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ATTORNEY FOR APPELLANT:

**PAUL J. WATTS**  
Watts Law Office, P.C.  
Spencer, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAWN FREDERICK,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 11A05-0702-CV-0111
	)	
JIM FREDERICK,	)	
	)	
Appellee.	)	

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APPEAL FROM THE CLAY SUPERIOR COURT  
The Honorable J. Blaine Akers, Judge  
Cause No. 1101-0505-DR-0218

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**October 24, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Dawn and Jim Frederick's marriage was dissolved in Clay Superior Court. Dawn appeals and raises the following dispositive arguments:

I. Whether the trial court abused its discretion when it failed to assign any value to the parties' business; and,

II. Whether the trial court abused its discretion when it found that the 1966 Chevrolet Impala was not a marital asset.

Concluding that the trial court abused its discretion when it failed to assign any value to the business and failed to include the vehicle in the marital estate, we reverse and remand for proceedings consistent with this opinion.

### **Facts and Procedural History**

Dawn and Jim Frederick were married in 1988, and two children were born to the marriage. During their marriage, the parties owned a business known as "Fun Time Scuba," but Jim was primarily responsible for operating the business.

Jim filed a Petition for Dissolution of Marriage on May 25, 2005. A hearing was held on September 20, 2006, and the trial court issued its findings of fact and conclusions of law dissolving the marriage on December 29, 2006. Despite testimony from a certified public accountant concerning the value of the parties' business, the trial court concluded that "there is no business value for Fun Time Scuba[.]" Appellant's App. p. 12. The trial court also found that a 1966 Chevrolet Impala owned by Jim prior to the marriage should not be included in the marital estate. Dawn filed a motion to correct error, which the court denied on January 26, 2007. Dawn now appeals. Additional facts will be provided as necessary.

## **Standard of Review**

Jim failed to file an appellate brief. When an appellee fails to submit a brief, we will not “undertake the burden of developing arguments for the appellee.” In re Paternity of B.D.D., 779 N.E.2d 9, 13 (Ind. Ct. App. 2002). Therefore, “[w]e apply a less stringent standard of review with respect to showings of reversible error, and we may reverse the trial court’s decision if the appellant can establish prima facie error.” Id. In this context, prima facie error is defined as “at first sight, on first appearance, or on the face of it.” Id. (citations omitted).

The trial court issued findings of fact and conclusions of law pursuant to Indiana Trial Rule 52, and we apply the following 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). The trial court’s findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. Id. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Id. We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. Id. We review conclusions of law de novo. Id.

### **I. Valuation of Fun Time Scuba**

Dawn argues that the trial court abused its discretion when it concluded that “there is no business value for Fun Time Scuba.” Appellant’s App. p. 12. “We review a trial court’s decision in ascertaining the value of property in a dissolution action for an abuse

of discretion.” Balicki v. Balicki, 837 N.E.2d 532, 536 (Ind. Ct. App. 2005), trans. denied. “If the trial court’s chosen valuation is within the range of values supported by the evidence, the court does not abuse its discretion.” Id.

Jim’s own certified public accountant, Harry Gallatin, testified that Fun Time Scuba had a business value of \$40,000, and he determined this value by utilizing an “income approach” method. Tr. pp. 57-58. In its findings of fact and conclusions of law, the trial court stated:

Based upon the testimony of Gallatin and largely to the lack of evidence presented by either party as to personal goodwill versus enterprise goodwill, this Court –although very tempted– will not speculate on assigning any goodwill and the Court concludes, except for real estate fair market values, the parties have failed to present sufficient evidence as to the business asset of Fun Time Scuba.

Appellant’s App. p. 13.

Concerning personal goodwill and enterprise goodwill, our supreme court has held:

[B]efore including the goodwill of a self-employed business or professional practice in a marital estate, a court must determine that the goodwill is attributable to the business as opposed to the owner as an individual. If attributable to the individual, it is not a divisible asset and is properly considered only as future earning capacity that may affect the relative property division. . . . [T]o the extent a business or profession has goodwill (or has a value in excess of its net assets) it is a factual issue to what extent, if any, that goodwill is personal to the owner or employee and to what extent it is enterprise goodwill and therefore divisible property.

Yoon v. Yoon, 711 N.E.2d 1265, 1269-70 (Ind. 1999). “If a party wishes to exclude personal goodwill from a business’s valuation in a dissolution proceeding, they must submit evidence of its existence and value to the trial court by ensuring that their chosen expert provides proof of such existence and value.” Balicki, 837 N.E.2d at 538.

The trial court abused its discretion when it failed to assign any value to Fun Time Scuba. Jim's own accountant, Gallatin, testified that the business was worth \$40,000 and Wife valued the business at \$396,822. Jim did not present any evidence that Gallatin's valuation of the business included personal goodwill attributable solely to Jim.<sup>1</sup> Gallatin specifically stated that he valued the business at \$40,000 by utilizing the "income approach" method. While it is unlikely that the actual value of Fun Time Scuba is either \$40,000 at the low end of the evidence, or \$396,822 at the high end of the evidence, it is clear that the business has significant, divisible value for dissolution purposes. Consequently, we cannot conclude that the trial court's finding that "the parties have failed to present sufficient evidence as to the business asset of Fun Time Scuba" is supported by the evidence. We therefore remand this case to the trial court for a determination of the value of Fun Time Scuba.

## **II. 1966 Chevrolet Impala**

Dawn also argues that the trial court erred when it failed to include Jim's 1966 Chevrolet Impala in the marital estate.

It is well-established in Indiana that all marital property goes into the marital pot for division, whether it was owned by either spouse prior to the marriage, acquired by either spouse after the marriage and prior to final separation of the parties, or acquired by their joint efforts. This "one-pot" theory insures that all assets are subject to the trial court's power to divide and award. While the trial court may ultimately determine that a particular asset should be awarded solely to one spouse, it must first include the asset in its consideration of the marital estate to be divided.

Hill v. Hill, 863 N.E.2d 456, 460 (Ind. Ct. App. 2007) (internal citations omitted).

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<sup>1</sup> With regard to personal goodwill, Jim argued only that he "seems to be developing a much better business now that [Dawn is] not . . . involved with it." Appellant's App. p. 54.

The trial court concluded that the Impala “is non-marital property and was acquired by [Jim] prior to the marriage[.]” Appellant’s App. p.12. While the fact that property was owned by one party prior to the marriage may justify deviation from an equal distribution of marital property or award to one party instead of the other, such fact does not support a finding that the property should not be included in the marital estate. See Ind. Code §§ 31-15-7-4, -5 (1998). Accordingly, we conclude that the trial court erred when it failed to include the 1966 Chevrolet Impala in the marital estate and remand this case to the trial court for inclusion of this asset in the marital estate.

### **Conclusion**

The trial court abused its discretion when it failed to assign a value to the Fun Time Scuba business and failed to include the 1966 Chevrolet Impala in the marital estate. Accordingly, we remand this case for recalculation and redistribution of the marital estate.<sup>2</sup>

Reversed and remanded for proceedings consistent with this opinion.

NAJAM, J., and BRADFORD, J., concur.

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<sup>2</sup> Given our resolution of the issues presented in this appeal, we need not address Dawn’s argument that the division of property is contrary to and not supported by the findings or her argument that the trial court failed to equally divide the marital estate. See Ind. Code § 31-15-7-5 (“The Court shall presume that an equal division of the marital property between the parties is just and reasonable.”).