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IN THE
COURT OF APPEALS OF INDIANA

HERBERT BUCK,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 48A02-1009-DR-1070
	)	
SONIA BUCK,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0709-DR-1106

July 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

The trial court granted Sonia Buck's ("Sonia") Trial Rule 60 Petition for Relief from and Modification of Decree of Dissolution and required Herbert Buck ("Herbert") to reimburse Sonia for the payment of taxes on certain business income and to pay state and federal income taxes on previously unreported income. Herbert's motion to correct error was denied, and he now appeals.

We reverse and remand with instructions.

Issue

Herbert raises a single issue for our review, whether the trial court abused its discretion when it granted Sonia relief from the Decree of Dissolution, thereby improperly modifying the property settlement agreement.

Facts and Procedural History

Herbert and Sonia (collectively, "the Bucks") were married on July 8, 1979. They separated in December 2006, and on September 27, 2007, Sonia filed a petition seeking dissolution of the marriage.

At the time of the petition, the Bucks were the only two shareholders and members of the board of directors of Contract Parcel Service, Inc. ("CPS"). CPS was a Subchapter S corporation under the U.S. Internal Revenue Code. See 26 U.S.C. 1361 et seq.[1] Herbert and

[1] Subchapter S corporations are afforded "pass-through" taxation treatment, so that the corporation itself pays no taxes on income received, but rather passes all income or losses through to the individual shareholders of the corporation. See 26 U.S.C § 1366. Such income is reported to the individual shareholder on IRS Schedule K-1; the individual shareholder then reports the income on his annual tax return. A shareholder in a Subchapter S corporation may be required to pay federal income tax on profits of the corporation, even when the shareholder has received no distribution of cash or property as a result of those profits. (Tr. 56-60.)

Sonia each held 50% of the stock in the corporation. Herbert was heavily involved in the operation and management of the business; Sonia performed some clerical work and ran errands, and served as secretary and treasurer of the business, for which she received a salary, but was uninvolved in the day-to-day operation of CPS.

At some point in 2006 or 2007, the Bucks learned that they owed past-due federal and state income taxes and associated penalties for portions of the 1990s through 2006.[2] They retained an accountant, William Harding ("Harding"), who prepared the Bucks' joint tax returns for 2007 and helped them make payment arrangements for the past-due tax obligations.

As part of their attempts to pay the past-due taxes and keep CPS in business, Herbert and Sonia each took distributions from their retirement accounts in 2007. Sonia liquidated $13,123.73 from an Individual Retirement Account ("IRA"). Of that amount, $3,280.93 was withheld to pay federal income tax on the distribution, $656.19 was withheld for state income tax payments, and a $12.00 overnight delivery charge was assessed, providing the Bucks with a check for $9186.61 from the IRA, which was deposited into the Bucks' joint personal checking account. Herbert transferred $7,975.94 of these funds to CPS's corporate accounts on February 26, 2008. Two days later, Sonia used the remaining $1,210.67 to pay attorney fees.

On March 18, 2008, pursuant to the trial court's Provisional Order issued on January 3, 2008, and a subsequent order on February 28, 2008, the Bucks convened as the board of

[2] The Bucks have alleged, in a separate lawsuit, that this was the result of misconduct by an accountant they had previously retained.

directors for CPS to determine how funds would be disbursed by CPS to provide salaries for Herbert and Sonia, to pay the past-due taxes, and to govern the operations of the business going forward pending entry of the Final Decree of Dissolution. During the meeting Herbert said that, for the year-to-date, CPS had seen no profit from its operations due to the bankruptcy of one client and another client's failure to pay CPS for services performed. Herbert also informed Sonia that he had been making payments on the past-due tax amounts using funds from CPS.

By the end of the meeting, the Bucks agreed that CPS would continue to pay salaries to Herbert and Sonia. They also agreed that the business would make no distributions outside of regular salaries to either Herbert or Sonia except when there was insufficient cash flow to provide Herbert with a regular paycheck for personal expenses or by unanimous agreement between Herbert and Sonia. Herbert further agreed to provide Sonia with bank statements for CPS. During the pendency of the divorce proceedings, Herbert continued to make payments on his and Sonia's past-due tax obligations pursuant to an agreement with the U.S. Internal Revenue Service ("IRS") and the Provisional Order; Herbert did so, however, using distributions from CPS made without Sonia's knowledge or consent.

After engaging in mediation on September 29, 2008, the Bucks entered into a property settlement agreement. On October 10, 2008, the trial court entered its Final Decree of Dissolution, which incorporated into its terms the property settlement agreement. The property settlement agreement provisions required sale of the marital home, and required that any profit from the sale of the home be used to pay the Bucks' past-due tax obligations. The

Decree also set forth the Bucks' individual obligations for the past-due tax payments and the disposition of CPS:

> The marital residence … shall be sold and any profit shall be paid to the Internal Revenue [sic] for past due taxes. In the event there is a deficiency HUSBAND shall pay the deficiency and hold WIFE harmless from that obligation. HUSBAND shall pay all utilities, repairs, and maintenance on the marital residence until sold. Further HUSBAND shall be responsible for any tax obligation on a short sale.
>
> ***
>
> HUSBAND shall have the following property set over to him, subject to the indebtedness thereon, and he shall hold WIFE harmless therefrom:
>
> a. The business "Contract Parcel Service Inc."
>
> b. Stock in business
>
> c. All rights in any pension, profit-sharing, 401(k), or any other retirement benefit in his name.
>
> ***
>
> HUSBAND shall pay the following obligations and hold WIFE harmless therefrom:
>
> a. IRS Lien and Indiana tax and hold WIFE harmless
>
> b. Business credit cards
>
> c. With regard to outstanding medical bills, HUSBAND shall pay WIFE the sum of $8000 in 30 days. WIFE shall pay and be responsible to pay all her outstanding medical bills. HUSBAND shall pay his own medical bills.
>
> ***
>
> If there is a recovery on the claim with [accountant], HUSBAND shall receive 75% and WIFE shall receive 25% of the total recovery.

(Appellant's App. 24-26.)

CPS reported business income of $70,203 to the IRS and the State of Indiana for

2008. At the end of 2008, Sonia received an IRS Schedule K-1 from CPS. Sonia's K-1 indicated that Sonia's pro-rata share of the income of CPS for 2008 was $29,059. This amount is a result of Harding's calculation of Sonia's percentage of ownership in CPS for the entirety of the 2008 tax year; Harding's calculation was determined under IRS regulations promulgated pursuant to 26 U.S.C. § 1377(a).[3] Added to the rest of Sonia's income, this allocation resulted in a $7,561 federal tax obligation and a $1,372 state tax obligation for the 2008 tax year, as well as $223.00 in federal penalties and $246.49 in state penalties for underestimation of estimated tax payments during 2008. At some point in 2009, Sonia filed her 2008 tax return and paid the taxes due as a result of the allocation of income from CPS.

In addition, in February 2009, Sonia and Herbert each received notice that they jointly owed an additional $2,965.00 in taxes for 2007 because of an underpayment of taxes stemming from the liquidation of part of Sonia's IRA. Specifically, Sonia never received a Form 1099 for the IRA, which caused the Bucks not to report the income from the liquidation

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[3] Section 1377(a) provides:

(a) Pro rata share.--For purposes of this subchapter--

(1) In general.--Except as provided in paragraph (2), each shareholder's pro rata share of any item for any taxable year shall be the sum of the amounts determined with respect to the shareholder--

(A) by assigning an equal portion of such item to each day of the taxable year, and

(B) then by dividing that portion pro rata among the shares outstanding on such day.

(2) Election to terminate year.--

(A) In general.--Under regulations prescribed by the Secretary, if any shareholder terminates the shareholder's interest in the corporation during the taxable year and all affected shareholders and the corporation agree to the application of this paragraph, paragraph (1) shall be applied to the affected shareholders as if the taxable year consisted of 2 taxable years the first of which ends on the date of the termination.

(B) Affected shareholders.--For purposes of subparagraph (A), the term "affected shareholders" means the shareholder whose interest is terminated and all shareholders to whom such shareholder has transferred shares during the taxable year. If such shareholder has transferred shares to the corporation, the term "affected shareholders" shall include all persons who are shareholders during the taxable year.

of Sonia's IRA on their 2007 tax returns.

On September 15, 2009, Sonia filed her Petition for Relief from Judgment and Modification of Decree of Dissolution, seeking that the trial court modify the Decree to determine the proper allocation of tax liability for CPS's income in 2008 and personal income taxes in 2007.

On March 22, 2010, a hearing was held on Sonia's Petition for Relief. At the hearing, Sonia sought reimbursement for her payment of income taxes on CPS's income, which she claimed occurred because CPS failed to elect, under 26 U.S.C. § 1377(a)(2), to terminate the 2008 tax year as to Sonia when she transferred her stock in CPS to Herbert. Sonia asserted that, had the election been exercised, she properly had tax liability for 2008 only on those tax-related events that occurred during the period in which she held stock in CPS, rather than prorating tax effects based on her percentage of ownership throughout the year (hereafter referred to as "the Section 1377 election" or "the election"). Sonia claimed that this would have significantly reduced her tax obligation on CPS's income, and thus she was entitled to payment from Herbert for taxes she paid that should have been paid by Herbert. She also sought an order requiring Herbert to pay the entirety of the tax arrearage from 2007 resulting from the failure to report income from the IRA disbursement.[4]

In support of her claims, Sonia introduced into evidence her actual 2008 tax returns and amended-but-unfiled 2008 tax returns reflecting what she claimed would be the proper tax return had CPS taken the Section 1377 election. These alternate returns show what

[4] Herbert had already paid the Federal portion of the taxes, leaving only $246.49 owing to the State of Indiana.

Sonia's tax liability would be if she had been allocated no income from CPS in 2008; the returns thus show a federal tax liability of $75.00, and an Indiana tax refund of $77.00. There was no evidence presented that Sonia had filed an amended return or that she had requested that CPS amend its returns or retroactively take the Section 1377 election for 2008. Sonia also introduced the Indiana tax assessment notice for the unreported 2007 IRA distribution.

On May 18, 2010, the trial court granted Sonia's Petition for Relief. On June 16, 2010, Herbert filed his Motion to Correct Error, requesting that the trial court vacate its order that Herbert reimburse Sonia for her 2008 income tax payment and that Sonia be ordered to reimburse Herbert for his payment of the 2007 federal income tax and penalties assessed as a result of the failure to report IRA distributions. The trial court denied Herbert's motion on August 27, 2010.

This appeal followed.

Discussion and Decision

Standard of Review and Legal Standard

Herbert appeals from the trial court's denial of his motion to correct error. We review trial court orders on motions to correct error for an abuse of discretion, which occurs when a trial court's decision is against the logic and effect of the facts and circumstances and the inferences which may be drawn from these, or where a trial court's decision is unreasonable or based on impermissible reasons or considerations. Gard v. Gard, 825 N.E.2d 907, 910 (Ind. Ct. App. 2005).

Here, the trial court modified a property settlement agreement entered into during a dissolution proceeding, granting that modification as relief from judgment under Trial Rule 60(B). Indiana Code section 31-15-2-17 governs the settlement of property issues arising from the dissolution of a marriage and the incorporation of a settlement agreement into a decree of dissolution. Once incorporated into a decree, contract principles prevail as to construction and interpretation of the agreement's terms. Deel v. Deel, 909 N.E.2d 1028, 1032 (Ind. Ct. App. 2009). Because contract interpretation is a matter of law, we review a trial court's interpretation of a property settlement agreement de novo. Id.

Importantly, the statute precludes "subsequent modification by the court" of a property settlement agreement that has been incorporated into a dissolution decree unless the agreement provides for or the parties consent to a modification. Ind. Code § 31-15-2-17(c). Because of the contractual nature of a settlement agreement incorporated into a decree, a dissolution court may not modify the agreement absent fraud, duress, or undue influence. Dillard v. Dillard, 889 N.E.2d 28, 33 (Ind. Ct. App. 2008). This policy promotes the finality of property divisions upon divorce by seeking to avoid the "'vexatious litigation which often accompanies the dissolution of a marriage.'" Id. (quoting Poppe v. Jabaay, 804 N.E.2d 789, 793 (Ind. Ct. App. 2004), trans. denied). Even a partial modification of a settlement agreement is problematic because it "will likely upset the division of property equation in the Decree. The adjustment of one asset or liability may require the adjustment of another to avoid an inequitable result or may require the reconsideration of the entire division of property." Dusenberry v. Dusenberry, 625 N.E.2d 458, 461 (Ind. Ct. App. 1993).

Despite the statutory and contract law principles disfavoring modification of a property settlement agreement incorporated into a dissolution decree, equitable principles may afford some relief. While the property settlement agreement cannot be modified absent fraud, duress, or undue influence, equitable principles under Trial Rule 60(B) may permit a trial court to modify a property division; we review a trial court's grant of relief from judgment in such cases for an abuse of discretion. Dillard, 889 N.E.2d at 32.

Trial Rule 60(B) allows a trial court to provide relief on a number of grounds. Sonia's petition and testimony about her surprise and shock at owing taxes most clearly indicate that Sonia sought relief under either Trial Rule 60(B)(1), which permits relief from judgment in the event of mistake, surprise, or excusable neglect, or Rule 60(B)(3), which permits relief in the event of fraud, misrepresentation, or misconduct of another party. Such relief is not a substitute for a direct appeal, and the basis for relief must not be "the result of any fault or negligence on the part of the movant." Dillard, 889 N.E.2d at 34 (quoting Goldsmith v. Jones, 761 N.E.2d 471, 474 (Ind. Ct. App. 2002)). It is not enough that one or both parties have been mistaken or surprised; rather, the circumstances must be so extraordinary as to warrant granting relief. Id.

Taxes Owed on Sonia's Interest in CPS for 2008

The trial court granted Sonia relief from judgment under Trial Rule 60(B), ordering Herbert to reimburse Sonia for income taxes she paid arising from CPS's income in 2008. Sonia claimed surprise and misrepresentation as grounds for this relief. We conclude that, because Sonia did not provide competent testimony as to the effect of the Section 1377

election, there was insufficient evidence for the trial court to conclude that CPS should have exercised the election and that the effect of that election would be Sonia's complete avoidance of the tax consequences of CPS's income in 2008. Moreover, since both Sonia and Herbert were surprised by CPS's profitability, it is inequitable for Herbert to be required to reimburse Sonia for taxes paid upon those profits, a portion of which paid a joint tax obligation the Bucks owed while they were still married. Finally, we conclude that the provisions of the property settlement agreement did not address the allocation of tax liability arising from each party's share of CPS's income in 2008 when the agreement could have done so; having thus failed to so agree, we cannot conclude that the agreement could act as a basis for allocating all of the tax consequences of CPS's income to Herbert.

Effect of the Section 1377 Election

Sonia argued before the trial court that Herbert's taking of the business subject to all its indebtedness dictates that Herbert is or should be responsible for payment of taxes arising from CPS's operations in 2008, and that CPS should therefore have exercised the Section 1377 election.

The trial court's order that Herbert pay Sonia $9,404.49 to reimburse her for taxes paid on CPS's income in 2008 relied upon an unfiled, essentially hypothetical 2008 federal tax return Sonia submitted into evidence at the hearing, Sonia's testimony that she was surprised by the K-1 form, and her testimony about the contents of the unfiled amended tax return. That tax return purports to calculate Sonia's income tax obligations for 2008 in the absence of any income from CPS. The tax return—and, thus, Sonia's argument—assumes

that, had CPS exercised the Section 1377 election, Sonia would not have had any income from CPS in 2008.

There is no evidence that Sonia had ever submitted the amended return to the Federal government as an amended return. Beyond that document, there is no evidence supporting Sonia's assertion that the Section 1377 election would have yielded the result she claims. Sonia did not claim or demonstrate any expertise in federal or state taxation such that she would be competent to assert that the figures on the tax return were in any way an accurate representation of her tax obligation in 2008 if the Section 1377 election had been taken. Moreover, Sonia's amended return did not include reporting of any income that might have arisen from CPS's payment of debts on Sonia's behalf, namely, the payments made by CPS on Sonia and Herbert's past-due income taxes.

The only expert witness, Harding, did not testify about the effect of the election itself. Rather, he testified that after twenty-five years as an accountant and fraud examiner, he had heard of the Section 1377 election but that taking the election would be a "very non-standard way of treating" the tax implications of CPS's income. (Tr. 68.) Moreover, for the election to operate, Harding testified that both Sonia and Herbert as CPS's board would have had to agree to take the election, and he was not aware that they had done so.

Thus, the unfiled tax return, Sonia's testimony about the return, and her claim that she should not have paid taxes on income for CPS from 2008 as a result of the company's failure to take the Section 1377 election are not sufficient evidence to prove the existence of a liability attributable to the Bucks' failure to exercise a tax election. There was no evidence

presented as to Sonia's assertion that exercising the election would have had the effect she claimed, that is, preventing her from incurring some amount of tax liability for CPS's income. Thus there was insufficient evidence as to the likely extent of the reduction of her tax obligation such that the trial court could properly determine that the reimbursement amount sought was the correct amount to award.

Relief from Judgment under Trial Rule 60(B)

Assuming that the trial court's assessment of the effects of the Section 1377 election is correct (or that exercising the election would have any tax reduction effect upon Sonia at all), we next turn to the basis under Trial Rule 60(B) for the trial court's order that Herbert reimburse Sonia for taxes and penalties she paid. In ordering the reimbursement, the trial court stated

> (C) In this case there are exceptional circumstances justifying relief from the Decree of Dissolution … with regard to the tax liability for the 2008 business income … for the following reasons:
>
> (1) The property agreement does not address the tax obligation of the parties related to the business income of Contract Parcel Service, Inc.;
>
> (2) The parties did not anticipate that there would be business income for Contract Parcel Service, Inc. in 2008;
>
> (3) Herbert Buck received all of the business income from Contract Parcel Service, Inc. in 2008;
>
> (4) The Provisional Order and Minutes of the Board of Directors meeting both required the parties to agree on any distributions to be made from the corporation aside from their salaries. No agreements were reached regarding distributions during the time they were both shareholders;
>
> (5) Herbert Buck received distributions from the corporation prior to the time of the divorce to pay the back tax obligation which he was required to pay personally under the Provisional Order;

(6) Proration of taxes based on the percentage of ownership throughout the year was not an appropriate method for allocating taxes since Sonia Buck did not receive any of the net business income and Sonia Buck was not consulted about the method of allocating taxes. Taxes could have been allocated based upon actual distributions that the parties received.

(7) Trial Rule 60(B) relief is appropriate considering the conduct of Herbert Buck in making distributions to himself and not following the requirements of the Provisional Order or the agreements reached by the Board of Directors on March 18, 2008, as well as mistake and surprise to Sonia Buck that she would have any obligation to pay taxes on business income she did not receive, but was received by Herbert Buck;

(Appellant's App. 34.) The trial court therefore ordered Herbert to pay Sonia $9,404.49 for taxes she paid on CPS's income in 2008.

The trial court's decision relies heavily on its finding that Herbert received all of the income from CPS for 2008 and that Sonia received none of it. Sonia did receive a benefit from these distributions, however: Herbert used cash distributions from CPS to pay the past-due taxes both Herbert and Sonia owed as a joint obligation to the IRS. Using those distributions, Herbert paid $3000 per month throughout 2008 to cover their joint past-due tax obligations. Thus, before the entry of the Decree of Dissolution, Herbert paid $30,000 on that obligation, and Sonia's tax obligations were reduced accordingly.

The trial court found that Herbert received distributions from CPS that he used to pay the Bucks' past-due taxes, and based its order that he reimburse Sonia in part upon the premise that Herbert wrongfully took distributions without securing Sonia's agreement. Yet with CPS as the only source of income for Herbert, it is unclear how Herbert could have complied with the Provisional Order's requirement that he pay all of the parties' tax

obligations without taking distributions from CPS to do so. These distributions, which came from corporate funds in which Sonia held a 50% interest as a shareholder in CPS, went to pay taxes owed jointly by Herbert and Sonia for years prior to their dissolution proceedings. But the fact that current distributions were used to pay past-due taxes does not exclude the obligation to pay current taxes on those same distributions.

Put another way, CPS, of which Sonia and Herbert were each half-owners at the time, made distributions to Herbert, which he used on his and Sonia's behalf to pay an obligation personal to both of them. Thus, Sonia received a benefit from the distributions of money from CPS to the Internal Revenue Service during 2008 as payments made upon the Bucks' past-due taxes. This benefit took the form of relief from having to pay some or all of the past-due tax obligations with her own funds. Setting aside the tax consequences of that benefit to Sonia[5], Sonia benefited from the distributions of money from CPS used to pay the past-due taxes. Having so benefited, it is inequitable for Sonia to avoid all attendant obligations arising from that benefit, even where the distributions were arguably made without Sonia's consent. This renders the relief from judgment granted by the trial court inequitable on the grounds contemplated by Trial Rule 60(B).

While Sonia may have been surprised and mistaken about whether she would have an obligation to pay taxes on CPS's income during 2008, that she had an obligation as a

[5] CPS's payment of taxes owed by Sonia may well have been income to Sonia. See 26 U.S.C. § 275(a) (making non-deductible payments made on Federal income tax). Thus, even if the Section 1377 election would have operated to avoid the distribution of income to Sonia as a shareholder in CPS during 2008 (and, again, there is no evidence that this is the case), to the extent distributions of cash from CPS continued to pay down Sonia's portion of the tax arrearage, Sonia might still have incurred a tax liability arising from those tax payments.

Subchapter-S corporate shareholder to pay taxes without receiving cash is not unusual. Indeed, Harding testified that a shareholder in a Subchapter-S corporation may have taxable income without receiving cash, and from the evidence in the record, Sonia appears to have remained a shareholder in CPS until the entry of the dissolution decree in October 2008.

We acknowledge that the trial court found that neither of the Bucks expected CPS to be profitable in 2008. That finding has some support from the minutes of the board meeting in 2008 when Herbert indicated that, as of March 2008, CPS was not profitable. We recognize that, as a result, Sonia was likely surprised to learn that she would be held liable for taxes for CPS's income without having directly received a distribution of funds from the business. But the trial court found that both Herbert and Sonia "did not anticipate that there would be business income for … 2008." (Appellant's App. 33.) While CPS saw income of slightly more than $70,000 in 2008, Herbert testified that he got "very little" of the profits that did arise. (Tr. 75.)

Thus, on the facts before us and the trial court's findings, we must conclude that Herbert, too, would have been surprised by CPS's profitability. That a business that was thought to be unprofitable became profitable, to the surprise of both owners, does not amount to the extraordinary circumstances contemplated by Rule 60(B). This is especially so where, as here, that unexpected profit served to benefit the party seeking relief. This surprise does not render as equitable the trial court's decision making Herbert alone responsible for taxes on CPS's income in 2008, whether that income was solely on paper or with accompanying

cash flow.[6] Relief under Trial Rule 60(B) as an order instructing Herbert to reimburse Sonia for taxes she paid on 2008 income from CPS was therefore inappropriate.

Effect of the Property Settlement Agreement's Provisions

The terms of the property settlement agreement do not directly assign responsibility for taxes arising from CPS's income in 2008. The property settlement agreement states, "HUSBAND shall pay the following obligations and hold WIFE harmless therefrom: IRS Lien and Indiana tax and hold WIFE harmless" (Appellant's App. 25), and requires Herbert to take ownership of CPS subject to all its indebtedness.

In Bailey v. Mann, our supreme court addressed a trial court's modification of a property settlement agreement based on what the trial court considered to be omitted but implied terms of the agreement. 895 N.E.2d 1215 (Ind. 2008). In Bailey, the property settlement agreement provided that wife would retain possession and use of a leased automobile and make payments on the lease. The wife made the payments required, but the husband continued to receive statements from the lease financing company. Upon the husband's petition, the trial court held that the settlement's requirement that "the wife 'shall take [the car] as her separate asset[]'" implicitly required her to remove her husband's name from the lease. Id. at 1218. Our supreme court held that there were no terms in the property settlement agreement that required the wife to remove her husband's name from the lease,

[6] The trial court found that "Taxes could have been allocated based upon actual distributions that the parties received." (Appellant's App. 34.) Unlike the Section 1377 election above, the trial court had competent evidence before it as to the effect of cash versus "on-paper" distributions in the form of Harding's testimony that income can and does arise even where there is no corresponding distribution of funds to the individual required to recognize income. Because it opined on the possible tax effects of a cash distribution to Sonia against the only competent evidence before it, the trial court's finding on this matter is in error.

and that, had this been the parties' intent, they should have agreed to do so. Absent such agreement, "a requirement to remove the husband's name" was not an "inevitable inference from an award of the vehicle to the wife." Id.

As in Bailey, given the lack of an explicit obligation for Herbert to pay future income taxes, the trial court implied such a term into the property settlement agreement and, in essence, modified the settlement. The agreement's discussion of Herbert's liability for the IRS lien and Indiana tax clearly contemplates that he would continue to pay the past-due taxes from 2006 and prior years—that is, only those taxes subject to the IRS lien. Moreover, we note that indebtedness on the business does not include tax attributed to Sonia's interest in the business. Because CPS is a Subchapter-S corporation, which passes through to individual shareholders all of the corporation's income and losses and their attendant tax consequences, the tax liabilities from CPS's income were personal to Sonia and Herbert, who reported (or would have reported) that income on their personal tax returns. The taxes are not indebtedness to which the corporation itself may be subject.

Thus we cannot conclude that the provisions of the property settlement agreement require Herbert to pay all of the taxes on CPS's income for 2008. Had this been the Bucks' intent, as in Bailey, they could have agreed thus in the provisions of the agreement. They did not so agree, and Sonia's reliance upon the provisions of the property settlement agreement to assign tax liability to Herbert is misplaced.

Absent evidence that the effect of CPS's election of alternate tax treatment after Sonia's transfer of stock to Herbert would have prevented Sonia from incurring any tax

liability from CPS's income in 2008, the trial court's decision ordering Herbert to reimburse Sonia for her tax year 2008 payments was unsupported by relevant and competent evidence. CPS paid past-due taxes Sonia and Herbert jointly owed from corporate distributions, a benefit Sonia received in addition to an agreed-upon salary from CPS during the pendency of the dissolution proceedings. Finally, the property settlement agreement does not assign responsibility for tax payments on CPS's 2008 income solely to Herbert. Sonia was therefore not entitled to reimbursement for her payment of federal and Indiana tax and penalties for her share of the income from CPS in 2008, and it was an abuse of discretion to deny Herbert's motion to correct error as to this part of the trial court's order.

Taxes Owed on the Unreported 2007 IRA Distribution

Herbert also appeals from the trial court's order that he is solely responsible for payment of federal and state taxes on the unreported 2007 IRA distribution. Here again, Sonia responds that mutual mistake and the provisions of the property settlement agreement require that Herbert be solely responsible for the tax on the distribution.

The trial court granted relief to Sonia under Trial Rule 60(B)(1), which permits relief from judgment in the event of mistake, surprise, or excusable neglect. This court has held that "a trial court does not abuse its discretion when it corrects a judgment to make that judgment conform to the intent of the trial court in entering that judgment in the first instance." Lankenau v. Lankenau, 174 Ind. App. 45, 48, 365 N.E.2d 1241 (1977). As discussed above, however, our supreme court in Bailey held that a grant of relief under Rule 60(B) as to a property settlement agreement in a dissolution decree was an abuse of

discretion where the parties had and failed to take advantage of an opportunity to negotiate such terms as the trial court later erroneously implied into the agreement.

The tax obligation arising from the unreported IRA distribution is a joint debt shared by both Herbert and Sonia, as they were married and filed a joint return for the 2007 tax year. Herbert has already paid the entirety of the federal income tax obligation for 2007, but, as of the trial court's order on Sonia's Petition for Relief from Judgment, the Indiana portion of the obligation went unpaid.

The Decree of Dissolution did not indicate which spouse would be required to pay any taxes the Bucks might owe from 2007 or later years. The trial court held in its Order on Sonia's Petition for Relief that "exceptional circumstances exist for relief under Trial Rule 60(B) since neither party was aware of an additional tax liability for 2007 at the time the Decree of Dissolution of Marriage was entered. This tax obligation represents a surprise for both parties." (Appellant's App. 34.) The trial court therefore ordered that "Herbert Buck shall be responsible for the state and federal income taxes for the unreported income in 2007" (Appellant's App. 34), and went on to note that Herbert had already paid the federal income taxes due on the IRA distribution.

While we recognize that both parties were surprised by the belated tax assessment notice, we cannot agree that this rises to the level of a mistake such that equity required Herbert to pay the entirety of the resultant tax obligation. Both Herbert and Sonia were aware that an IRA distribution had been made, as well as its amount. That either or both of them misunderstood the tax consequences of that distribution does not itself rise to the level

of a mistake warranting relief from judgment. Moreover, though there was some dispute between Herbert and Sonia as to the use of the funds from the IRA, Sonia voluntarily made these funds available, and Herbert similarly liquidated his own IRA. Moreover, Sonia's own submission of evidence indicates that she used $1,210.67 of the money from the IRA distribution to pay her own legal bills. Thus, Herbert and Sonia each benefited from the IRA distribution—Herbert used the funds to continue to operate CPS, while Sonia used the IRA distribution to pay attorney fees and benefited from the continued operation of CPS.

While we recognize that the Decree of Dissolution and the incorporated property settlement agreement require Herbert to pay past-due taxes, these are either taxes connected to the IRS lien or past-due taxes ordered to be paid from proceeds of the sale of the marital residence. There is no clear statement in the Decree indicating that Herbert is solely responsible for payment of prior years' taxes that might be assessed in the future as the result of an error in a tax filing, and we cannot agree with the trial court that it was equitable to assign sole responsibility for the 2007 tax obligations arising from the IRA distribution to Herbert. It was therefore an abuse of the trial court's discretion to order Herbert to pay the entirety of the taxes due from the unreported income.

Sonia draws our attention to this court's holding in Russell v. Russell, 693 N.E.2d 980 (Ind. Ct. App. 1998), trans. denied. In Russell, the wife filed a Petition to Enforce the dissolution decree. In its findings, the trial court found a premarital debt not accounted for in the dissolution decree was paid by the husband prior to his payment to the wife of funds from a jointly-held bank account, and as a result reduced the amount the husband was required to

pay the wife. This court affirmed the trial court, holding that the trial court's modification of the property settlement was not an abuse of discretion in light of the newly discovered debt of the marital estate.

Here, the 2009 demand for payment of additional tax relates back to a debt of the marital estate. Unlike Russell, however, where the debt paid by the husband was a premarital debt, here the deficiency assessed based on the IRA was not merely undiscovered, but, from the Bucks' perspective, did not exist at all until several months after the dissolution occurred.

Also unlike Russell, Herbert does not appear to have paid the debt from as-yet-undistributed marital funds, but rather from his own funds. In Russell, the language of the trial court's order makes it clear that the court was attempting to distribute a marital asset while attempting to preserve the already-determined proportions in which that asset was to be distributed between the two spouses. Here, there is no set proportion or valuation of assets which the trial court endeavored to maintain. Instead, the property settlement agreement provided that Herbert would be responsible for payment of the past-due taxes subject to the IRS lien and for any deficiency arising from the sale of the house. Beyond that, with the exception of maintenance payments to Sonia, each of the Bucks was to take her or his own personal property, without more.

Thus, while the settlement agreement's default position appears to be that Herbert must pay all taxes, its provisions limit the extent of Herbert's obligation to the taxes associated with the IRS lien. The Bucks do not appear to have contemplated any taxes from 2007 or 2008, and agreed to a division of their assets and liabilities without apportioning

between them responsibility for later-discovered marital obligations. Ordering Herbert to pay all of the tax obligations arising from the IRA distribution thus does not fit into a general scheme of asset and liability distribution between him and Sonia as in Russell. We thus conclude that the trial court abused its discretion when it ordered Herbert to pay the remaining taxes from the IRA distribution on a joint tax liability.

There was no equitable basis under Trial Rule 60(B) for assessing responsibility for the 2007 distribution solely against Herbert, and thus we reverse the trial court's order that Herbert pay the Indiana taxes due on the IRA distribution. We further note that the dissolution decree includes no finding indicating a reason to deviate from the statutory presumption that marital assets and liabilities are to be divided evenly between the parties, and there are no terms in the property settlement agreement that indicate any general deviation from the statutory presumption. We therefore remand this issue to the trial court with instructions to determine the liability of each of the Bucks on the taxes owed as a result of the IRA distribution in 2007.

Conclusion

The trial court abused its discretion when it ordered Herbert to reimburse Sonia for her payment of taxes arising from her share of CPS's income in 2008. The trial court also abused its discretion when it allocated to Herbert all payment obligations for the 2007 tax deficiency resulting from Sonia's unreported IRA distribution.

Reversed and remanded.

FRIEDLANDER, J., and BROWN, J., concur.