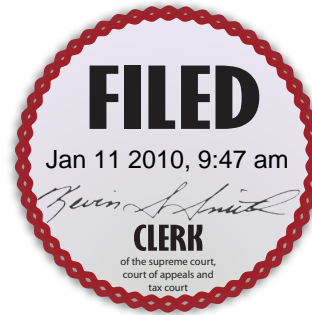


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRIGID JACOBS (FLANNERY),

Appellant-Petitioner,

vs.

GEORGE JACOBS,

Appellee-Respondent.

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No. 50A04-0905-CV-244

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0104-DR-66

January 11, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Brigid Jacobs (Flannery) (“Wife”) appeals the trial court’s order denying her petition for the modification of the dissolution decree between her and George Jacobs (“Husband”). She raises several issues, of which we find the following dispositive: whether Husband committed constructive fraud by failing to disclose that his military pension was a marital asset subject to division in the dissolution.

We affirm.

FACTS AND PROCEDURAL HISTORY

Wife and Husband were married in June 1981. Husband served in the United States Navy for a total of twenty years from approximately 1974 until 1995, and he was married to Wife for approximately fourteen of his twenty years of active military service. Husband retired from the Navy in 1995 and began drawing his military pension. In the Spring of 2001, Wife and Husband decided to end their marriage, and Husband filed for dissolution on April 4, 2001. The couple sought to divide their assets by agreement, and Wife agreed to meet with an attorney selected by Husband in order to save on the cost of the dissolution. In dividing their marital property, Wife and Husband agreed that each would be entitled to keep their future income. Husband’s military pension was discussed only as income and was treated as such. At the time of the dissolution, Wife was not aware that the pension was considered an asset of the marriage subject to division between the parties.

Husband retained an attorney to represent him in the dissolution action, and the attorney entered an appearance on behalf of Husband. Husband met with his attorney on several occasions; Wife met with the attorney only once with Husband to sign the Marital

Settlement Agreement (“Agreement”), which had been drafted by Husband’s attorney.

The Agreement contained a clause, which stated:

Husband and Wife hereby represent and warrant to each other that there has been a full disclosure of assets and that the property referred to in this Agreement represents all the property of any sort whatsoever and wheresoever located, real, personal or mixed, which either of them have an interest in or right to, whether legal or equitable.

Resp’t’s Ex. D at 3; *Appellant’s App.* at 9. The Agreement listed various assets and items of personal property and referred to “401k and retirement accounts,” providing that each party may retain the accounts in his or her individual name. The Agreement did not specifically list or refer to Husband’s military pension. The Agreement was accepted by the trial court, and a Decree of Dissolution was entered on June 6, 2001.

A month after the dissolution was final, Wife learned that Husband’s military pension was a marital asset and that she may have been entitled to a portion of it under the Uniformed Services Former Spouses’ Protection Act (“USFSPA”).¹ Wife retained an attorney at that time to attempt to enforce her rights under the USFSPA, but the attorney failed to follow through in a timely fashion. Wife later obtained a second attorney and filed a petition for modification of the decree on September 7, 2006. This second attorney was required to withdraw due to a disciplinary action, and a third attorney agreed to assume the action.

A hearing was held on Wife’s petition on March 30, 2009. At the hearing, Husband testified that he understood his military pension to be a part of his income and

¹ The Uniformed Services Former Spouses’ Protection Act (“USFSPA”) recognizes the right of state courts to distribute military retired pay to a spouse or former spouse and provides a method of enforcing these orders through the Department of Defense. The USFSPA itself does not provide for an automatic entitlement to a portion of the member’s retired pay to a former spouse. *Pet’r’s Ex. 7*.

that the term “retirement plans” in the Agreement included his military pension. *Tr.* at 54, 66. Husband was receiving his pension at the time of the dissolution, but did not become aware of the USFSPA until Wife informed him of it. At the hearing, Wife testified that she was aware of the existence of Husband’s military pension at the time of the dissolution, but was not aware of her entitlement to a portion thereof. *Id.* at 108-09. She argued that the Agreement could be modified pursuant to Indiana Code section 31-15-7-9.1, which allows for modification of a property disposition order in the case of fraud where the fraud is asserted within six years of the order. Wife claimed that Husband had committed constructive fraud by representing his military pension as income when he knew or should have known that it was an asset of the marriage subject to division. At the conclusion of the hearing, the trial court entered an order denying Wife’s petition for modification of the dissolution decree. Wife now appeals.

DISCUSSION AND DECISION

Initially, we note that Wife contends that the trial court’s order was insufficient because it did not contain specific findings of fact as she had requested. At the hearing on Wife’s modification petition, before any evidence was heard, she orally made a request for specific findings of fact when the trial court ruled on the petition. *Tr.* at 41. Under Indiana Trial Rule 52(A), a trial court shall find facts specially and state its conclusions thereon upon its own motion or a written request of any party. An oral request for special findings does not invoke Indiana Trial Rule 52(A). *Carroll v. J.J.B. Hilliard, W.L. Lyons, Inc.*, 738 N.E.2d 1069, 1075 (Ind. Ct. App. 2000), *trans. denied*

(2001). Therefore, the trial court did not err in failing to make specific findings of fact because Wife only made an oral request.

Here, the trial court entered a general judgment without findings of fact and conclusions thereon. ““A general judgment will be affirmed upon any legal theory consistent with the evidence, and the court of review neither reweighs the evidence nor rejudges the credibility of the witnesses.”” *Perkins v. Brown*, 901 N.E.2d 63, 65 (Ind. Ct. App. 2009) (quoting *Jones v. Jones*, 641 N.E.2d 98, 101 (Ind. Ct. App. 1994)). We will reverse the judgment only if it is clearly erroneous. *Id.* (citing *Borders v. Noel*, 800 N.E.2d 586, 591 (Ind. Ct. App. 2003)). We presume that the trial court correctly followed the law. *Id.* (citing *Jones*, 641 N.E.2d at 101). This presumption is one of the strongest presumptions applicable to our consideration of a case on appeal. *Id.*

Wife argues that the trial court erred when it denied her petition for modification and failed to find that Husband had committed constructive fraud as to his military pension. She contends that Husband committed constructive fraud at the time of the Agreement when he mischaracterized his military pension as income and not as an asset of the marriage of which she was entitled to a portion. She specifically alleges that Husband owed her a duty to disclose all assets based upon their relationship as husband and wife and based upon the full disclosure clause of the Agreement.

“Constructive fraud ‘arises by operation of law from a course of conduct which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the existence or evidence of actual intent to defraud.’” *Allison v. Union Hosp., Inc.*, 883 N.E.2d 113, 122 (Ind. Ct. App. 2008) (quoting *Stoll v. Grimm*, 681 N.E.2d 749, 757 (Ind.

Ct. App. 1997)). The elements of constructive fraud are: (1) a duty owed by the party to be charged to the complaining party due to their relationship; (2) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists; (3) reliance on the misrepresentations by the complaining party; (4) injury to the complaining party as a proximate result of the reliance; and (5) the gaining of an advantage by the party to be charged at the expense of the complaining party. *Id.* at 123. The complaining party has the burden of proving the existence of a duty owed to it by the other party stemming from their relationship. *Morfin v. Estate of Martinez*, 831 N.E.2d 791, 802 (Ind. Ct. App. 2005).

In *Selke v. Selke*, 600 N.E.2d 100 (Ind. 1992), our Supreme Court held that absent “unique factual circumstances,” such as a provision in a property settlement agreement requiring full disclosure or a discovery request made under the trial rules, there is no express or implied duty of spontaneous disclosure of assets. *Id.* at 101-02. In that case, the parties entered into a property settlement agreement which was subsequently approved by the trial court and which gave husband all of the pension rights from his employment. *Id.* at 101. Wife later filed a petition to set aside the agreement on grounds that husband had allegedly committed constructive fraud by failing to inform wife of the value of a profit sharing plan. *Id.* The trial court denied the wife’s petition and she appealed. *Id.* Our Supreme Court determined that husband was under no duty to disclose the value of the plan because wife had not specifically requested the information and there was no disclosure obligation imposed by the settlement agreement. *Id.* at 101-02.

Although Wife contends that Husband owed her a duty to disclose all assets at the time of the Agreement, she is actually arguing that he had a duty to disclose her *entitlement* to his military pension. It is undisputed that, at the time of the Agreement, Wife knew of the existence of Husband's military pension; she was merely not aware of that she may have been entitled to a portion of such pension. We conclude that Husband had no duty to inform Wife of her potential entitlement to his military pension.

As previously stated, Husband had no spontaneous duty to disclose Wife's entitlement and no "unique factual circumstances" existed in this case to impose such a duty on him. Although the Agreement contained a clause requiring full disclosure of all assets by the parties, the clause merely required the disclosure of the *existence* of such assets and not the *entitlement* to such assets. Further, Wife never filed any discovery requests regarding Husband's military pension or her entitlement to such. As the trial court found, Wife was, at all relevant times, aware that Husband received a military pension. While Wife may have been entitled to a portion of Husband's military pension, Husband had no duty to provide legal advice to Wife on Indiana law regarding the distribution of such pensions in dissolution proceedings. Wife failed to seek legal counsel to properly advise her and cannot hold Husband responsible for her failure to do so. The trial court's decision to deny Wife's petition to modify the dissolution decree due to constructive fraud was not clearly erroneous.

Affirmed.

DARDEN, J., and MAY, J., concur.