before addressing Husband’s, we review her claim first. On cross-appeal, Wife raises the following issue:

- I. Whether the trial court’s findings that (1) Husband is entitled to credit for his purchase of the parties’ land and (2) Husband is entitled to credit for his contributions to the marital estate in the last eighteen months of the marriage are clearly erroneous.

On appeal, Husband presents the following question:

- II. Whether the trial court’s division of the marital estate reflects a 55/45 split in Wife’s favor as intended.

## Facts and Procedural History

Husband and Wife married on October 17, 1972, and separated on January 10, 2005. Wife filed a marriage dissolution petition on January 17, 2006. On June 27, 2006, the trial court issued its dissolution decree. In it, Wife received possession of the parties’ real estate (“the Paris Crossing Property”), a twenty-seven and one-half acre farm with a house. The land originally belonged to Husband’s grandparents, and the parties built the house during the marriage. As to the division of the marital estate, the dissolution decree quantified

---

<sup>1</sup> Husband asserts in his reply brief that Wife failed to follow the proper procedure to challenge the Amended Decree. However, Indiana Appellate Rule 9(D) provides, “An appellee may cross-appeal without filing a Notice of Appeal by raising cross-appeal issues in the appellee’s brief.” Accordingly, we address Wife’s claims.

neither the net value of the marital estate nor the percentage of the marital estate awarded to each party. However, Wife received a greater percentage of the marital estate than Husband because, according to the trial court, Husband had a greater earning capacity than Wife, there was a significant disparity in their incomes, and their marriage lasted thirty-four years. Appellant's App. at 22.

Husband appealed the amount of the marital estate awarded to Wife, arguing that the trial court's finding that the parties intended for Wife to be the sole owner of the Paris Crossing Property was clearly erroneous and that the trial court failed to consider all the relevant factors pursuant to Indiana Code Section 31-15-7-5 in dividing the marital estate.<sup>2</sup> *Hendrix v. Hendrix*, Cause No. 40A01-0610-CV-438 (Ind. Ct. App. August 23, 2007). In that memorandum decision, another panel of this court concluded that there was evidence to support the finding that the parties intended Wife to be the sole owner of the Paris Crossing

---

<sup>2</sup> Indiana Code Section 31-15-7-5 provides,

The court shall presume that an equal division of the marital property between the parties is just and reasonable. 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.

Property. The panel then turned to the division of the marital estate. The panel estimated the parties' net marital estate to be \$228,934.66, of which Wife received \$191,009.92 (83.4%) and Husband received \$37,924.74 (16.6%). Appellant's App. at 41. However, it noted that these amounts did not include items such as personal property, vehicles, and individual bank accounts to which the trial court did not assign a value. Because Husband had provided values as to some of the personal property awarded to him, the panel added this personal property to the marital estate, which resulted in a revised estimate of an 81%-19% division in Wife's favor.<sup>3</sup> *Id.* The panel concluded that the trial court had failed to consider all the factors set forth in Indiana Code Section 31-15-7-5. Specifically, the panel found that the trial court failed to consider (1) Husband's purchase of the Paris Crossing Property land prior to the marriage and (2) the parties' contributions to the acquisition of property during the marriage. *Id.* at 43. The panel remanded the case to the trial court to consider the aforementioned factors in determining a just and reasonable division of the marital estate.

On July 15, 2008, the trial court issued its Amended Decree, which provides as follows:

10. At the time of the final hearing, [Husband] and [Wife] lived on a 27 1/2 acre farm located in Paris Crossing, Jennings County, Indiana [the Paris Crossing Property]. There is a house, barn and pond on the property. At the time of the final hearing, the property had an appraised value of \$163,000.00. At the time of the final hearing, the property was secured by a mortgage. As of May 30, 2006, the balance of that mortgage was \$26,174.54. [Husband] and [Wife] took out the mortgage so a room could be added on to the house.

11. [Husband] bought [the Paris Crossing Property] from his grandparents before he and [Wife] were married. [Husband] paid \$16,000.00

---

<sup>3</sup> The total value of the property Husband valued was estimated at \$8,150.00, which increased the estimated value of the marital estate to \$237,084.66.

for the property. [Wife] did not contribute to buying the property. As a result, [Husband] should receive a \$16,000.00 offset or credit for acquiring the property where he and [Wife] lived while they were married.

12. [Husband] transferred his interest in [the Paris Crossing Property] to [Wife] on June 17, 1998. He did this through a properly executed and recorded Quitclaim Deed. It was not clear from the evidence and testimony presented at the final hearing why [Husband] transferred his interest in the property to [Wife]. It was clear from the evidence and testimony presented, however, that [Husband] and [Wife] intended for [Wife] to be the sole owner of [the Paris Crossing Property]. It was also clear from the evidence and testimony presented that the transfer was not a post nuptial agreement. As a result, the court finds that the home and farm property are marital assets.

13. [Wife] and [Husband] had a joint account from which they paid their bills including the mortgage, insurance, taxes, car payments, utilities and other household expenses. [Wife] contributed her entire paycheck to that account. Her net earnings from the Jennings County Area Plan Commission were \$647.31 every two weeks, or \$323.62 per week. [Husband] contributed between \$200.00 and \$500.00 a week to this account. During the last 12 to 18 months of their marriage, [Husband] contributed more money than usual to the account. [Husband] made these extra contributions so he and [Wife] could pay off their debts, buy a boat and so he could retire.

14. The evidence and testimony presented at the final hearing established that [Husband] contributed more to the acquisition of marital property over the last 18 months of the marriage than [Wife] did. There were 77.4 weeks during that 18 month period. [Husband] contributed at least \$500.00 a week to the joint account over those 77.4 weeks. As a result, he should receive an offset or credit of \$38,700.00 (77.4 weeks x \$500.00/week = \$38,700.00) for those contributions.

15. The evidence and testimony presented at the hearing also established that [Wife] made significant contributions to the acquisition of the marital property. She kept the finances in order, made sure the bills were made and helped manage the farm. Over the course of the marriage, [Wife's] contributions to the acquisition of marital property were greater than [Husband's] contributions.

16. Based on the evidence and testimony presented at the final hearing, and on the Indiana Court Of Appeals remand instructions, the court finds that [Wife] shall keep the following property:

A. The home and the property located at 4710 W. State Highway 250 in Paris Crossing, Jennings County, Indiana. [Wife] shall pay the mortgage on the home and property. Additionally, she shall pay all taxes, insurance and other expenses necessary to maintain the home and property. [Wife] shall hold [Husband] harmless for these expenses.

- B. All personal property currently in her possession.
- C. The vehicle currently in her possession. ....
- D. The proceeds from the farm equipment and tractor [Wife] sold. ....
- E. Her retirement account ....
- F. All bank accounts currently in her name.
- G. \$23,077.24 (50%) of [Husband's Cummins] RSP account. ....
- H. \$21,785.68 (50%) of [Husband's Cummins] pension account. ....

17. Based on the evidence and testimony presented at the final hearing, and on the Indiana Court Of Appeals remand instructions, the court finds that [Husband] shall keep the following property:

- A. The vehicle currently in his possession. ....
- B. The personal property currently in his possession.
- C. The [] lawn mower valued at \$3,500.00. The Troy Built rototiller valued at \$700.00. One of the weed eaters valued at \$250.00. One of the chain saws valued at \$100.00. The Kennedy tool boxes valued at \$1,000.00. The big screen television valued at \$2,000.00 and the freezer valued at \$600.00. ....
- D. [Husband] shall also keep all his fishing equipment, the trolling motors and their batteries, the tree stands, all of his hunting equipment, all of his tools, the chain hoist, two of the four recliners, one of the two hutches and his knife collection. ....
- E. All the proceeds (\$2,500.00) from the sale of his boat.
- F. The proceeds from all accounts at Centra Credit Union.
- G. All the proceeds (\$4,500.00) from his profit sharing bonus from Cummins.
- H. All bank accounts currently in his name.
- I. The remaining balance (\$23,077.24) of his Cummins RSP account.
- J. The remaining balance (\$21,785.68) of his Cummins pension account.

18. Based on the evidence and testimony presented at the final hearing, and on the Indiana Court of Appeals remand instructions, the court finds that [Wife] shall be responsible for the following debts:

- A. The mortgage on the house and farm property.
- B. The \$1,757.16 owed to Rhodes Furniture. ....
- C. \$3,101.23 (50%) of the debt owed on the Blue-Green vacation package. ....
- D. Any debts incurred in her name since she and [Husband] have been separated.

....

19. ... [Husband] shall be responsible for the following debts:
  - A. \$5,100.68 owed on the Chase Visa credit card. ....
  - B. \$3,101.23 (50%) of the debt owed on the Blue-Green vacation package. ....
  - C. Any debts incurred in his name since he and [Wife] have been separated.

....

21. The court notes that the distribution of property and debts deviates from the presumptive distribution of property and debts contemplated by section 31-15-7-4 of the Indiana Code. According to the court's calculations, and with giving John credits for buying the farm property and his greater contribution for acquiring marital property over the last 18 months of the marriage, this distribution results in [Wife] receiving 55% of the marital estate and [Husband] receiving 45% of the marital estate.

22. The court finds that this deviation is appropriate for three reasons. First, [Husband's] earning capacity is greater than [Wife's]. Second, there is a significant disparity in their incomes. Third, [Wife] contributed more to acquiring marital property during the course of the marriage than [Husband] did.

*Id.* at 9-14.

In addition to Findings 11 and 14, the Amended Decree differs from the original decree in that it (1) reduces the amounts Wife receives from Husband's Cummins RSP and pension accounts from 55% to 50%, (2) increases Husband's award from the sale of the boat from 50% to 100%, (3) specifically indicates that the division of the marital estate is 55/45 in Wife's favor, and (4) in justifying the deviation from the presumptive 50/50 split, revises the third reason from the duration of the marriage to Wife's greater contribution toward acquiring marital property.

On August 14, 2008, Husband filed a motion to correct error, alleging that although the trial court correctly found that he was entitled to offsets or credits of \$16,000 and \$38,700, its distribution of the marital estate failed to provide him with assets or property

representing these funds. On November 5, 2008, the trial court issued an order denying Husband's motion to correct error. The order states that the offsets of \$16,000 and \$38,700 were included in the final distribution of the marital estate and that without these offsets, Husband would have to pay or provide some cash equalization to Wife. *Id.* at 91. This appeal ensued.

## **Discussion and Decision**

### ***I. Wife's Cross-Appeal***

Wife contends that on remand the trial court erred in finding that Husband was entitled to a \$16,000 credit representing his purchase of the Paris Crossing Property land (Finding 11) and that Husband was entitled to a \$38,700 credit for his contributions to the parties' joint bank account during the last eighteen months of marriage (Finding 14). Initially, we note that Husband failed to respond to the substance of Wife's cross-appeal. "An appellee's failure to respond to an issue raised by an appellant is akin to failure to file a brief." *Newman v. State*, 719 N.E.2d 832, 838 (Ind. Ct. App. 1999), *trans. denied* (2000). "This circumstance does not, however, relieve us of our obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required." *Id.* In such a case, we review the claim for prima facie error or error "at first sight, on first appearance, or on the face of it." *Id.*

Where a trial court has entered findings of fact and conclusions thereon, we engage in the following two-tiered standard of review:

We must first determine whether the evidence supports the findings of fact and then whether the findings support the judgment. We will not reverse the trial

court's findings and judgment unless they are clearly erroneous. Findings of fact are clearly erroneous when the record lacks any facts or reasonable inferences from the evidence to support them. The judgment is clearly erroneous when it is unsupported by the findings of fact and conclusions entered on the findings. In making these determinations, we will neither reweigh the evidence nor judge witness credibility, considering only the evidence favorable to the judgment and all reasonable inferences therefrom.

While we defer substantially to findings of fact, we do not do so for conclusions of law. We apply a de novo standard of review to conclusions of law and owe no deference to the trial court's determination of such questions.

*Mueller v. Karns*, 873 N.E.2d 652, 657 (Ind. Ct. App. 2007) (citations omitted).

Turning first to the trial court's finding that Husband is entitled to a \$16,000 credit for his purchase of the Paris Crossing Property land (Finding 11), our review of the record shows that Husband testified that (1) he bought the land on which the marital home was built, (2) he "believed" the land was purchased before the marriage, (3) he paid \$16,000 for the land, and (4) Wife made no contributions toward that purchase. Appellant's App. at 199. Wife testified that Husband purchased the land before they got married. *Id.* at 174. She further testified that she could not recall contributing anything toward the purchase of the land. *Id.* As such, the record contains facts and reasonable inferences that support the trial court's finding that Husband bought the property from his grandparents before he and Wife were married for \$16,000 and should receive a \$16,000 offset or credit. We therefore conclude that Wife has failed to make a prima facie showing that Finding 11 is clearly erroneous.<sup>4</sup>

---

<sup>4</sup> Wife contends that the Paris Crossing Property was transferred by Husband's grandparents to both Husband and Wife, citing a deed in her appellee's appendix. However, our review of the exhibits does not reveal a copy of that deed. "It is well settled that matters outside the record cannot be considered by this court on appeal." *Schaefer v. Kumar*, 804 N.E.2d 184, 187 n.3 (Ind. Ct. App. 2004), *trans. denied*. As the deed does not appear to have been admitted as evidence, we decline to consider it.

Next, Wife challenges Finding 14, in which the trial court found that Husband contributed more than Wife to the acquisition of marital property in the last eighteen months of marriage, and therefore Husband is entitled to an offset or credit of \$38,700 (77.4 weeks x \$500/week = \$38,700). Wife states that the 77.4-week time frame represents the period between the date of separation, January 10, 2005, and the date when the first dissolution decree was issued, June 27, 2006. She contends that Husband made payments of \$500 a week during that time as maintenance and therefore is not entitled to credit for it. She notes that the trial court issued a provisional order on April 6, 2006, specifically ordering Husband to pay maintenance to her in the sum of \$500 per week. Appellee's App. at 13. Thus, Husband paid \$500 per week for approximately twelve weeks pursuant to the provisional order. As to the remaining sixty-five weeks, we note that Husband testified that he was voluntarily paying Wife \$500 as maintenance. Appellant's App. at 207-08. As such, we conclude that Wife has established a prima facie showing that Husband is not entitled to a \$38,700 credit, and therefore Finding 14 is clearly erroneous.

## ***II. Division of Marital Estate***

Husband does not challenge the 55/45 division of the marital estate in Wife's favor. Rather, Husband asserts that the trial court's division of the marital estate fails to account for the credits to which he is entitled. We note that the Amended Decree fails to explain how its distribution of marital assets and debts effectuates the 55/45 split in Wife's favor. On the first appeal, another panel of this court found that the initial dissolution decree awarded Wife 81% and Husband 19% of the marital estate. On remand, the trial court found that Husband

was entitled to credits equaling \$44,700 (\$16,000 + \$38,700). However, the Amended Decree changed the distribution of the marital assets and debts in only two respects: (1) rather than receiving 55% of Husband's Cummins RSP and Pension accounts, Wife is awarded 50% of each account; and (2) Wife's award of one-half of the proceeds from the sale of the boat is removed and Husband is awarded 100% of the sale proceeds. The total difference results in a decrease of \$5,736.28 in Wife's share of the estate and a corresponding increase in Husband's share of the estate. Thus, it appears Husband is correct that the distribution of the marital estate in the Amended Decree does not reflect credits in his favor of \$44,700. However, given our resolution of Wife's cross appeal, Husband is not entitled to a credit of \$44,700 but rather to a credit of \$16,000.

Accordingly, we remand to the trial court with the following instructions. The trial court is instructed to calculate the net value of the marital estate and, to reflect Husband's aforementioned credit, set off to Husband \$16,000 from the net value. From the remainder, the trial court will calculate the 55/45 split in Wife's favor. In other words, the marital estate should be divided such that Wife receives 55% of the value of the marital estate *after* \$16,000 has been set off to Husband. The trial court should make any necessary adjustments so as to effectuate such a distribution.

Affirmed in part, reversed in part, and remanded with instructions.

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