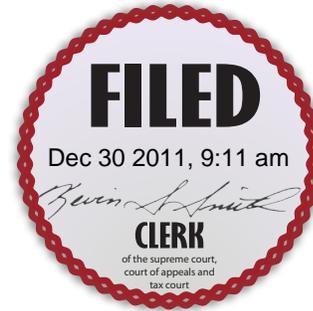


**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE: THE MARRIAGE OF )  
 )  
LINDA CARPENTER, )  
 )  
Appellant-Petitioner, )  
 )  
and ) No. 89A01-1101-DR-1  
 )  
WILLIE CARPENTER, )  
 )  
Appellee-Respondent. )

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APPEAL FROM THE WAYNE SUPERIOR COURT  
The Honorable Gregory A. Horn, Special Judge  
Cause No. 89D01-0603-DR-36

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**December 30, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Linda Carpenter (“Wife”) appeals the division of marital assets in the dissolution of her marriage to Willie Carpenter (“Husband”).<sup>1</sup> We affirm in part, reverse in part, and remand with instructions.

### **Issues**

Wife presents three issues for review:

- I. Whether Wife’s motion to set aside a provisional order should have been granted;
- II. Whether the dissolution court abused its discretion by failing to credit Wife for nonconforming payments that benefitted Husband; and
- III. Whether the dissolution court erroneously included non-marital assets in the marital estate subject to division.

### **Facts and Procedural History**

Husband and Wife were married on March 20, 1995. At that time, each owned various parcels of real estate used as rental property. Wife had recently become a co-owner of a trucking business, Hoosier Bulk Trucking, Inc. (“HBT”). After the marriage, Wife became the sole owner of HBT. During the marriage, Husband and Wife jointly acquired rental properties and storage units. They also acquired a residence in Hagerstown, Indiana, where they lived together with Wife’s children from a previous marriage. The Hagerstown residence further served as the principal business office of HBT.

On March 13, 2006, Wife filed a pro-se petition for dissolution of marriage. Nonetheless, the parties proceeded with their plan to build additional storage units for rent.

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<sup>1</sup> Husband cross-appeals, contending that the dissolution court erred by ordering an equalization payment from him to Wife in the entire amount, as opposed to one-half the amount, of the difference between Wife’s award of assets and Husband’s award of assets. Wife concedes that the dissolution court erred in this regard.

During the separation, which ultimately extended over several years, Husband managed the jointly-owned rental properties and lived at a remodeled building at one of the storage facilities. Wife continued to reside at the marital residence and conduct HBT business from that location.

The parties obtained respective counsel, conducted discovery, and appeared at several hearings. The final dissolution hearing was held on April 27 through April 30, 2010. On December 6, 2010, the marriage was dissolved. This appeal ensued.

## **Discussion and Decision**

### Standard of Review

The trial court made specific findings of fact and conclusions of law pursuant to Indiana Trial Rule 52. Accordingly, we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, 457 (Ind. 2009). We will not set aside the findings or judgment unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. Id. (citing Trial Rule 52(A)). A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment. Id. A judgment is also clearly erroneous when the trial court has applied the wrong legal standard to properly found facts. Id. When a party has requested that the trial court enter specific findings of fact and conclusions of law, we may affirm the judgment on any legal theory supported by the findings. Daugherty v. Daugherty, 816 N.E.2d 1180, 1183 (Ind. Ct. App. 2004).

### I. Motion for Relief from Provisional Order

On April 12, 2010, Wife moved to set aside a provisional order that had been entered on December 27, 2006, requiring Wife to pay \$800 per month to Husband. For the most part, Wife had not made those payments, resulting in an arrearage of \$32,800 by the time of the final hearing.

Hearing on the motion for relief from the provisional order was consolidated with the final hearing. Wife argued that she had been denied due process because the provisional hearing was held in-chambers and she had been deprived of the opportunity to present evidence that Husband was economically self-sufficient and spousal maintenance was unwarranted. Wife testified and conceded that she had been represented by counsel but insisted that she had specifically advised her attorney that she would not agree to spousal support.

The dissolution court observed that a hearing had been conducted in-chambers with attorneys for both parties present, Wife had not then requested a hearing in open court to present evidence, and a subsequent hearing had been conducted in May of 2007 to address compliance with the provisional order. Concluding that Wife had not been denied due process, the dissolution court denied the motion for relief from the provisional order.

Although Wife now claims that her prior attorney acted without her authorization, the record is replete with evidence of Wife's acquiescence. In July of 2006, attorneys for the parties filed their respective appearances, and the matter was set for a preliminary hearing. On August 3, 2006, the hearing was vacated, the court having been advised that settlement

had been reached. However, the following month, Husband petitioned for a preliminary hearing, and a hearing date was set for December 20, 2006. There is no transcript of this hearing but, by all accounts, it took place in-chambers with both attorneys present and ostensibly reporting their clients' respective positions.<sup>2</sup> Agreement was reached that Husband would continue to manage jointly held properties, including the responsibility for collecting rents and making payments. According to Husband's recollection, the \$800 monthly payments were to be Wife's contribution to budget deficits related to jointly held properties when less than all of the storage units were completed and rented. According to Wife, the payments were in the nature of maintenance to supplement Husband's pension and Social Security income.<sup>3</sup>

A hearing was set for April 3, 2007, "upon provisional order issues and for a preliminary pre-trial conference." (App. 51.) The hearing was delayed and rescheduled several times, with the parties attempting mediation. Meanwhile, in May of 2007, Husband filed a Rule to Show Cause, contending that Wife was in contempt of the provisional order. At the hearing on rule to show cause, Wife was represented by new counsel. She did not challenge the propriety of the provisional order, but rather challenged the computation of

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<sup>2</sup> The judge presiding over the in-chambers hearing has since retired, and Wife's original counsel subsequently withdrew his representation of Wife. However, the attorneys representing the parties at the final hearing agreed that Wife's former attorney and Husband's sole attorney had met with the trial court judge in-chambers, presumably to present their respective client's positions, and that no recording was made.

<sup>3</sup> At the final hearing, Wife conceded that Husband had made mortgage payments for four years on the marital residence where she continued to reside. The mortgage payments were \$1,600 monthly, payable from a joint account. Wife's position was that Husband should have had sufficient funds collected from jointly-owned rental properties to satisfy all joint obligations and she suggested that he failed to accurately report all monies collected.

arrears. She requested an opportunity to present evidence in this regard. The trial court's entry included a memorandum describing the dispute to be resolved at a future hearing:

The provisional dispute revolves around each party's interpretation of the short form provisional order which entered herein on December 27, 2006. The petitioner takes the position that she is only \$1,600.00 in arrears for the reason that she paid \$1,600.00 to the respondent herein out of a joint account and another \$800.00 to the respondent herein out of a separate account in her name only. The respondent takes the position that \$4,000.00 is due and owing in that the basis of the Provisional Order was to have monies paid to Mr. Carpenter from current income. It is the respondent's position that since no monies were paid to him out of the petitioner's current income, she has wholly failed to comply with the terms and conditions of the Order. The court will have this matter set for a one hour hearing to help the parties resolve this dispute.

(Ex. pgs. 530-31.)

In sum, Wife was initially represented by counsel who agreed that Wife should contribute monies to Husband during the pendency of the dissolution petition. Dissatisfied with original counsel and having obtained subsequent counsel, Wife nonetheless did not challenge the propriety of the provisional order for over three years. During those years, she challenged only the amount of arrearage. On appeal, a party is precluded from taking advantage of invited error, or error in which she acquiesced. Wright v. Wright, 782 N.E.2d 363, 368 (Ind. Ct. App. 2002). We will not now entertain an allegation that the dissolution court deprived Wife of due process for failing to conduct a 2006 in-court hearing on Husband's entitlement to maintenance.

Moreover, the record does not support Wife's characterization of the payments as spousal maintenance.<sup>4</sup> Wife was ultimately permitted, at the final hearing, to elicit evidence that Husband had sufficient means to meet his personal living expenses without contribution from Wife. However, it is uncontroverted that Husband – with Wife's acquiescence -- was responsible for managing the jointly-held rental properties. In so doing, he was required to make substantial mortgage payments. Wife continued to live at one of the jointly-held properties and operate her business from those premises. Clearly, Husband was entitled to receive contributions from Wife toward joint liabilities.

We find no error in the dissolution court's refusal to set aside the 2006 provisional order, and its conclusion that Wife was substantially in arrears has ample evidentiary support.

## II. Non-Conforming Payments

Wife next argues that, even if she is liable under the provisional order, she should receive credit for non-conforming payments. Specifically, Wife claims to have paid for Husband's health insurance at a cost of \$240 per week, from the date of the filing of the dissolution petition to the final hearing. She further contends that Husband never reimbursed her. Wife directs us to no documentary evidence of said payments. Nonetheless, the dissolution court found that the payments had been made, and specifically denied Wife credit for these payments.

Wife argues that the denial of credit amounts to an abuse of the dissolution court's

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<sup>4</sup> The dissolution court made the following factual finding: "On December 27, 2006, the Court (Hon. P. Thomas Snow, prior to his retirement) ordered Wife to pay \$800.00 per month to Husband, commencing January 10, 2007, to help defray the shortfall after the collection of rent and payment of expenses on their joint rentals such as mortgages, insurance and maintenance." (App. 22.)

discretion and she directs our attention to two child support cases discussing the potential for credit for non-conforming payments. An abuse of discretion occurs when the decision is against the logic and effect of the facts and circumstances before the court, and the inferences that may be drawn therefrom. Knowledge A-Z, Inc. v. Sentry Ins., 891 N.E.2d 581, 584 (Ind. Ct. App. 2008), trans. denied.

In the first of the cases cited by Wife, Franklin v. Franklin, 169 Ind. App. 537, 543, 349 N.E.2d 210, 214 (1976), a panel of this Court held “In light of the fact that James was totally supporting the child [for six weeks], it was well within the court’s discretion to credit James with the \$90.” In the second case, O’Neil v. O’Neil, 535 N.E.2d 523, 524-25 (Ind. 1989), our Indiana Supreme Court held that “the trial court erred in allowing the father any credit against his support obligation for sums voluntarily paid for the children’s educational costs.” In reaching that conclusion, the Court acknowledged the “proper general rule that an obligated parent will not be allowed credit for payments not conforming to the support order.” Id. at 524.

Thus, even assuming that Wife’s position is analogous to that of a child support payor, it was incumbent upon her to demonstrate an exception to the general rule that credit is not permitted for non-conforming payments. However, Wife’s payment of insurance premiums is voluntary and there is no evidence that Husband agreed to accept the insurance coverage in lieu of the provisional payments. Wife has demonstrated no abuse of discretion in this regard.

### III. Assets in Marital Estate

The division of marital property involves a two-step process. Thompson v. Thompson, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004), trans. denied. First, the trial court must determine what property is to be included in the marital estate, or marital pot. Id. Second, the trial court must divide the marital property under the presumption that an equal split is just and reasonable. Id. (citing Ind. Code § 31-15-7-5). Wife contends that the trial court erred in determining the makeup of the marital pot, by including a HBT shareholder loan to Wife of \$30,893 and a Mini Cooper automobile valued at \$21,000.

All marital property goes into the marital pot for division, whether it was owned by either spouse before marriage, acquired by either spouse after the marriage and before final separation of the parties, or acquired by their joint efforts. Ind. Code § 31-15-7-4(a); Hill v. Hill, 863 N.E.2d 456, 460 (Ind. Ct. App. 2007). Property acquired by a spouse after the final separation date is excluded from the marital estate. Thompson, 811 N.E.2d at 912.

The 2005 tax return for HBT disclosed a shareholder loan from Wife in the amount of \$53,628 as of December 31, 2005. Corporate records indicated that three months later, HBT owed Wife only \$22,735. The dissolution court included the difference, \$30,893, as an asset in the marital pot. It was allocated to Wife in the division of marital assets.

Testimony from Wife's expert witness, Michael Stover, and from Husband's expert witness, Robert Schlegel, supports the conclusions that HBT had partially satisfied the shareholder loan, and Wife had received the funds. Stover, upon examination of the 2005 HBT tax return, testified as follows:

Question: There was cash of almost Forty-Five Thousand dollars at the end of the year 2005, correct.

Answer: I believe that's correct.

Question: All right. And you show cash, uh, she showed you cash in the amount of Sixteen Thousand Dollars, (\$16,000.00)?

Answer: Yes.

Question: You didn't do any independent accounting or audit of her bank account, did you?

Answer: No, I did not.

Question: And, you have no idea what happened to that cash?

Answer: Specifically, no.

Question: Could it have been used to pay her back, it's about the same amount?

Answer: Could have.

(Tr. 87-88.)

Schlegel testified in relevant part:

[T]his would indicate that according to the records as of December 31<sup>st</sup> the company owed Mrs. Carpenter Fifty-Five Thousand. According to the records I got in mid March that had dropped to Twenty-Two, indicating that part of it had been paid or extinguished in some way.

(Tr. 406.) Finally, Wife testified that her checking account balance, at First Bank of Richmond, was \$67,205 as of March 25, 2006, although she had reported to the dissolution court a date-of-separation balance of \$5,909. Accordingly, the dissolution court properly included the \$30,893 shareholder loan repayment as a marital asset subject to division.

Wife testified that she had purchased a Mini Cooper in May of 2006, and it had since been paid off. It is undisputed that the asset was acquired after the final date of separation. The dissolution court made no finding that it was acquired with marital funds. As the vehicle is post-separation property, it was not properly included in the marital pot. Thompson, 811 N.E.2d at 912.

In light of the foregoing, the dissolution court's calculation that Wife is to receive \$766,136.27 in net assets should be reduced by \$21,000 to adjust for the improper inclusion of the Mini Cooper. This yields net assets of \$745,136.27. Husband received net assets of \$799,219.87. His share exceeds Wife's share by \$54,083.60. In order to effect an equal division of the marital estate, Husband owes Wife \$27,041.80.

### **Conclusion**

Wife has not established that she was entitled to have the provisional order set aside, or to have credit for non-conforming payments. The shareholder loan repayment funds were properly included in the marital pot; however, an after-acquired vehicle was not. We remand to the dissolution court with instructions to exclude the vehicle and order Husband's repayment of one-half of the difference between assets awarded to him and assets awarded to Wife.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, J., and DARDEN, J., concur.