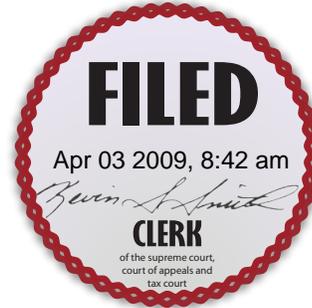


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KRISTINA K. BRENNAN,
Appellant-Respondent,

vs.

CHRISTOPHER J. BRENNAN,
Appellee-Petitioner.

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No. 91A04-0810-CV-602

APPEAL FROM THE WHITE CIRCUIT COURT
The Honorable John D. Potter, Special Judge
Cause No. 91C01-0605-DR-62

April 3, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Kristina K. Brennan (“Wife”) appeals the trial court’s dissolution decree as well as the trial court’s grant of the motion to correct error filed by Christopher J. Brennan (“Husband”).

We affirm in part, reverse in part, and remand with instructions.

Issues

- I. Did the trial court err by ordering an unequal division of property in its January 28, 2008 dissolution decree?
- II. Did the trial court err by granting Husband’s motion to correct error?

Facts and Procedural History

Husband and Wife married on February 14, 1992, and had one child. Prior to the marriage, Wife’s parents owned real estate on Lake Freeman in Monticello, Indiana. There were two buildings on the property, the main residence and a boathouse. In October 1991, Wife’s parents executed and recorded a quit claim deed, adding Wife as a joint tenant with right of survivorship. Soon thereafter, Wife began living in the boathouse. After Husband and Wife married, they moved into the main residence. In September 1993, Wife and her parents executed a quit claim deed, again naming themselves and Wife as joint tenants with right of survivorship and identifying Wife by her married name.

Wife’s parents lived in Gulf Shores, Alabama, and used the boathouse as a second home. Husband, who worked in the construction industry, added many improvements to the main residence, including a great room, bedroom, bathroom, and porch. From 1995 to 2001, Husband was the sole breadwinner for the family. Husband’s name was never added to the property’s list of owners.

At the time of their marriage, Husband owned a construction business which began as a sole proprietorship and later was incorporated as a sub-S corporation. In December 2006, Husband closed the business, at which time its primary asset was an accounts receivable balance in the amount of \$197,000. On May 26, 2006, Husband filed a petition for dissolution of marriage. On June 7, 2006, Wife filed a counter-petition for dissolution of marriage and a counter-petition for provisional orders. On October 10, 2007, the trial court held a final hearing in the case and entered an order as to custody and child support issues but took under advisement all issues regarding division of property and debt. On January 28, 2008, the trial court entered findings of fact and conclusions of law regarding division of property and debts.

On February 27, 2008, Husband filed a motion to correct error and motion for relief from judgment. On May 9, 2008, the trial court held a hearing on Husband's motion. On July 20, 2008, the trial court granted in part Husband's motion to correct error and ordered several modifications to the decree of dissolution. On August 25, 2008, Wife filed a motion to correct error, which the trial court denied. Wife now appeals portions of both trial court orders.

Discussion and Decision

I. Dissolution Decree

Wife appeals the trial court's January 28, 2008, decision to divide the marital estate unequally in Husband's favor. Husband argues that Wife has failed to timely appeal that particular order and therefore waives this issue. He cites several cases for the proposition

that an issue must be raised in a motion to correct error before it can be appealed. *See, e.g., Martin v. Grutka*, 278 N.E.2d 586, 591, 151 Ind. App. 167, 175 (1972) (failure to preserve an issue by filing a motion to correct errors prevents assertion of that error on appeal); *see also Lewis v. State*, 332 N.E.2d 107, 108, 165 Ind. App. 267, 269 (1975) (issues not contained in a motion to correct error or supporting memorandum need not be considered by the Court of Appeals). As Wife notes, however, these cases are unpersuasive because they were decided prior to the adoption of Indiana Appellate Rule 9(A)(1) on January 1, 2001, and prior to significant revisions of Indiana Trial Rule 59. Appellate Rule 9(A)(1) states in pertinent part:

A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court's ruling on such motion, or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

Moreover, Indiana Trial Rule 59(A) states that “[a] motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address ... [n]ewly discovered material evidence ... or ... a claim that a jury verdict is excessive or inadequate. All other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief.”

In this case, the trial court issued the dissolution decree on January 28, 2008. Husband filed a motion to correct error on February 27, 2008, within thirty days of the order. On May 9, 2008, a hearing was held on Husband's motion. On July 30, 2008, the trial court, having obtained from our supreme court an order granting an extension of time to rule on Husband's motion, granted the motion in part. On August 25, 2008, Wife filed a motion to

correct error, challenging the trial court's order on Husband's motion to correct error. On August 29, 2008, the trial court denied Wife's motion to correct error. On September 8, 2008, Wife filed her notice of appeal with the trial court, raising, inter alia, the issue of the trial court's unequal division of the marital estate in the original dissolution decree.

Even before the rule revisions noted above, another panel of this Court held that a party who is prejudiced by the trial court's granting of his opponent's motion to correct error does not have to file his own motion to correct error in order to raise new allegations of error. *See Groves v. First Nat'l Bank of Valparaiso*, 518 N.E.2d 819, 827-28 (Ind. Ct. App. 1988), *trans. denied*. The Court noted that to hold otherwise would contradict "the underlying philosophy of our appellate rules, which seek to facilitate, and not to frustrate, appellate review." *Id.* at 828. The current rules more clearly reflect this philosophy.

Husband filed his motion to correct error within thirty days of the trial court's dissolution decree. Wife filed her motion to correct error within thirty days of the trial court's grant of Husband's motion to correct error, an appealable final judgment pursuant to Indiana Trial Rule 59(F). Wife timely filed her notice of appeal within thirty days of the trial court's denial of her motion to correct error, thus complying with Indiana Appellate Rule 9(A)(1). In sum, Wife may properly claim error related to the original dissolution decree—in this case, the unequal division of the marital estate—for the first time on appeal.

The trial court issued, at Husband's request, findings of fact and conclusions of law. Our standard of review is well-settled.

First, we determine whether the evidence supports the findings. Second, we determine whether the findings support the judgment. Only when the record

contains no facts to support the findings, either directly or by inference, will we hold the findings to be clearly erroneous. A judgment is clearly erroneous only when the trial court applies the wrong legal standard to the properly found facts. In order to determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made.

Brackin v. Brackin, 894 N.E.2d 206, 210 (Ind. Ct. App. 2008) (citations omitted).

Wife argues that the trial court erred by failing to divide Husband and Wife’s marital estate equally, as is the presumption pursuant to Indiana statutory law and caselaw. *See* Ind. Code §31-15-7-4; *see also Leonard v. Leonard*, 877 N.E.2d 896, 900 (Ind. Ct. App. 2007) (an equal division of marital property is presumed just and reasonable). Our review of the record indicates that the trial court’s two orders, when considered together, call for the division of property as follows:

<u>WIFE</u>		<u>HUSBAND</u>	
Marital Residence	\$93,352.51	Brennan Construction, Inc.	
		-Accounts Receivable	\$ 49,567.00
Regions Bank Account	\$ 5,017.23	-Tools	\$ 2,500.00
		-Vehicles	\$ 2,500.00
PERF	\$ 1,574.70	IFCU Bank Account	\$ 500.00
IRA	\$37,161.13	IFCU Business Account	\$ 4,172.00
Payment to Husband	(\$34,461.76)	Prudential Life Insurance	\$ 10,000.00
		Wife’s IRA	\$ 7,997.16
		Loan Amounts	
		dissipated by Husband	\$ 16,000.00
		Payment from Wife	\$ 34,461.76
<u>TOTAL:</u>	\$102,643.81	<u>TOTAL:</u>	\$127,697.92

Appellant’s App. at 16-30, Appellant’s Br. at 12. These figures indicate that the trial court ultimately awarded forty-five percent of the marital estate to Wife and fifty-five percent to Husband.

The presumption of an equal division of the marital estate may be rebutted by a party who presents relevant evidence, including evidence concerning 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 before the marriage, or through inheritance or gift; (3) the economic circumstances of each spouse as of 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 that residence for such periods as the court may deem 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; and (5) the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties. *See* Ind. Code § 31-15-7-5.

The party challenging the trial court's division of a marital estate must overcome a strong presumption that the trial court complied with the relevant statute and considered evidence on each of the statutory factors. *Thompson v. Thompson*, 811 N.E.2d 888, 913 (Ind. Ct. App. 2004), *trans. denied* (2005). While the trial court cited most of the factors listed above, its findings fail to support an unequal division of property in favor of Husband. Arguably, the findings of fact support an unequal division in favor of Wife. For example, the trial court found that the marital residence was acquired by Wife prior to the marriage, that Husband did not have ownership in the marital residence, that Husband's business failure resulted in the dissipation of marital funds, and that the parties have similar incomes. *See*

Appellant's App. at 25-28. In sum, the trial court failed to explain why it deviated from the presumption of an equal division of property in this case, and the trial court's findings do not support this deviation. Therefore, we must conclude that Wife has overcome the presumption that the trial court considered the proper factors and evidence. If the trial court intends to effectuate something other than a 50/50 distribution, it is necessary for the court to affirmatively indicate that and set out the factors which support such a division. We hereby reverse the trial court's orders regarding division of the marital estate and remand for further proceedings consistent with this opinion.

II. Motion to Correct Error

A. Wife's Share of Marital Residence

Wife also appeals the trial court's grant of Husband's motion to correct error on three issues. First, Wife argues that in the trial court's second order, it charged her with the entire net equity of the marital residence, rather than one-third of the net equity. On January 28, 2008, the trial court found that "the fair market value of the house was \$300,000.00 and the Wife owned an undivided one-third interest in the property." *Id.* at 18. Clearly, the evidence supported this finding, as the deed to the real estate in question was in the names of Wife and both of her parents as joint tenants in the entirety. On July 30, 2008, in the trial court's order on Husband's motion to correct error and motion for relief from judgment, the trial court ordered Wife to pay \$34,461.76 to Husband to buy out his so-called "share of the parties' marital residence." *Id.* at 22-23. Wife speculates that the trial court came up with this amount by using the total net equity in its calculations. Unfortunately, the trial court did

not explain how it arrived at this payment amount, and since the payment results in a substantial deviation from an equal division, we reverse and remand for entry of a new property division.

B. Valuation of Brennan Construction, Inc.'s Assets

Wife also appeals the trial court's grant of Husband's motion to correct error on the valuation of Brennan Construction, Inc.'s primary asset, one account receivable of \$197,670.00. In its original order, the trial court determined that the Husband be awarded all interest in Brennan Construction including any equipment or property, and the court credited him with \$197,670.00 as well as the account receivable in the amount of \$197,670. In his motion to correct error, Husband reminded the trial court that he had entered into evidence a prepared list of assets and liabilities, which outlined the specific debts to be paid from the proceeds of the account receivable and the specific net value of \$49,567.00. Husband's Exh. 3. In its order on Husband's motion to correct error, the trial court found that "Husband expects to receive the sum of \$49,567.00 from a mechanic's lien case." Appellant's App. at 28.

Wife argues that Husband's assets and liabilities list was merely speculative and thus should not have been considered by the trial court for the purpose of valuing Brennan Construction, Inc. As Husband points out, however, he did testify that Exhibit 3 accurately represented the couple's assets and liabilities, and Wife failed to provide any evidence to rebut Husband's claimed liabilities related to Brennan Construction, Inc. Thus, we conclude that the trial court did not abuse its discretion by granting Husband's motion to correct error

on this issue and reducing the value of Brennan Construction, Inc.'s assets to \$49,567.35.

C. Wife's IRA

Finally, Wife appeals the trial court's grant of Husband's motion to correct errors on the issue of dividing her IRA. In the trial court's original order, it found that the parties had agreed to offset \$10,000 in life insurance cash value that was liquidated by Husband while the case was pending. In his motion to correct error, Husband suggested that the parties' agreement regarding the IRA was simply to deduct the pre-marital value of the fund, which was \$9,263.96, and then divide the remaining balance equally between Husband and Wife. In his appellate brief, Husband seems to concede that the parties had agreed to do both of the above, so that Husband should receive \$7,997.16 from Wife's IRA, and Wife should retain the rest of the fund. Since we are remanding for revision of the property division in any event, we leave it for the trial court's reconsideration.

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

ROBB, J., and BROWN, J., concur.