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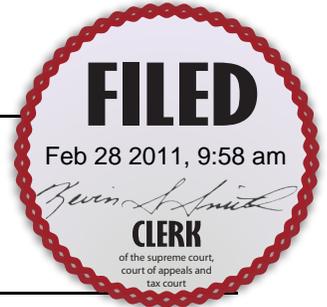
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**IN THE
COURT OF APPEALS OF INDIANA**



REBECCA ZOBOROSKY,)
)
Appellant-Respondent,)

vs.)

No. 46A04-1010-DR-702

BRIAN L. ZOBOROSKY,)
)
Appellee-Petitioner.)

APPEAL FROM THE LaPORTE CIRCUIT COURT
The Honorable Thomas J. Alevizos, Judge
The Honorable Thomas G. Pawloski, Magistrate
Cause No. 46C01-0910-DR-216

February 28, 2011

DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-respondent Rebecca Zoborosky (Wife) appeals from the trial court's dissolution decree that divided the marital assets between her and her former husband, appellee-petitioner, Brian L. Zoborosky (Husband). Specifically, Wife argues that the trial court abused its discretion in deviating from the statutory presumption of an equal division of the marital property, that the trial court erred in determining that Wife was in contempt of court for allegedly dissipating marital assets, and that the trial court was unfairly biased and prejudiced against her. Concluding that the marital assets were properly divided, and finding no other error, we affirm the judgment of the trial court.

FACTS

Husband and Wife were married in December 1994. Sometime in 2006, Husband discovered that Wife had accumulated approximately \$30,000 in credit card debt. Some of the cards authorized Wife's mother, and a daughter from a previous marriage to use those accounts. Moreover, Wife used her mother's mailing address in Westville for the billing statements.

When Husband discovered the credit card debt, he arranged for joint payment of the debt and paid over \$30,000 to pay off the credit cards with marital funds. Wife admitted that Husband did not know about her credit cards until he discovered the debt. Although Wife purportedly made some of the credit card purchases for the marital residence, she admitted making purchases for herself that she did not tell Husband about.

Wife also borrowed at least \$6,000 from her 401K account during the marriage without Husband's knowledge. Although Wife did not deny the loan, she was unsure of the total amount that she had withdrawn from the 401(k) fund. The parties eventually paid off Wife's \$6,000 loan with funds from their joint bank account.

On October 1, 2009, Husband filed a petition for dissolution of marriage. Husband maintained that Wife's credit card debt and the loan from the 401(k) plan constituted a misuse of marital funds and a dissipation of the marital assets. Thus, Husband argued that he should receive an adjustment of \$15,000 for the credit card debt that was repaid, as well as an adjustment of \$3,000 for paying back the 401(k) loan. Therefore, Husband argued that the trial court should deviate from the presumptive equal division of the assets and reduce Wife's cash award by \$18,000.

Wife lived in the marital residence during the period of separation and Husband made the mortgage payments. Husband agreed to pay Wife \$3,000 in October to vacate the residence, and to pay for a portion of the heating, telephone, and internet access charges. However, Wife refused to move out and Husband continued making the mortgage payments. Shortly before the final hearing, the trial court ordered Wife to immediately allow an appraiser into the marital residence and appraise the real estate.

When the final hearing commenced on February 4, 2010, Husband's counsel pointed out during his opening argument that Wife had agreed to vacate the residence by January 15, 2010. Wife failed to do so and later agreed to leave by January 30, 2010. However, as of the date of the final hearing, Wife still had not moved out.

Husband's counsel also asserted that Wife had refused to allow the appraiser to enter the marital residence on several occasions. Thereafter, Husband obtained a court order that directed Wife to allow the appraiser's access to the residence. However, as of the hearing date, Wife had still not permitted the appraiser to enter the home.

During the hearing, the trial judge asked Wife if she was "willing to go to jail" for violating the court's previous orders. Appellant's App. p. 20. The trial court also expressed its "unhappiness" with Wife and directed her to "answer the question[s]" that were posed to her on cross-examination. Id. at 26. At the conclusion of the hearing, the trial court ordered Wife to vacate the premises no later than March 4, 2010, or "we can proceed with eviction proceedings and charge rent." Id. at 29.

The trial court also ordered a new appraisal of the residence, and Wife was ordered not to interfere. The appraisal was to include repair estimates regarding damages that had occurred to the residence.

Thereafter, the trial court entered a final dissolution decree that provided

During the parties' marriage the wife took out certain loans against her 401k Plan which by her own admission totaled \$6,000 and possibly more. The proceeds of these loans was not explained but the husband repaid the approximate amount from marital funds. Also, towards the end of 2006, the husband learned of certain credit cards of the wife. The statements for these credit cards were being mailed to the address of the wife's mother. Apparently the wife's mother had the use of at least one credit card and the wife's daughter by a prior marriage also had use of a credit card in the wife's name. The accounts had not been paid and were accruing late fees and 28% to 30% interest. The husband has documented spending at least \$30,000.00 to pay these cards off. Clearly, this was a dissipation of marital assets. One half of this amount or \$18,000.00 should be charged against her one-half of the marital assets.

Appellant's App. p. 16. Notwithstanding the charge of \$18,000 against the marital assets, the trial court still awarded Wife a judgment against Husband in an amount of over \$50,000 to further equalize the distribution of the marital estate.

On March 30, 2010, Wife filed a motion to correct error, alleging that the trial court erred in attributing \$30,000 in credit card debt and the \$6,000 loan to Wife as a dissipation of the marital assets. Wife maintained that the trial court abused its discretion in charging one-half of that amount against her share of the marital estate.

On June 8, 2010, Husband filed a Motion for Rule to Show Cause why Wife should not be held in contempt because Wife had taken some of personal property from the residence in violation of the trial court's order. Husband also alleged that Wife damaged Husband's truck, car, the marital residence, and an outbuilding during the pendency of the dissolution proceedings.

At a hearing on June 21, 2010, Husband presented evidence establishing the value of his losses. Husband testified that Wife took personal property from the residence including the television, freezer, kitchen stove, garage door opener, a rifle, two pistols, mattresses, a vacuum sweeper, and other household items and tools. Husband presented repair estimates and photographs to the court. Husband found dents in his vehicles that included a dent that was made by a hammer. The hammer was found in the toolbox with the paint from the truck still on it. The remote control to the garage door was missing

and the wires were cut. The total value of the damaged and lost items amounted to nearly \$35,000. Although Wife admitted taking various items from the residence, she testified that she was willing to return them to Husband. Wife denied damaging any of the property and testified that she did not have access to the outbuilding.

Following the hearing, the trial court entered an order and determined that

3. Upon further consideration, the Court finds that wife's engagement/wedding rings and other rings were gifts to the wife by husband and became her separate property. . . . Therefore, their value (\$5,000.00) should be subtracted from the Court's determination of the value of the wife's portion of the marital estate to be set over to her. This would therefore, increase the amount of wife's judgment to the total sum of \$59,701.52.

4. The Court finds that the husband's testimony concerning the wife's credit card debts and their constituting a dissipation of assets is found to be compelling and credible. Accordingly, the remainder of the wife's Motion to Correct Errors should be denied.

. . .

12. The wife's actions in not securing the barn/workshop/shed . . . shows a complete disregard of the value of the property stored therein and equates to waste on her part for which she should be held accountable. The remaining property she removed from the premises long after she received the copy of the Decree, without immediately returning the same, is contemptuous. For this contempt the husband should be awarded \$750.00 in attorney's fees. The waste committed by the wife of \$22,209.00 and the attorney fees of \$750.00, a total of \$22,959.00, should be subtracted from the judgment due to the wife and thereby reduces her judgment to the sum of \$31,742.52.

13. The waste committed by the wife of \$22,209.00 and the attorney's fees of \$750.00, a total of \$22,959.00, should be subtracted from the judgment due to the wife and thereby reduces her judgment to the sum of \$31,742.52.

Appellant's App. p. 12.¹ Wife now appeals.

DISCUSSION AND DECISION

I. Standard of Review

When, as here, a trial court enters findings of fact and conclusions of law sua sponte, those 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. We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id. When we review a trial court's specific findings of fact and conclusions of law, we engage in a two-step process. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). Id. First, we must determine whether the evidence supports the trial court's findings of fact. Id. Second, we must determine whether those findings support the trial court's conclusions of law and judgment. Id. We will construe the findings liberally in support of the judgment. Pitman v. Pitman, 721 N.E.2d 260, 263 (Ind. Ct. App. 1999).

Findings will be set aside only if they are clearly erroneous. Yanoff, 688 N.E.2d at 1262. To determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with a firm conviction that a mistake has been made. Coffman v. Olson & Co., 906 N.E.2d 201, 206-207 (Ind. Ct. App. 2009), trans. denied. Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. Yanoff, 688 N.E.2d at 1262. A judgment is clearly erroneous if it

¹ The trial court subsequently determined that it made a mathematical error in computing the judgment. Thus, Wife's judgment was reduced to \$34,242.52, rather than to \$31,742.52. Appellant's App. p. 7-8.

applies the wrong legal standard to properly found facts. Id. In determining the validity of the findings or judgment, we consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom, and we will not reweigh the evidence or assess the credibility of witnesses. Id. at 207.

II. Wife's Contentions

A. Division of Marital Property

Wife argues that the trial court abused its discretion in dividing the marital assets. Specifically, Wife maintains that Husband failed to meet his burden of rebutting the statutory presumption that an equal division of marital property is just and reasonable and the evidence failed to support the finding that Wife dissipated the marital assets.

In resolving this issue, we initially observe that the trial court shall presume that an equal division of the marital property between the parties is just and reasonable. Ind. Code § 31-15-7-5. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
 - (A) before the marriage; or
 - (B) through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of

awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.

(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.

(5) The earnings or earning ability of the parties as related to:

(A) a final division of property; and

(B) a final determination of the property rights of the parties.

I.C. § 31-15-7-5.

In this case, Wife maintains that the trial court abused its discretion in dividing the property because “the trial court did not adequately consider all of the enumerated statutory factors listed in Indiana Code section 31-15-7-5.” Appellant’s Br. p. 10 (emphasis added). Notwithstanding Wife’s contention, a trial court is not required to make a finding and explicitly address each and every statutory factor set forth in that statute. Eye v. Eye, 849 N.E.2d 698, 701-02 (Ind. Ct. App. 2006). To the contrary, we presume that the trial court considered these factors. Montgomery v. Faust, 910 N.E.2d 234, 239 (Ind. Ct. App. 2009). Moreover, the trial court is not required to list the factors to justify an unequal division of property. Eye, 849 N.E.2d at 701-02. Rather, it need only state its reasons for deviating from the presumption of an equal division. Helm v. Helm, 873 N.E.2d 83, 90 (Ind. Ct. App. 2007).

As noted above, Indiana Code section 31-15-7-5(4) includes the dissipation of marital assets as a proper factor that the trial court should consider. Dissipation involves

more than meeting routine financial obligations and must be more substantial than a disputed transaction at the time, or the transaction appears in retrospect unwise. Coyle v. Coyle, 671 N.E.2d 938, 942 (Ind. Ct. App. 1996). Dissipation generally involves the use or diminution of the marital estate for a use unrelated to the marriage. Pittman, 721 N.E.2d at 264. As we observed in Pitman, the factors to be considered as to whether dissipation of marital assets has occurred are:

- 1) Whether the expenditure benefited the marital enterprise or was made for a purpose entirely unrelated to the marriage;
- 2) Whether the transaction was remote in time and effect or occurred just prior to the filing of a divorce petition;
- 3) Whether the expenditure was excessive or de minimis; and
- 4) Whether the dissipating party had the intent to hide, deplete or divert the marital asset.

Id.

As noted above, the evidence demonstrated that Husband discovered sometime in 2006 or 2007 that Wife held several credit card accounts in her name only. Some of those cards authorized Wife's mother and daughter from a previous relationship to use and incur debt on them. Appellee's App. p. 15-17. The cards listed Wife's mother's residence as the billing address.

After Husband discovered the debt, he paid that amount with the parties' joint funds. Appellee's App. p. 13-14, 158-99. Wife did not deny withdrawing at least \$6000

from her 401(k) account during the marriage, and she admitted purchasing various items for herself and not for the benefit of the marriage. Husband arranged to pay back this loan with the parties' joint funds. Appellee's App. p. 4.

Husband testified that he was not aware of Wife's debt until he discovered it in 2006. Husband did not know of any benefit that inured to the marriage as a result of those expenditures and he did not know what Wife purchased with the money.

Even though Wife testified that some of the credit card charges were for the benefit of the marriage, the trial court heard the evidence and considered the parties' credibility. Moreover, Wife's relatives were authorized to make charges on the account and did so without Husband's knowledge. And, as noted above, Wife had the statements mailed to her mother's residence.

The record demonstrates that Wife's expenditures were significant, given the total value of the marital estate. Again, the testimony demonstrated that there was no less than \$36,000 involved in the dissipation. Taking into consideration that the total marital estate was valued at \$313,721.21, including both retirement plans, the debt referenced totals of over ten percent of the marital estate.

In light of this evidence, we agree with the trial court's conclusion that Wife's loan against the 401(k) plan and credit card debt constituted a waste and misuse of the marital funds. As a result, the trial court properly determined that Husband is entitled to an adjustment of \$15,000 for the credit card debt that was repaid as well as \$3,000 for

paying back the 401(k) loan. Thus, Wife's claim that the trial court erred in deviating from the presumptive equal division of the marital property, fails.

B. Finding of Contempt

Wife next maintains that the trial court abused its discretion in finding her in contempt. Specifically, Wife contends that the evidence did not support the trial court's conclusions that she had damaged or stolen any property during the pendency of the dissolution. Moreover, Wife asserts that the trial court improperly modified the terms of the final decree in light of the contempt finding and reducing the judgment award.

Whether a party is in contempt is a matter left to the trial court's discretion. Cowart v. White, 711 N.E.2d 523, 530 (Ind. 1999). The finding of contempt will be reversed if there is no evidence or inferences drawn therefrom to support that finding. Id. In accordance with Indiana Code section 31-15-7-10, a trial court may enforce "all orders and awards contained in a dissolution of marriage decree . . . by contempt." And our Supreme Court has determined that contempt may be used to enforce a court's order or decree when a party is ordered to transfer property to another. Cowart, 711 N.E.2d at 531.

On June 8, 2010, Husband filed a Motion for Rule to Show Cause why Wife should not be held in contempt, complaining that Wife took various items of personal property in violation of the trial court's order. Husband also alleged that Wife damaged his truck, the marital residence, and the outbuilding while certain items were under Wife's exclusive control. Appellant's App. p. 51, 52.

At the hearing, Husband testified that Wife removed appliances, tools, and other items of personal property from the residence. Husband also testified that there was damage to the drywall, floors, countertops, and the thermostat. Appellee's App. p. 20-40. Husband presented repair estimates and photographs to the trial court. Id. at 20-40, 43-157. Husband further testified that he discovered dents in his vehicles, including a dent that was made by a hammer that was found in the toolbox with paint from the truck. Id. at 23. The remote control to the garage door was missing and the wires were cut. Id. at 41. The total value of the damaged and lost items amounted to nearly \$35,000. Id. at 42.

As discussed earlier, the trial court entered an order on July 6, 2010, concluding that Wife's conduct amounted to a

12. [C]omplete disregard of the value of the property stored therein and equates to waste on her part for which she should be held accountable. The remaining property she removed from the premises long after she received the copy of the Decree, without immediately returning the same, is contemptuous. For this contempt the husband should be awarded \$750.00 in attorney's fees. . . .

13. The waste committed by the wife of \$22,209.00 and the attorney fees of \$750.00, a total of \$22,959.00, should be subtracted from the judgment due to the wife and thereby reduces her judgment to the sum of \$31,742.52.

Appellant's App. p. 12.

When considering the evidence that was presented at the hearing, it is apparent that Wife removed, damaged, or destroyed some of Husband's property. Thus, we conclude that the evidence was sufficient to support the trial court's finding of contempt, and we decline to set aside the judgment.

Notwithstanding this conclusion, Wife maintains that the trial court abused its discretion in reducing the monetary judgment that was awarded to her under the final decree from \$57,201.52 to \$34,242.52. In short, Wife argues that because the trial court did not make a finding of fraud against her, the final decree was improperly modified.

Notwithstanding Wife's contentions, once a party is found in contempt, monetary damages are permitted to compensate the aggrieved party. Meade v. Levett, 671 N.E.2d 1172, 1181 (Ind. Ct. App. 1996). The amount and determination of damages are within the trial court's discretion and will only be reversed if there is no evidence to support the award. Id. A monetary judgment is an appropriate measure of damages and the shifting or award of marital property is not permitted. Cowart, 711 N.E.2d at 532.

In this case, Husband already owed Wife a judgment under the dissolution decree in the amount of \$54,701.52. Appellant's App. p. 16. Although the trial court could have entered a separate judgment against Wife in the amount of \$22,959, this amount simply serves to offset the judgment that Husband owed. Moreover, Husband did not seek to modify the terms of the decree. Rather, he sought to enforce those terms. The very essence of Husband's Rule to Show Cause is that he did not receive that which was contemplated and awarded by the decree. Pursuant to Husband's request and the evidence presented, the trial court put Husband back to the place to which he was entitled upon the entry of the decree but for Wife's contemptuous conduct. In other words, the trial court awarded monetary damages to compensate Husband for the injuries he incurred as a result of Wife's contempt. Therefore, we reject Wife's contention that the

trial court “improperly modified a final judgment in its contempt order,” and we decline to set aside the award. Appellant’s App. p. 17.

C. Trial Court’s Bias or Prejudice

Wife also argues that the judgment cannot stand because various comments that the trial judge made throughout the hearing demonstrated bias or prejudice against her. As a result, Wife claims that she is entitled to a reversal because the judge failed to maintain his impartiality and objectivity.

In resolving this issue, we note that a judge is presumed to be impartial and unbiased. Dahlin v. Amoco Oil Corp., 567 N.E.2d 806, 814 (Ind. Ct. App. 1991). A litigant must demonstrate actual personal bias against him or her to overcome that presumption. Id.

Wife asserts that the trial court’s inquiry about whether she was “willing to go to jail” demonstrated bias and unfair prejudice against her. Appellant’s Br. p. 18. However, prior to that statement, the trial court observed that Wife had previously refused to allow an appraiser into the residence and had refused to obey a court order. Indeed, as of the date of the hearing, Wife had still not allowed the appraiser access to the residence. Appellee’s App. p. 23. The trial judge then pointed out that because Wife failed to comply with the trial court’s appraisal order, she could be found in contempt of court and ordered to jail. Appellant’s App. p. 18. When considering all of these comments, the trial court was merely making the point that Wife should follow the court order or face the possible consequences of going to jail for contempt.

We also note that Wife was not particularly responsive to the questions that were posed to her on cross-examination. As a result, the trial court observed that Wife was telling “a big story . . . and it is just not helping things.” Appellee’s App. p. 6. The trial court then directed Wife to “answer the question.” Id.

Notwithstanding Wife’s claim that these comments also showed bias and prejudice against her, the trial court was merely attempting to “rein in” Wife’s testimony, particularly in light of her failure to respond to the questions that were posed. It is apparent from the record that the trial court was seeking to move the case forward and dispense with irrelevant information. As a result, Wife’s claim of bias and prejudice also fails on this basis.

Finally, Wife argues that the trial court’s comments regarding her agreement to vacate the marital residence established the judge’s bias and unfair prejudice against her. At some point, the trial court stated that if Wife refused to vacate the premises, “we can proceed with eviction proceedings and charge rent.” Appellant’s App. p. 29.

Notwithstanding these comments, Husband’s counsel pointed out at the final hearing that Wife agreed to vacate the marital residence by January 15, 2010. Appellee’s App. p. 2. Wife failed to do so but later promised to move by January 30, 2010. However, as of the date of the hearing, Wife had still not vacated the premises. Because Wife had still not vacated the premises, the trial court made the comments about eviction proceedings and paying rent in an effort to direct Wife to comply with the court orders. Moreover, the trial court granted Wife an additional thirty days to move and changed the

appraiser. When considering these circumstances, we cannot conclude that these statements amounted to unfair bias or prejudice against Wife.

The judgment of the trial court is affirmed.²

VAIDIK, J., and BARNES, J., concur.

² On January 31, 2011, Wife filed a verified motion to dismiss and/or strike Husband's brief because he did not include a citation to every sentence in the Statement of Facts section of his brief. Notwithstanding Wife's contentions, Indiana Appellate Rule 46(A)(6) does not require a citation to each and every sentence in the Statement of Facts section of an appellate brief. We find that Husband has provided adequate citation to the facts presented in his brief. Thus, we deny Wife's motion to dismiss and/or strike.