

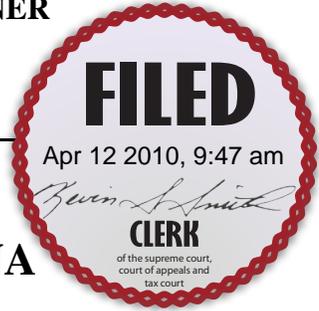
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**IN THE  
COURT OF APPEALS OF INDIANA**

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KATHLEEN KLEEMAN, )  
DENNIS AVERY, LINDA HALL, and )  
DIANA CORNELL, )

Appellants-Petitioners, )

vs. )

MARLENE DECKER, )

Appellee-Respondent. )

No. 74A01-0908-CV-412

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APPEAL FROM THE SPENCER CIRCUIT COURT  
The Honorable Robert R. Aylsworth, Special Judge  
Cause No. 74C01-0512-ES-50

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**April 12, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Kathleen Kleeman, Dennis Avery, Linda Hall, and Diana Cornell (collectively, “the Siblings”) filed an Information for Contempt against their sister, Marlene Decker (“Decker”), alleging that she was in possession of certain personal property belonging to their deceased mother’s estate. The trial court denied their contempt petition and their subsequent motion to correct error, and the Siblings now appeal, raising several issues that we consolidate and restate as: whether the trial court abused its discretion when it denied the Siblings’ motion to correct error, which they filed after the trial court denied their Information for Contempt against Decker.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

This is the parties’ second visit to the Court of Appeals on issues related to the Estate of Frances L. Helbling, their mother, who died on December 10, 2005. In the first appeal, published at *Decker v. Zengler*, 883 N.E.2d 839 (Ind. Ct. App. 2008), *trans. denied*, Decker appealed the trial court’s denial of her motion for summary judgment and its grant of the Siblings’ summary judgment on the issue of ownership of several bank accounts that Decker jointly owned with Helbling. The trial court had granted the Siblings’ motion for summary judgment and thereby determined that the accounts should be divided equally pursuant to the terms of Helbling’s last will and testament. We reversed, finding that the Siblings had failed to overcome the statutory presumption of Indiana Code section 32-17-11-18 in favor of a right of survivorship and thus Decker was entitled to summary judgment as to ownership of the jointly held accounts. *Decker*, 883 N.E.2d at 845. In this appeal, the property at issue is

Helbling's jewelry and certain guns that Helbling's husband had owned prior to his death. In *Decker*, a panel of this court touched on the issue of the guns and jewelry in Footnote 3, noting:

The trial court also held that Helbling's firearms and jewelry, both in Decker's possession after Helbling died, were to be returned to the Estate. Decker does not appeal the trial court's grant of summary judgment to the Siblings and the Estate concerning the firearms and jewelry.

*Id.* at 842. Following the previous appeal, the Siblings filed an Information for Contempt, alleging that Decker had failed to return "numerous guns" and "numerous rings" to the Estate as required by the trial court's summary judgment order. *Appellants' App.* at 21.

At the hearing on the contempt motion, the Siblings and some of their children testified about their knowledge of the jewelry and guns, including (1) what jewelry Helbling possessed before her death and the estimated values of the pieces, (2) whether she wore certain rings to the hospital on the night of her death, (3) that Decker and her daughters had a key to Helbling's residence, and (4) that Decker and/or her daughters were seen at Helbling's residence on several occasions after Helbling's death. Decker testified that she had already turned over to the Estate all jewelry and guns in her possession, which consisted of two guns and some rings. Decker's daughters also testified on her behalf. The Siblings maintained there were additional guns that were not accounted for, and the jewelry that Decker gave to the Estate's special administrator was not Helbling's jewelry. At the conclusion of the hearing, the trial court denied the Information for Contempt as follows:

The heirs have no direct evidence that Ms. Decker received or took jewelry. Circumstantial evidence might suggest an opportunity to do so. There was no family in the ambulance that went with Ms. Helbling to the

hospital in Owensboro on the December 10<sup>th</sup> date she was transported there. There is no receipt from the hospital or any other documentation showing that, in fact, Ms. Decker received anything from the hospital that went with Mrs. Helbling when she went from the hospital that evening. Ms. Decker, on the other hand, has given testimony in direct evidence that she does not have the jewelry or the guns the heirs believe she does have. She absolutely denies the allegations made in the Information for Contempt.

Based upon the evidence presented, the heirs cannot prove by a preponderance of the evidence, as they would have to prove, that their allegations in their June 25<sup>th</sup>, 2008, Information for Contempt are true, and based upon the absence of direct evidence putting this property in Ms. Decker's hands after Ms. Helbling died, the Court, pursuant to law, must deny the heirs' Information for Contempt and find Ms. Decker is not in contempt of Court.

*Appellants' App.* at 363-64. The Siblings filed a motion to correct error, which the trial court denied after a hearing.<sup>1</sup> The Siblings now appeal. Additional facts will be supplied as necessary.

## **DISCUSSION AND DECISION**

The Siblings assert that the trial court erred in denying their motion to correct error challenging the trial court's decision to deny their Information for Contempt. We review the trial court's decision to deny a motion to correct error for an abuse of discretion. *Benjamin v. Benjamin*, 849 N.E.2d 719, 723 (Ind. Ct. App. 2006). An abuse of discretion will be found when the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences that may be drawn therefrom. *Id.* An abuse of discretion also

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<sup>1</sup> According to the parties, the Estate was "effectively clos[ed]" on September 2, 2009, when the trial court entered its "Final Decree Allowing Final Account, Directing Payment of Claims and Distribution." *Appellants' Br.* at 2; *see also Appellee's Br.* at 1 (agreeing with Appellants' Statement of the Case); *Appellants' App.* at 80-81.

results from a trial court's decision that is without reason or is based upon impermissible reasons or considerations. *Id.*

Whether a party is in contempt is a matter left to the sound discretion of the trial court, and we reverse the trial court's finding of contempt only if it is against the logic and effect of the evidence before it or is contrary to law. *Reed Sign Serv., Inc. v. Reid*, 755 N.E.2d 690, 698 (Ind. Ct. App. 2001), *trans. denied* (2002). When reviewing a contempt order, we will neither reweigh the evidence nor judge the credibility of witnesses, and unless after a review of the entire record we have a firm and definite belief a mistake has been made by the trial court, the trial court's judgment will be affirmed. *Id.*

Here, at the hearing on their Information for Contempt, the Siblings presented evidence identifying the various rings at issue and their values. Kleeman testified that she previously had loaned two of her own rings to her mother, but never got them back after her mother's death. Other evidence indicated that when Helbling was transported to the hospital on the night of her death she was wearing some of her rings and that only Decker, her boyfriend, her daughters and their spouses viewed Helbling's body that night. They also presented evidence that Decker signed a hospital document accepting responsibility for Helbling's personal belongings. The Siblings or their family members testified to having seen Decker or her daughters in Helbling's house on dates after Helbling's death. The Estate's special administrator testified that he did not find any jewelry at Helbling's residence when he went there after her death. The Siblings also presented evidence that Decker at one point in time had seven of Helbling's guns and a gun cabinet, but she turned over only two to

the Estate. One of the Siblings' children testified to having seen Decker wearing one or more of Helbling's rings sometime after Helbling's death. Decker, in response, flatly denied having, either now or previously, any additional guns in her possession beyond the two she produced to the Estate's special administrator. She maintained that she already had turned over all of her mother's jewelry to the special administrator, and she denied having in her possession any other rings belonging to either Helbling or Kleeman.

We recognize that Decker's testimony conflicted with that of the Siblings and, at times, with her own prior testimony given under oath during her deposition. For instance, at one point, Decker testified to having possessed seven of her father's guns and his gun cabinet at her home. *Appellants' App.* at 119-20. Later testified that she had possessed only four guns (and Helbling had given two to grandsons, leaving the two that she tendered to the Estate) and that she never had possessed the gun cabinet. *Id.* at 313-16, 321. Her testimony was not entirely consistent with the testimony of her daughters with regard to whether Helbling's hands and rings, if any, could be seen when Decker and her daughters viewed Helbling at the hospital as she lay under a sheet or blanket. *Id.* at 312, 332, 342. However, the trial court is assigned the job of assessing the credibility and weight to afford testimony; any conflicts in the evidence are not to be reweighed on judicial review. *Norris v. Pethe*, 833 N.E.2d 1024, 1029 (Ind. Ct. App. 2009) (when reviewing contempt order, appellate court neither reweighs evidence nor judges witness credibility).

The Siblings argue that Decker's testimony is so fraught with inconsistencies that the trial court should have given it no weight at all, and they ask that we extend Indiana's

“incredible dubiousity” rule,<sup>2</sup> which has been applied only in criminal matters, to this civil case. We decline to do so here. Although the trial court’s order ultimately determined that the Siblings failed to “prove by a preponderance of the evidence . . . that their allegations in their . . . Information for Contempt are true,” the tone of the trial court’s decision reflects its awareness of the evidentiary inconsistencies:

If it is shown at a later date that Ms. Decker was not truthful in her direct testimony denying these allegations regarding her possession of either the jewelry—items of jewelry or the guns, then other issues may arise for her as a result of that. But under the circumstances, and based upon the evidence presented, the Court must deny the heirs’ Information for Contempt[.]

*Appellants’ App.* at 364. In this case, the Siblings’ motion to correct error was based on alleged conflicts, inconsistencies, and discrepancies in Decker’s testimony before and during the hearings on the contempt motion. The trial court’s decision to deny the Siblings’ motion to correct error was not without reason and was not an abuse of discretion.

Affirmed.<sup>3</sup>

DARDEN, J., and MAY, J., concur.

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<sup>2</sup> Under the “incredible dubiousity” rule, a reviewing court may infringe upon a jury’s function to determine the credibility of witnesses. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). The rule provides that if a sole witness presents inherently improbable testimony, and there is a complete lack of circumstantial evidence, a defendant’s conviction may be reversed. *Id.* It is appropriate only in cases where the trial court is confronted with inherently improbable testimony or “coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity.” *Id.* Its application is rare, and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Id.*

<sup>3</sup> We do not find that the Siblings’ appeal was meritless or frivolous; accordingly, we hereby deny Decker’s request for appellate attorney fees. Ind. Appellate Rule 66(E) (appellate court may assess damages, including attorneys’ fees, if an appeal, petition, or motion, or response, is frivolous or in bad faith).