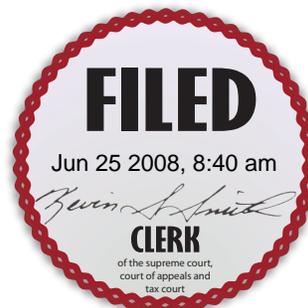


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE MARRIAGE OF)

MARK GALLAGHER,)

Appellant-Petitioner,)

vs.)

No. 71A05-0711-CV-654

KATHLEEN GALLAGHER,)

Appellee-Respondent.)

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
Cause No. 71C01-0407-DR-347

June 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Mark Gallagher (“Husband”) appeals the trial court’s order as to the division of assets and debts in the dissolution of his marriage to Kathleen Gallagher (“Wife”). Husband raises two issues, which we consolidate and restate as whether the trial court abused its discretion in dividing the marital assets and debts.¹ We affirm in part, reverse in part, and remand.

The relevant facts follow. Husband and Wife were married on September 2, 1977. In 1993, Husband and Wife formed Gallagher Engineered Systems, Inc. (“GES”). Husband was originally the sole shareholder of GES. Husband later transferred fifty-one of the one hundred shares to Wife because Husband and Wife thought that it would benefit GES to become a “Women’s Business Enterprise.” Transcript at 27. Husband was an engineer and worked as a sales representative. Wife performed the “book work,” taxes, accounts payable, accounts receivable, and debt collection. *Id.* at 268.

In 1996, Husband and Wife purchased a building on U.S. 31 South and operated GES from this building until April 2007. GES paid Husband and Wife monthly rent payments in the amount of \$2,000, and they in turn paid the mortgage, which was approximately \$871. Specifically, Husband and Wife each received \$1,000 in rent, and they each paid half of the mortgage.

On July 14, 2004, Husband and Wife separated, and Husband filed a petition for dissolution of marriage. For a year and a half, GES was under Husband’s control. For a period of time, GES did not pay Wife rent payments. On April 20, 2007, Husband

¹ Husband did not include the trial court’s judgment with his brief, and we direct his attention to Ind. App. Rule 46(A)(10) which requires an appellant’s brief to “include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal.”

resigned from GES. Husband told Wife that she could have GES, and he formed a new corporation, which performed the same business as GES, within “500 yards or 1,000 yards” of the GES building. Id. at 55. Husband’s new company used information from GES including customer names, contacts, accounts receivable, and accounts payable. Wife took “control” of GES, but shut GES down because “[t]here was no other choice.” Id. at 293, 295.

In August 2007, the trial court held a hearing on Husband’s petition. At the hearing, Daniel Young, Wife’s expert witness, testified that, while Husband was in control of GES, there were numerous unusual personal expenses, and Husband and his son “had a heck of a good time at [GES]’s expense and ran it into the ground.” Id. at 236. Young testified that GES had a value of \$57,160 as of December 31, 2006. Young also testified that GES lost its value when Husband “walked out the door.” Id. at 255. After the hearing, the trial court entered an order, which, in pertinent part, ordered that Wife receive eighteen months of rent that GES failed to pay her. The trial court also found that the value of GES was \$57,160 as of December 31, 2006, and awarded Wife half of this value.

The sole issue is whether the trial court abused its discretion in dividing the marital assets and debts. Husband argues that the trial court abused its discretion in dividing the assets by: (A) finding that GES failed to pay Wife her portion of GES’s rent payment and that GES paid the entire rent payment to Husband for a period of eighteen months; and (B) using December 31, 2006 as the valuation date for GES. We will discuss each issue separately.

The trial court apparently entered sua sponte findings of fact and conclusions thereon. In general, sua sponte findings control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). When a trial court has made findings of fact, we apply the following two-tier standard of review: whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions thereon. Id. Findings will be set aside if they are clearly erroneous. Id. “Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. 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. Id. “A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence.” Id.

The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. Woods v. Woods, 788 N.E.2d 897, 900 (Ind. Ct. App. 2003). “When a party challenges the trial court’s division of marital property, he must overcome a strong presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal.” Id. 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 the marital property. Id. Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our

judgment for that of the trial court. Id. Ind. Code § 31-15-7-5 (2004), which governs the distribution of marital property, provides that “[t]he 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. Ind. Code § 31-15-7-5.

A. Rent

Husband argues that the trial court erred by finding that GES failed to pay Wife rent for a period of eighteen months. The trial court found:

11. The parties each received monthly rent from [GES] in the sum of One Thousand Dollars (\$1,000.00) of which each party would be responsible for one-half (½) of the \$871.00 monthly debt service on the mortgage securing the US 31 property. [GES] ceased paying Wife rent of One Thousand Dollars (\$1,000.00) per month for a period of eighteen (18) months. Instead, [GES] paid Husband Two Thousand Dollars (\$2,000.00) per month for said time period. Husband paid the debt service and retained the excess. Wife was thereby denied net rent (\$1,000.00 less \$435.50) or Five Hundred Sixty-four and 50/100 Dollars (\$564.50) per month for eighteen (18) months or a total of Ten Thousand, One Hundred Sixty-one Dollars (\$10,161.00). Wife shall receive said amount from Husband’s portion of the proceeds of the sale of the US 31 property.

Appellant’s Appendix at 15.

Husband argues that the evidence established that the period during which he received the entire \$2,000 rent payment did not exceed eleven months. Husband points to Wife’s Exhibit J, which reveals that GES owed Wife eleven payments of rent in the amount of \$1,000 for the months from May 2006 until March 2007. Husband acknowledges that some of Wife’s testimony conflicted with Exhibit J, her testimony

indicating that Husband received the entire \$2,000 rent payment for thirteen months as opposed to the eleven months indicated by Exhibit J.

Wife argues that the trial court's finding that she was entitled to rent for eighteen months was apparently based on the following exchange that occurred on redirect examination of Wife:

Q Now did you come to find out that [Husband] was taking just the amount of the mortgage? Or was he taking more during the term in which he was operating the business?

A He was taking the full amount of the \$2,000 lease agreement.

Q So he was taking \$2,000 to pay the \$875 mortgage, whereas you took \$1,000 to pay the \$875 mortgage?

A Correct.

Q And [Husband] was in charge for a period of approximately 18 months. Is that correct?

A Yes.

Transcript at 303.

Based on the record, we conclude that the evidence does not support the finding that Husband failed to pay Wife her portion of the rent for eighteen months. Thus, we conclude that the trial court clearly erred in calculating the amount of rental income.

Wife argues that, if we conclude that the trial court erred by using eighteen months, the record reveals that she is entitled to at least thirteen months of rent. Wife points to the following exchange, which occurred on redirect examination of Wife:

Q Why in March of 2006 did you stop, to your knowledge, getting any funds from [Husband]?

A At that point in time, I did not have an attorney. I had relieved Mr. Canfield, because I was not happy with the representation that he was providing. During those few weeks between the time that I released him and hired you as my attorney, which was on March 8, 2006, [Husband] filed a motion in court calling my salary and benefits from a corporation that I was an owner in as spousal maintenance. The Court apparently accepted it as that. That was incorrect. That was not spousal maintenance. That was an agreement that [Husband] and I had. I walked away willingly.

Q Did he pay you any spousal maintenance from that point?

A Not one – he never paid me spousal maintenance.

Q I understand. But the question is: Did he pay you spousal maintenance from that point on?

A No.

Q Did you receive any monies from [GES] from that point in time on?

A Not one penny.

Id. at 300. Wife argues that “[t]he date mentioned by [her], March 8, 2006, roughly coincides with a hearing held on March 10, 2008, [sic] on [Husband]’s motion for modification of provisional orders, which was granted,” and she “took control of [GES] from [Husband] in April 2007, thirteen months later, and resumed paying herself rent payments.” Appellee’s Brief at 6. To the extent that the parties disagree on the appropriate time that Wife did not receive rent payments, we remand to the trial court to make such a determination.

B. Value of GES

Husband argues that the trial court abused its discretion by using December 31, 2006 as the valuation date of GES. According to Husband, the trial court should have valued GES as of the date of the final hearing.

The trial court's order stated, in part:

14. Since Wife left the employment of [GES], Husband, through his mismanagement i.e. allowing excessive expenses to be charged to [GES], deliberately diminished the value of [GES] which was an asset of the parties. The Court adopts the testimony of Dan Young, C.P.A. and his business valuation report dated August 4, 2007 (Respondent's Exhibit PP) as its findings of fact. The value of [GES] as of December 31, 2006 is found to be Fifty-seven Thousand, One Hundred Sixty Dollars (\$57,160.00). Husband dissipated the value of said assets and his reasons for such action lack credibility. Wife shall be reimbursed fifty percent (50%) of said value, to-wit: \$28,580.00 from Husband's portion of the proceeds of the sale of the US 31 property. Any deficiency shall be reduced to judgment.

Appellant's Appendix at 15-16.

The trial court has discretion when valuing marital assets to set any date between the date of filing the dissolution petition and the date of the hearing. Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). The selection of the valuation date for any particular marital asset has the effect of allocating the risk of change in the value of that asset between the date of valuation and the date of the hearing. Id. This allocation is entrusted to the discretion of the trial court. Id.

We find Reese v. Reese, 671 N.E.2d 187 (Ind. Ct. App. 1996), trans. denied, instructive. In Reese, husband and wife owned a business. The court addressed “[w]hether the trial court abused its discretion in utilizing an early valuation date for a business whose value declined during the pendency of the dissolution proceedings.” Id.

at 189. The trial court used a valuation date of June 30, 1992, instead of June 30, 1993, when the business was allegedly worth less. Id. at 190.

On appeal, husband argued that the trial court abused its discretion when it failed to use June 30, 1993, as the valuation date. Id. at 191. This court noted that the trial court had determined that husband should bear the risk of the change in value because he had complete control of the company both before and after the petition for dissolution was filed. Id. at 191-192. The court noted that husband had the power to decide whether to retain the company or sell it before the value dropped too low. Id. at 192. The court held that the trial court's choice of an early valuation date was not clearly erroneous because there was evidence in the record to support husband's control of the company. Id. (relying on Quillen, 671 N.E.2d at 102).

Here, Husband was an engineer and worked as a sales representative for GES. Young testified that, while Husband was in control of GES, there were numerous unusual personal expenses, and Husband and his son "had a heck of a good time at [GES]'s expense and ran it into the ground." Transcript at 236. Husband then told Wife that she could have GES, and he formed a new corporation, which performs the same business as GES, within "500 yards or 1,000 yards" of the GES building. Id. at 55. Husband's new company used information from GES including customer names, contacts, accounts receivable, and accounts payable. After Husband started his own business, Wife shut GES down because "[t]here was no other choice." Id. at 295. The trial court recognized that Husband dissipated assets during the pendency of the dissolution proceeding. We conclude that the trial court did not abuse its discretion by using December 31, 2006, as

the valuation date because there was evidence in the record to support Husband's control of and impact upon GES.² See Reese, 671 N.E.2d at 192.

For the foregoing reasons, we affirm the trial court's judgment in part, reverse in part, and remand for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

NAJAM, J. and DARDEN, J. concur

² Husband relies on Knotts v. Knotts, 693 N.E.2d 962 (Ind. Ct. App. 1998), trans. denied. In Knotts, wife argued that the trial court abused its discretion in valuing an option to purchase stock as of the date of filing, rather than the date of the property distribution. 693 N.E.2d at 968. The court recognized the holding in Quillen, 671 N.E.2d 98, and held that "we do not believe that this discretion afforded trial judges is inconsistent with their ability to select a date which would avoid injustice." Id. at 968-969. The court concluded that "it is possible for a court to abuse its discretion in picking a date which unjustly fails to account for a significant increase in the value of an asset during the proceedings." Id. at 969. The court did not confront the issue because the record failed to contain any documentation of the closing price of the stock on the date of the property distribution. 693 N.E.2d at 969. Even in light of Knotts, based on the record, we cannot say that the trial court abused its discretion.

Husband claims that his arguments do not run afoul of Quillen and Quillen is distinguishable because, in Quillen, "the business was damaged by the husband's absence but not out of business entirely," and "[h]ere, [GES] is dead." Appellant's Brief at 18. We do not find Quillen distinguishable on this basis.

Husband also argues that "[i]t is inappropriate for the Court to punish [him] for choosing to resign from [GES] as there is no testimony in the record that it was not his right to do so." Appellant's Brief at 17. The trial court did not punish Husband for choosing to resign from GES. Rather, the trial court trial court recognized that Husband dissipated assets during the pendency of the dissolution proceeding.