

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.

ATTORNEY FOR APPELLANT:

PERRY D. SHILTS
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

MICHAEL H. MICHMERHUIZEN
Barrett & McNagy LLP
Fort Wayne, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

GILBERT L. JUSTICE, JR.,)

Appellant/Cross-Appellee,)

vs.)

No. 76A04-0611-CV-678)

CHRISTINE A. JUSTICE,)

Appellee/Cross-Appellant.)

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause No. 76C01-0408-DR-267

August 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Gilbert L. Justice, Jr. (“Gilbert”) and Christine A. Justice (“Christine”) appeal various elements of the trial court’s division of the marital property. We affirm.

Issues

Gilbert raises four issues, which we consolidate and re-state as: whether the trial court abused its discretion in dividing the net marital estate. Meanwhile, Christine raises two additional issues, which we re-order and re-state as follows:

- (1) Whether the trial court clearly erred in finding the value of Gilbert’s pre-marital estate; and
- (2) Whether the trial court abused its discretion in amending its division of the net marital estate.

Facts and Procedural History

Christine and Gilbert married in 1987. They filed respectively their petition and counter-petition for dissolution in 2004. After a bench trial, the trial court entered its Final Decree of Dissolution (“Decree”), dissolving the marriage, dividing the marital assets and debts, and awarding Christine a “Property Equalization Adjustment Judgment” (“Equalization Judgment”) against Gilbert for \$2,500,000.¹ Appellant’s Appendix at 47. Among several other things, Gilbert received an IRA account valued at \$591,708. The Decree further provided that funds from the sale of the personal property of two businesses, held in a trust account during the litigation, would be used as partial satisfaction of the

¹ The Final Decree of Dissolution also addressed custody and child support.

Equalization Judgment.²

Each party filed a Motion to Correct Errors. In part, Gilbert asked the trial court to satisfy Christine's portion of the estate with the allocation of particular accounts, rather than an Equalization Judgment, which would bear interest. In response, Christine stated in her motion that she was "willing to accept a \$500,000.00 tax free roll over from Respondent's IRA . . . into an IRA owned by her." *Id.* at 71. The trial court denied Christine's motion, but granted in part and denied in part Gilbert's motion. In its Order on Gilbert's Motion to Correct Errors ("Amended Order"), the trial court made five revisions to its findings, four of which were nominal. In the fifth, the trial court removed from the calculation of Gilbert's assets a \$250,000 receivable that the trial court found would not be collected. In total, the revised findings reduced the net marital estate by \$208,975. The trial court reduced Christine's Equalization Judgment by \$100,000. The trial court did not order the transfer of the IRA account. Gilbert filed a Motion for Reconsideration, which was denied. This appeal ensued.

Discussion and Decision

I. Division of the Marital Property

Gilbert argues that the trial court abused its discretion in dividing the net marital estate. Specifically, he challenges the trial court's decision not to order the transfer of an IRA from Gilbert to Christine and the impact of the trial court's Decree in light of the

² During the course of this litigation, Gilbert was also appealing a trial court's judgment regarding real estate in Steuben County. The trial court noted that if Gilbert "should be successful in his efforts this claim would be a marital asset which would need to be divided." Appellant's Appendix at 43. In a memorandum decision, however, this Court affirmed the trial court's judgment. Center Peace Ministries, Inc. v. Assemblies of God

statutory provision for post-judgment interest.

Indiana Code Section 31-15-7-4(b) provides as follows:

The court shall divide the property in a just and reasonable manner by:

- (1) division of the property in kind;
- (2) setting the property or parts of the property over to one (1) of the spouses and requiring either spouse to pay an amount, either in gross or in installments, that is just and proper;
- (3) ordering the sale of the property under such conditions as the court prescribes and dividing the proceeds of the sale; or
- (4) ordering the distribution of benefits described in IC 31-9-2-98(b)(2) or IC 31-9-2-98(b)(3) that are payable after the dissolution of marriage, by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt.

Section Ten of the same Chapter allows the trial court to secure the enforcement of its order with any remedy “available for the enforcement of a court order,” except as otherwise provided in the Article.

Effectively, Gilbert’s arguments amount to an assertion that the trial court’s division of the marital property was not just and reasonable. “Although this is in some sense an issue of law, it is highly fact sensitive and is subject to an abuse of discretion standard. A reviewing court will not weigh evidence, but will consider the evidence in a light most favorable to the judgment.” Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2002) (internal citations omitted).

Fin. Servs. Group, 857 N.E.2d 449 (Ind. Ct. App. 2006), reh’g denied. Effectively, that decision leaves the marital estate unchanged.

A. \$500,000 IRA

Gilbert asked the trial court to allocate enough accounts to Christine such that an interest-bearing Equalization Judgment would not be necessary. In opposing Gilbert's Motion to Correct Errors, Christine stated that she was "willing to accept a \$500,000.00 tax free roll over from [Gilbert's] IRA . . . into an IRA owned by her." Appellant's App. at 71. Christine's counsel reiterated her willingness to take such an IRA in oral argument on the competing Motions to Correct Errors. The trial court, however, did not order the transfer.

Gilbert argues that the omission constitutes error. By statute, spouses may agree in writing to the disposition of marital property. Ind. Code § 31-15-2-17(a)(2). The trial court has discretion to approve the agreement or to divide the property as otherwise provided by Title 31. I.C. § 31-15-2-17(b).

We decline Gilbert's invitation to consider the parties' conduct to constitute a written agreement. While Christine's oral and written arguments acknowledged a willingness to receive \$500,000 in an IRA, no terms of an agreement were reduced to writing in a document for that purpose. Gilbert seizes on a decision of this Court in which we indicated that a recitation of an agreement on the record could satisfy the statute. Appellant's Brief at 11 (citing Akers v. Akers, 849 N.E.2d 773 (Ind. Ct. App. 2006)). In Akers, however, this Court made clear that such a recitation would necessarily be followed by the parties' acknowledging, under oath, their assent to the terms. Akers, 849 N.E.2d at 776. That did not occur here. Furthermore, Gilbert essentially concedes that a written agreement was not formed, arguing on appeal "that the trial court would have accepted a property settlement agreement from the parties." Appellant's Br. at 11. Thus, he admits the absence of the very

thing he asks us to find.

In the alternative, Gilbert argues creatively that Christine is equitably estopped from receiving post-judgment interest on \$500,000 because he reasonably relied on her attorney's statements that she was willing to take a \$500,000 IRA and an Equalization Judgment reduced by that amount. He suggests that it was on this basis that "he did not pay \$500,000.00 of this money judgment as he might otherwise have done." Appellant's Br. at 14. Gilbert adds that he "assumed that the trial court would honor the parties' agreement." Id. (emphasis added). Gilbert fails to direct us to any authority that would support his theory and it is not clear why a party would assume a particular result where a statute allows the trial court discretion to act. This argument fails.

B. Post-Judgment Interest

Gilbert also complains regarding the impact of the trial court's Decree in light of the statutory provision for post-judgment interest. Interest accrues on money judgments at the annual rate of eight percent, calculated "from the date of the return of the verdict or finding of the court until satisfaction." Ind. Code § 24-4.6-1-101(2). Gilbert asserts two errors in this respect.

First, he contends that he should not pay post-judgment interest on money held in trust by the parties' attorneys. The personal property of two businesses was sold at auction, the revenue from which was being held in trust. In its Decree, the trial court awarded this money to Gilbert, but also ordered the attorneys to "forthwith transfer to [Christine] as partial satisfaction of [her Equalization Judgment] all monies in their respective trust accounts derived from the auction sale of the assets of [the two businesses]." Appellant's App. at 47.

Gilbert acknowledges the statute which authorizes a trial court to allocate parts of the marital property to one spouse and to order a spouse to pay an amount that is just and proper. Appellant's Br. at 15 (citing I.C. § 31-15-7-4(b)(2)). However, he cites no authority for the proposition that the trial court's Decree constituted error. He simply complains that he was being ordered to pay interest on an asset at least temporarily being held in trust. Indiana Code Section 31-15-7-10 allows trial courts the discretion to provide for the enforcement of dissolution decrees by any remedy "available for the enforcement of a court order." Gilbert has not established that the trial court abused its discretion in dividing the marital property.

Second, he asserts, "notwithstanding the statute," that it was "unfair and unnecessarily prejudicial" for him to pay post-judgment interest from the date of the Decree, rather than the date of the Amended Order, because the trial court revised its division of the property in its Amended Order. Appellant's Br. at 16. In its Amended Order, the trial court merely corrected five of its findings. Within the context of a net marital estate valued at more than \$8,800,000, the revised findings accounted collectively for a \$208,975 reduction in the net marital estate. Gilbert has not convinced this Court, with any of his arguments, that the trial court abused its discretion in dividing the marital property.

II. The Value of Gilbert's Pre-Marital Estate

Christine argues that the trial court clearly erred in finding the value of Gilbert's pre-marital estate. On appeal, we do not set aside the findings of the trial court unless they are clearly erroneous, and we give due regard to the trial court to judge the credibility of witnesses. Ind. Trial Rule 52(A); Fobar, 771 N.E.2d at 59.

In considering Gilbert's pre-marital estate, relevant for purposes of determining

whether and to what degree to deviate from the statutorily-presumed equal division of marital property,³ the trial court found that Gilbert owned a New Jersey commercial park with a mortgage of \$500,000 on the date of marriage. As Gilbert identifies, Christine has argued inconsistently regarding the mortgage. In her Motion to Correct Errors, Christine argued that the trial court “erred in finding that the debt [] on the date of marriage was only \$500,000.” Appellee’s App. at 7. On appeal, however, she argues that the trial court erred in finding that there was any mortgage on the property, and that it erred in reducing Gilbert’s pre-marital estate by \$500,000. Appellee’s Br. at 8, 21. In his Reply Brief, Gilbert notes the inconsistency and the fact that it is actually in Christine’s interest for Gilbert’s pre-marital estate to be low, rather than high. Christine does not address the inconsistency in her Reply Brief.

Regardless, Christine acknowledged that the record contained evidence of the mortgage and its amount. A public records search identified a mortgage of \$775,439. After reviewing tax returns, financial statements, and an expert’s report, Gilbert testified that the mortgage on the date of marriage was approximately \$500,000. The trial court did not clearly err in finding that there was a \$500,000 mortgage on the commercial park upon the date of marriage.

III. Revised Equalization Judgment

Finally, Christine argues that the trial court abused its discretion in revising her Equalization Judgment from \$2,500,000 to \$2,400,000, which she contends to have changed her share of the marital estate from 35% to 34%. In dividing the marital property, the trial

³ See discussion below.

court must presume that an equal division is just and reasonable. Ind. Code § 31-15-7-5. A party may rebut this presumption, however, with evidence regarding property acquired before the marriage. I.C. § 31-15-7-5(2)(A).

In its Amended Order, the trial court revised five of its findings. The effect of those revisions reduced the net marital estate by \$208,975 (from \$9,080,499 to \$8,871,524), which resulted in a 0.36% (from 34.31% to 33.95%) reduction in Christine's share of the estate. On appeal, Christine acknowledges that the trial court's "extensive findings for deviating from the 50-50 division of marital assets" were "valid." Cross-Appellant's Reply Br. at 1; Appellee's Br. at 21. Furthermore, she does not challenge any of the revised findings. She suggests, however, that additional findings were required for what amounts to a nominal change. We disagree. Christine has not established that the trial court abused its discretion in dividing the marital property.

Conclusion

The trial court did not abuse its discretion in dividing the marital estate or in revising Christine's Equalization Judgment to account for its revised findings. Furthermore, the trial court did not clearly err in finding the value of Gilbert's pre-marital estate.

Affirmed.

SHARNACK, J., and MAY, J., concur.