

Frances Collins challenges the denial of her motion to correct error. She argues the court abused its discretion by denying her request to modify its judgment because the court should have: (1) divided the business debt equally between the parties; and (2) modified its judgment to divide equally between the parties the responsibility for paying a deficiency judgment. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

During a relationship that began in 1999 and ended in September of 2006, Collins and Jean Ann Elsfelder lived together, jointly acquired certain property, and comingled their assets. Most of their income came from jobs outside their joint business ventures. During the relationship, Collins and Elsfelder purchased properties in Evansville on North Kentucky Avenue (North Kentucky), Oak Hill Road (Oak Hill), and Adams Avenue (Adams). The parties individually obtained credit cards for the use of both parties.

The couple purchased Oak Hill for \$64,000 and borrowed an additional \$10,000 to replace the windows and make other improvements. The couple purchased the North Kentucky property in 2004 for approximately \$33,000. They rented this property and deposited the profits into a joint account. In 2005, they purchased the Adams property, which housed an antique mall, a church, and an apartment where they lived. Collins and Elsfelder formed two businesses: A's LLC, which operated the antique mall and an art gallery, and Colder's Antiques, an antique and merchandise reseller that operated out of the antique mall.

On January 4, 2007, Elsfelder petitioned for division of personal property and for

partition of the real estate holdings and business assets. The business assets included accounts of deposit and items intended for sale. A's LLC and Colder's Antiques had outstanding credit card debt and other debt. During the relationship, Collins obtained a Citi credit card and a Citibank credit card, both in her name. The couple also jointly obtained a Capital One credit card. They used these credit cards for both business and personal purposes.

On April 11, 2007, the parties entered into a Partial Mediation Settlement Agreement ("PMS Agreement"). They agreed to sell the North Kentucky and Oak Hill properties and to deposit any proceeds with the Clerk of the Court. Collins agreed to make periodic mortgage payments on the North Kentucky property and to cover the cost of improvements to the property during the pendency of the sale. Elsfelder agreed to make the mortgage payments on the Oak Hill property and cover the costs of improvements to the property during the pendency of the sale. The parties agreed to divide equally their jointly-held savings and checking accounts at Centurion Federal Credit Union. The PMS Agreement did not address the division of credit cards, vehicles, or fees owed to the businesses' accountant.

After the settlement agreement was entered, and while the partition action was pending, Fifth Third Bank foreclosed on the North Kentucky property, which mortgage was Collins' responsibility pursuant to the Agreement. The Vanderburgh Superior Court entered a civil judgment of foreclosure against Collins and Elsfelder for \$36,716.14. The property was sold at a sheriff's sale for \$14,401.00, leaving a deficiency of \$22,315.14.

The trial court held a final hearing on June 9, 2010, to address all outstanding issues.¹ Collins asked the Court to order Elsfelder to pay half of the accountant's fees for the businesses because Collins had already paid half. On the February 2006 statement for the Citi credit card in Collins' name, the couple handwrote and signed a note agreeing to treat the \$5,000 obligation as a business loan. In order to avoid a lawsuit for nonpayment, Elsfelder transferred the balance of the Capital One card to a Chase card in her name only in 2008. The Chase card was in Elsfelder's name only and had a balance of \$3,878.33 at the time of the final hearing on June 9, 2010. Collins argued the business portion of the total credit card debt should be divided equally, and Elsfelder believed Collins should be held responsible for paying off both cards.

On June 21, 2010, the trial court partitioned the property. Prior to the trial court's order, Elsfelder paid approximately \$8,000 towards the mortgage on the Oak Hill property and other improvements, and the trial court accordingly awarded her possession of the property. The trial court ordered Collins to be solely responsible for satisfying the \$22,315.14 deficiency judgment on the North Kentucky property. The parties were to be responsible for debt incurred in their individual names, which meant that the \$3,878.33 Chase card was to be paid by Elsfelder, while the \$5,000 Citi credit card was to be paid by Collins. The parties were to pay their accountant out of the proceeds from the sale of the Adams property. The remaining proceeds from the sale were to be divided equally between

¹ Prior to this hearing, the parties sold the Adams property and deposited the proceeds with the Clerk of the Court for distribution pursuant to the terms of the court's final order.

the parties, with Collins' share of the proceeds withheld by the Clerk of the Court until Collins satisfied the deficiency judgment.

After the hearing, Collins' attorney informed Elsfelder's attorney of an additional Citibank credit card in Collins' name with a balance of \$28,255.49 and requested that Elsfelder pay half of that balance. Elsfelder refused. Collins filed a Motion to Correct Error on July 12, 2010. The court held a hearing and denied the motion.

DISCUSSION AND DECISION

A trial court has broad discretion in ruling on a motion to correct error. *Volunteers of Am. v. Premier Auto Acceptance Corp.*, 755 N.E.2d 656, 658 (Ind. Ct. App. 2001), *reh'g denied, trans. denied*. We will reverse only for an abuse of that discretion. *Id.* An abuse of discretion occurs if the decision was against the logic and effect of the facts and circumstances before the court or if the court misapplied the law. *Id.*

Whether the court abused its discretion in denying Collins' motion to correct error will depend in large part on the propriety of the findings and conclusions entered in the court's final judgment. When, as was the case here, a trial court entered findings of fact and conclusions of law *sua sponte*, the 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." *Tracy v. Morell*, 948 N.E.2d 855, 862 (Ind. Ct. App. 2011). We review findings for clear error and we review conclusions of law *de novo*. *Boyer v. Ind. Dep't of Natural Res.*, 944 N.E.2d 972, 983 (Ind. Ct. App. 2011). "[A] judgment is clearly erroneous if no evidence supports the findings, the findings fail to support the judgment, or if the trial court applies the incorrect

legal standard.” *Id.* at 983-84. When reviewing findings of fact, we do not reweigh evidence or assess credibility of witnesses. *DeHaan v. DeHaan*, 572 N.E.2d 1315, 1320 (Ind. Ct. App. 1991), *reh’g denied, trans. denied.*

1. Business and Credit Card Debt

Collins first contends the trial court should have granted her motion to correct error because it did not divide the debt equally pursuant to the Partnership and Operating Agreements (“Agreements”). The Agreements provide that all business profits and losses are to be divided equally. The trial court divided equally the proceeds from the sale of the Adams Property, which housed the antique mall operated by A’s LLC and from which Colder’s Antiques operated. However, Collins contends the trial court’s order did not divide the accountant’s fees and credit card debt equally pursuant to the Agreements.

a. Accountant’s Fees

The trial ordered the proceeds from the sale of the Adams Property to be deposited into an account with the Clerk of Courts, to be distributed to the parties after the final property partition. From that amount, the court ordered the Clerk to issue checks to the parties’ business accountant totaling \$830.56. The trial court then found, “That the monies remaining in the Clerk of this Court after the payment of the obligations owing to [accountant] should be divided equally and distributed to the respective parties.” (App. at 54.) The accountant fees were deducted from the entire amount, which was then equally divided between the parties, and thus the accountant’s fees appear to have been equally divided between the parties.

Collins argues the accountant’s fees were not equally divided because she “had already paid half the bill.” (Br. of Appellant at 9.) Collins testified she paid “half of all amounts due because of business activity.” (Tr. at 217.) Elsfelder’s attorney indicated, when asked if he objected to the admission of the exhibit outlining the accounting fees account payments, “I’m not going to object Your Honor, but I’m definitely not agreeing to it.” (*Id.*) Because Elsfelder did not agree to the validity of the payments Collins alleged she had made to the accountant, the trial court was required to determine whether or how much Collins alone had paid to the accountant. Therefore, Collins argument is a request that we reweigh the evidence or assess her credibility, neither of which we may do. *See DeHaan*, 572 N.E.2d at 1320. Accordingly, we affirm the division of accounting fees.

b. Credit Card Balances

Collins also asserts the trial court erroneously failed to divide the credit card debt presented at trial² in accordance with the Agreements, which required business debts and

² At the hearing on the motion to correct error, Collins attempted to introduce into evidence an additional credit card with a \$28,255.49 balance that Collins claims is business debt. A motion to correct error can be used to address “[n]ewly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial.” Ind. Trial Rule 59(A)(1). However, the evidence suggests this credit card debt could have been discovered and produced at trial. Collins established this debt by producing a “Demand for Payment in Full” letter which is dated June 3, 2009, which was a year before the trial. Therefore, we cannot say the court abused its discretion by refusing to consider this new evidence. *See Hawkins v. Cannon*, 826 N.E.2d 658, 664 (Ind. Ct. App. 2005) (no error in denial of motion to correct error when evidence could have been discovered and produced at trial with due diligence), *trans. denied*.

Collins contends this debt is not new evidence because it was discussed during an off-the-record hearing. In addition, she claims she alluded, at the final hearing, to additional debt by testifying that “there was additional credit card charges done during the – the – during the period when I was trying to keep all the bills paid.” (Tr. at 216.) Although Collins so testified, she did not offer evidence or testimony demonstrating the existence or balance of this Citibank II card. We cannot say the trial court erred by leaving the Citibank II card out of its final judgment. *See Gilstrap v. Gilstrap*, 397 N.E. 2d 1277, 1281 (Ind. Ct. App. 1979) (“It is improper for the trial court to consider evidence not of record in the cause.”).

assets be partitioned equally. The trial court found “each of the parties are [sic] responsible for paying any remaining debt incurred in their individual names[.]” (Tr. at 54.) The balance on the Chase card in Elsfelder’s name was \$3,878.33. The balance on the Citi card in Collins’ name is not clear, but Elsfelder entered into evidence a statement from Citi on which the parties signed a note indicating \$5000 charged to the Citi card was used for business purposes.

As the Agreement indicated all business assets and liabilities were to be distributed equally, the trial court should have so divided the credit card debt. From the order before us, we cannot determine whether the trial court equally divided the business debt when it ordered each party to pay the credit card debt in her name. Therefore, we reverse and remand so the trial court may explain why this seemingly unequal distribution of credit card debt is equal or so the court may distribute the credit card debt equally between the parties pursuant to the parties’ Partnership and Operating Agreements.

2. North Kentucky Property Deficiency

Collins contends the order that she satisfy the deficiency judgment on the North Kentucky property was inequitable because she and Elsfelder were joint tenants, so each was entitled to an equal share of the debt on partition. As a result of the order, Collins contends, she is now required to pay much more for the Kentucky property granted to her as part of the mediated settlement than Elsfelder was required to pay for the Oak Hill property granted to her under the settlement. Collins asserts, “The court was apparently punishing [Collins] for violating the parties’ Mediated Agreement[.]” (Br. of Appellant at 14.) We cannot agree.

Collins freely entered into the Partial Mediated Settlement Agreement, which assigned to Collins responsibility for the mortgage payments on the North Kentucky property and for improvements to the property. The trial court reaffirmed Collins' obligations regarding the North Kentucky property in its May 16, 2008, order. As the deficiency judgment was entered because Collins did not maintain the North Kentucky property as she had agreed to do, we cannot find the ruling inequitable. *See Broadview Sav. & Loan Co. v. Muldrow-Nelson*, 587 N.E.2d 1346, 1348 (Ind. Ct. App. 1992) (holding debtor responsible for entire deficiency judgment when she did not abide by the terms of a settlement agreement).³

CONCLUSION

Because Collins has not demonstrated the terms of the original final judgment were erroneous, she has not demonstrated the court abused its discretion by denying her motion to correct error. However, we reverse the assignment of the \$5000 Citi credit card to Collins and the \$3878 Chase card to Elsfelder, and we remand the issue of the division of credit card debt to the trial court for proceedings consistent with this decision. Accordingly, we affirm in part and reverse and remand in part.

Affirmed in part, and reversed and remanded in part.

BAKER, J., and BRADFORD, J., concur.

³ Collins also argues the order that she satisfy the deficiency judgment is an overly-harsh punishment for violating the Partial Mediated Settlement Agreement because she did not willingly fail to pay the mortgage payments on the North Kentucky property. She claims she did not have means to make the mortgage payments, and she should not have been found in contempt because "to hold a party in contempt for a violation of a court order, the trial court must find that the party acted with willful disobedience." (Br. of Appellant at 14.) There is no indication the court ordered her to satisfy the deficiency judgment as a punishment, nor does the record reflect Collins was found in contempt. Because her argument is unsupported by the facts, we need not address her legal assertions.