**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.**

FILED
Aug 21 2009, 8:44 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

**ROBERT J. PALMER**
**E. SPENCER WALTON, JR.**
May · Oberfell · Lorber
Mishawaka, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| BARBARA MACMILLIAN, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 71A05-0902-CV-58 |
| | ) | |
| JEFFREY S. MACMILLIAN, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE ST. JOESPH SUPERIOR COURT
The Honorable David C. Chapleau, Judge
Cause No. 71D06-0008-DR-364

**August 21, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Barbara MacMillan appeals an Order entered on December 15, 2008, ordering Barbara to pay half of any tax liability based upon the sale of certain investment accounts, and also granting Jeffrey MacMillan a credit of $15,226.00 which represents 40% of the mortgage and real estate taxes paid by Jeffrey from the filing date until the date of the dissolution trial. Barbara raises three issues, which we revise and restate as:

I. Whether the trial court erred in granting Jeffrey a $15,226.00 credit which was not granted to Jeffrey in the original dissolution decree, when the original dissolution decree was not appealed;

II. Whether the trial court erred in ordering Barbara to pay one-half of the tax liabilities concerning the sale of certain investment accounts; and

III. Whether this court should remand the case to the trial court for its consideration of awarding appellate attorney fees and expenses in favor of Barbara.

We reverse and remand.

The relevant facts follow. Barbara commenced the dissolution of her marriage to Jeffrey on August 21, 2000. Barbara and Jeffrey continued to cohabitate their marital home on Colfax Avenue ("Colfax house") until the trial court, in an order on September 23, 2005 (the "September 2005 Order"), granted Barbara temporary exclusive occupancy, which was effective on November 1, 2005. On November 1, 2005, the trial court entered an Order (the "November 2005 Order") in response to Jeffrey's motion for clarification regarding the September 2005 Order which, among other things, directed Jeffrey to make all mortgage, tax, and insurance payments on the Colfax house and directed Barbara to make all utility payments. The November 2005 Order also stated: "[t]he Court does not

foreclose the possibility of providing [Jeffrey] credit against his share of the marital estate for some portion of all of these payments." Appellant's Appendix at 20.

The dissolution action was tried on July 25, 2006. The trial court entered its Findings of Fact and Decree of Dissolution of Marriage on October 11, 2006 (the "October 2006 Decree"). The October 2006 Decree ordered, among other things, that:

> [Jeffrey] shall be responsible for and hold [Barbara] harmless from, any and all liability in connection with the debt secured by a lien encumbering the 1986 Beechcraft airplane, and for any and all state and federal tax liabilities, including capital gains from the sale of the Montana House, of either parties . . . .

Id. at 52. Also, the October 2006 Decree did not provide Jeffrey any credit with regard to the mortgage payments he had been making as had previously been alluded to in the November 2005 Order. Although Jeffrey filed a notice of appeal on November 14, 2006, he ultimately did not pursue an appeal of the October 2006 Decree.

On June 5, 2007, Jeffrey filed a motion to address unaccounted for assets and liabilities and for an accounting.[1] On June 8, 2007, Jeffrey filed a motion for change of judge, which was granted. Various issues arose in the ensuing months, and on September 26, 2008 an evidentiary hearing was held to resolve them. At the hearing, both parties were ordered to "submit memoranda with attached exhibits regarding disputed issues." Id. at 14.

Pursuant to the filed memoranda, and after a telephone conference with the parties, the trial court entered an order on December 15, 2008 (the "December 2008 Order").

[1] The record does not include a copy of this motion.

The trial court made two findings relevant to this appeal. First, it credited Jeffrey $15,226.00, which represented "40% of mortgage and real estate taxes paid during the pendency of the case when the parties were not cohabitating the Colfax [house]." Id. at 18. The trial court, citing Bojrab v. Bojrab, 786 N.E.2d 713 (Ind. Ct. App. 2003), vacated on other grounds by 810 N.E.2d 1008 (Ind. 2004), determined that Barbara "should be accountable for the mortgage payments during her exclusive occupancy" of the Colfax house. Appellant's Appendix at 17. The trial court found that from the date of the filing through the date of trial, Barbara and Jeffrey continued to cohabitate the Colfax house "[d]uring a majority of this time." Id. at 17. Because "no evidence was submitted as to what 'majority' was as a percentage," the trial court drew "a reasonable inference that majority means 60% of the time the parties shared the house." Id. Hence, Jeffrey was credited for the other 40% of his payments.

Second, the December 2008 Order ordered Barbara and Jeffrey to share equally the tax liability resulting from the liquidation of certain investment accounts.[2] The December 2008 Order stated that:

> This court finds that this is an undistributed marital debt which should be distributed pursuant to the plan of distribution stated in [the October 2006] decree. . . . [T]he court clearly decided that there should be an equal division of the marital estate. . . . Any tax liability based upon the sale of the above accounts should be equally divided by the parties.

[2] The investment accounts included the following: (1) a money market account with the Robert W. Baird investment group held jointly for $149,937.00; (2) a Harris/DLJ Direct account held in Jeffrey's name for $51,532.00; and (3) various investment accounts held with Janus Funds totaling $85,986.00.

Id. at 16. The investment accounts had essentially been liquidated before the 2006 dissolution proceeding. Although at the time of filing the investment account assets totaled $287,455.00, only one account remained in existence at trial which was valued at $3,903.00.[3]

When a trial court enters findings of fact and conclusions of law, we apply a two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. Staresnick v. Staresnick, 830 N.E.2d 127, 131 (Ind. Ct. App. 2005), reh'g denied. The trial court's findings and conclusions will not be set aside unless they are clearly erroneous. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Schacht v. Schacht, 892 N.E.2d 1271, 1274 (Ind. Ct. App. 2008) (quoting Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996)). "A judgment is clearly erroneous if it relies on an incorrect legal standard." Id. We neither reweigh the evidence nor assess witness credibility, and we consider only the evidence most favorable to the judgment. Staresnick, 830 N.E.2d at 131. While we defer substantially to the trial court's findings of fact, conclusions of law are reviewed *de novo*. Schacht, 892 N.E.2d at 1274.

Before addressing Barbara's arguments we note that Jeffrey did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the

[3] We note that there was a new account in Jeffrey's name with the Robert W. Baird investment group for $15,397.00 in existence at trial. There is no evidence whether this represented a transfer of funds from the jointly held money market account that the MacMillans had maintained with the same group, whether the money was once part of the marital estate, or whether the money consisted of entirely post-filing funds.

burden of developing appellee's arguments, and we apply a less stringent standard of review, that is, we may reverse if the appellant establishes prima facie error. Zoller v. Zoller, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). This rule was established so that we might be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. Wright v. Wright, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002). Questions of law are still reviewed *de novo*, however. McClure v. Cooper, 893 N.E.2d 337, 339 (Ind. Ct. App. 2008).

I.

The first issue is whether the trial court in the December 2008 Order erred in granting Jeffrey a $15,226.00 credit which was not granted to Jeffrey in the October 2006 Decree, when that decree was not appealed. Barbara appears to argue that Jeffrey's failure to appeal the October 2006 Decree waived his ability to request any credit by subsequent motion, and also that even if the issue was not waived the trial court's findings and conclusions were clearly erroneous.

Barbara first argues that Jeffrey waived his opportunity to request a credit on the payments made toward the Colfax house because he did not appeal the October 2006 Decree. "[T]he question of what facts are necessary to constitute waiver is a matter of law." Pohle v. Cheatham, 724 N.E.2d 655, 658 (Ind. Ct. App. 2000). Thus, we will review whether Jeffrey waived his right to request a credit under a *de novo* standard.

In its November 2005 Order, which clarified the September 2005 Order, the trial court held open "the possibility of providing [Jeffrey] credit against his share of the

marital estate for some portion" of mortgage, tax, and insurance payments he was ordered to make on the Colfax house. Appellant's Appendix at 20. Nevertheless, in the October 2006 Decree, the trial court did not provide for any such credit. Jeffrey did not file a timely notice of appeal of the October 2006 Decree. The instant action stems from Jeffrey's June 2007 motion to address unaccounted for assets and liabilities and for an accounting. At Jeffrey's request, the motion was considered by a different trial judge. The December 2008 Order ruled on this motion.

We conclude that the facts demonstrate the issue was waived as a matter of law. When the trial court entered its October 2006 Decree, the issue of credit for mortgage and tax payments on the Colfax house was before the court. Jeffrey was not awarded any credit in that decree. Jeffrey failed to appeal that issue, and he may not raise it now.[4] See Holman v. Holman, 472 N.E.2d 1279, 1290 n.9 (Ind. Ct. App. 1985) (holding that husband's failure to appeal an order to pay daughter's education costs waived husband's ability to challenge it at a subsequent proceeding).

Despite the fact that we find the issue was waived, even if the issue had been properly appealed, there is ample reason to find the trial court's December 2008 Order clearly erroneous. Indiana law dictates that "orders concerning property disposition . . .

[4] Moreover, the trial court erred in its application of Bojrab v. Bojrab. Bojrab arose on a motion to correct error which had been granted by the trial court. Bojrab, 786 N.E.2d at 720. Jeffrey failed to file a motion to correct error or otherwise pursue an appeal, and he may not now collaterally attack the final property disposition.

may not be revoked or modified, except in the case of fraud."[5] Ind. Code § 31-15-7-9.1 (2004). Although the trial court in its November 2005 Order "[did] not foreclose the possibility of providing [Jeffrey] credit against his share of the marital estate for some portion of all of [the mortgage and tax] payments," that possibility *was* effectively foreclosed when the October 2006 Decree failed to provide such a credit and Jeffrey failed to challenge the decree by filing a notice of appeal, a motion to correct error, or otherwise. Appellant's Appendix at 20. On these facts, and in accordance with the applicable standard, Barbara demonstrated prima facie error that the trial court's property disposition modification was made in the absence of a showing of fraud and therefore the trial court's December 2008 Order granting Jeffrey a $15,226.00 credit was clearly erroneous.

II.

The second issue is whether the trial court erred in ordering Barbara to pay one-half of the tax liabilities concerning the sale of certain investment accounts. Barbara appears to argue that Jeffrey's failure to appeal the October 2006 Decree waived his ability to request that Barbara share in paying taxes on the investment accounts by subsequent motion. Barbara also argues that even if the issue was not waived, the trial court's findings and conclusions were clearly erroneous because the October 2006 Decree was not ambiguous.

[5] This is juxtaposed from modifications for child support or other maintenance, which may be modified upon a showing of "changed circumstances so substantial and continuing as to make the terms unreasonable . . . ." Ind. Code § 31-15-7-3 (2004).

First, Barbara argues that Jeffrey waived his opportunity to request that Barbara help to cover the tax liabilities on the investment accounts because he did not appeal the October 2006 Decree. As stated above, "the question of what facts are necessary to constitute waiver is a matter of law." Pohle, 724 N.E.2d at 658. Thus, we will review whether Jeffrey waived his right to have Barbara share the tax liability under a *de novo* standard.

We find that Jeffrey waived this issue as a matter of law. Here, the investment accounts at issue had been almost entirely liquidated before the trial court entered its October 2006 Decree; only $3,903.00 of the $287,455.00 remained invested when the decree was issued. Per Ind. Code § 31-15-7-7 (2004), the trial court "in determining what is just and reasonable in dividing property . . . shall consider the tax consequences of the property disposition with respect to the present and future economic circumstances of each party," when issuing a dissolution decree. The trial court fulfilled its statutory responsibility in its October 2006 Decree when it ordered Jeffrey to hold Barbara harmless for any and all state and federal tax liabilities. This provision of the October 2006 Decree, as well as the decree as a whole, was not appealed, and the subsequent motion by Jeffrey in June 2007 constituted an impermissible collateral attack. Holman, 472 N.E.2d at 1290 n.9

Again, although Jeffrey waived the issue by failing to properly appeal, the modification of the October 2006 Decree's property disposition by the December 2008 Order was clearly erroneous. As stated above, property disposition orders may not be

revoked or modified except where a showing of fraud is made. I.C. § 31-15-7-9.1. The October 2006 Decree ordered that Jeffrey "shall be responsible for and hold [Barbara] harmless from . . . any and all state and federal tax liabilities . . . ." Appellant's Appendix at 52. The December 2008 Order, which ordered Barbara and Jeffrey to "equally divide and pay any income tax liability" with regard to the investment accounts, was a modification of that decree.[6] Id. at 19. On these facts, and in accordance with the applicable standard, Barbara demonstrated prima facie error in an improper modification of the property disposition set forth in the October 2006 Decree in the absence of a showing of fraud and that therefore the trial court's December 2008 Order directing Barbara to pay one-half of the tax liabilities on the sale of certain investment accounts was clearly erroneous.

III.

The next issue is whether under Ind. Code § 31-15-10-1(a), a trial court "may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under [Article 15]." The purpose of the statute "is to provide access to an attorney to a party in a dissolution proceeding who would not otherwise be

[6] It was the December 2008 trial court's view that "the decree does not clearly address the debt due to taxing authorities based upon the liquidation of the [investment accounts] . . . ." Appellant's Appendix at 16. We agree with Barbara that a plain reading of the word "all" within the phrase "all state and federal tax liabilities" in the October 2006 Decree actually meant *all* state and federal tax liabilities, and that therefore the issue was clearly addressed in the decree. Appellant's Brief at 9; see also Firestone v. American Premier Underwriters, Inc., 891 N.E.2d 151, 154 (Ind. Ct. App. 2008) (holding that judgments are to be interpreted in the same manner as contracts, and giving plain meaning to the word "all"), trans. denied. Thus, although the trial court intended in its December 2008 Order to act "pursuant to the plan of distribution stated in [the 2006] decree" in dividing the liability equally, the effect of that Order was an improper modification of that decree. Appellant's Appendix at 16.

able to afford one." Webb v. Schleutker, 891 N.E.2d 1144, 1156 (Ind. Ct. App. 2008). "Jurisdiction rests with the trial court to determine if an award of appellate attorney fees is appropriate." Goodman v. Goodman, 754 N.E.2d 595, 603 (Ind. Ct. App. 2001), reh'g denied. "[T]he trial court retains jurisdiction even after perfection of the appeal to make an award of appellate attorney fees and in what amount." Pierce v. Pierce, 702 N.E.2d 765, 769 (Ind. Ct. App. 1998), trans. denied.

Recognizing again that Jeffrey did not file a brief in opposition, and without making any suggestion on the merits, we see no reason to deny Barbara a hearing with the trial court to decide whether appellate attorney fees are appropriate. Accordingly, we remand to the trial court on this issue to determine if appellate attorney fees should be awarded and in what amount. See, e.g., Thompson v. Thompson, 811 N.E.2d 888, 929-930 (Ind. Ct. App. 2004) (rejecting husband's unsupported assertion that "no such request is on file with the trial court, and accordingly, this court may not remand the case to the trial court for the purpose of determining appellate fees" and remanding for a determination of whether wife was entitled to appellate attorney fees), reh'g denied, trans. denied.

For the foregoing reasons, we reverse the trial court's order that Jeffrey receive a credit for $15,226.00 for mortgage and tax payments on the Colfax house, and that Barbara pay half of the tax liability on the sale of certain investment accounts, and we remand this case to the trial court to determine whether Barbara MacMillan is entitled to reasonable appellate attorney fees.

Reversed and remanded.

CRONE, J., and BRADFORD, J., concur.