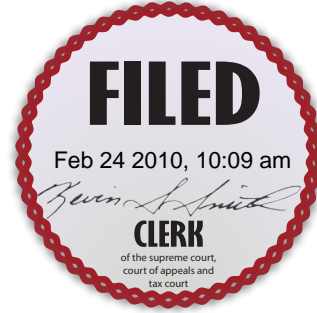


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MARRIAGE OF:)
)
CHRISTINA ANN SCHMITT,)
)
Appellant-Petitioner,)
)
vs.)
)
DAVID SCHMITT,)
)
Appellee-Respondent.)

No. 46A03-0907-CV-305

APPEAL FROM THE LAPORTE SUPERIOR COURT NO. 1
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0703-DR-52

February 24, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Christina Ann Schmitt (Christina), appeals the trial court's corrected decree of dissolution of marriage.

We affirm.

ISSUE

Christina raises one issue for our review, which we restate as: Whether the trial court erred by finding that employment taxes owed by the business of Appellee-Respondent, David Schmitt (David), to be a legitimate business debt which reduced the value of the business thereby.

FACTS AND PROCEDURAL HISTORY¹

Christina and David were married on November 4, 1995. In 2003, David purchased his family's business, A.J. Schmitt Jewelers, by paying each of his four siblings \$25,000 in exchange for their shares. The business was unprofitable during 2004 through 2007. On March 9, 2007, Christina filed a petition for dissolution of their marriage. During the proceedings leading up to the dissolution hearing, it came to light that A.J. Schmitt Jewelers had developed significant tax liabilities consisting of approximately \$259,000 for unpaid sales tax owed to the Indiana Department of Revenue, and \$28,900 in unpaid employment tax owed to the Internal Revenue Service (IRS). David admitted that he had collected the sales

¹ Christina has inserted adversarial contentions into her Statement of Facts of the Appellant's Brief. (*See, e.g.*, "The court erred when it failed to find that Husband also admitted to his role and responsibility for incurring the Internal Revenue Service debt and the State of Indiana." (Appellant's Br. p. 6)). The Statement of Facts should not be argumentative. *See County Line Towing, Inc., v. Cincinnati Ins. Co.*, 714 N.E.2d 285, 289-90 (Ind. Ct. App. 1999), *trans. denied*.

tax when selling to customers, but had knowingly invested the collected money in the failing business instead of paying it to the Indiana Department of Revenue. David concealed these activities from Christina.

On August 20, 2008, the trial court conducted a dissolution hearing. On October 29, 2008, the trial court entered its Decree of Dissolution of Marriage. Among other things, the trial court included the assets and liabilities of A.J. Schmitt Jewelers in the marital property. In doing so, the trial court reduced the net worth of A.J. Schmitt Jewelers by \$28,900 to account for the employment taxes due to the IRS which David had failed to pay on behalf of A.J. Schmitt Jewelers. However, the trial court concluded that David should be solely liable for the approximately \$259,000 owed to the Indiana Department of Revenue for unpaid sales tax.

On November 26, 2008, both Christina and David filed separate motions to correct error, and on December 9, 2008, each replied to the other's pending motion. On May 11, 2009, the trial court issued corrections to the dissolution decree, which stated in part that:

Internal Revenue Service debt:

There are taxes due and owing in the amount of \$28,900.00. [Christina] argues that this debt is not a marital debt and that husband should be personally liable. This debt arises from taxes due for A.J. Schmitt Jewelers. This debt resulted as part of the regular course of business dealings for A.J. Schmitt Jewelers and is accordingly a business debt and therefore a marital debt. The court finds no error.

(Appellant's App. p. 6).

Christina now appeals. Additional facts will be presented as necessary.

DISCUSSION AND DECISION

Christina argues that the trial court abused its discretion by not deviating from the presumed just and reasonable equal marital property split and allocating solely to David the liability for the \$28,900 in unpaid employment taxes owed by A.J. Schmitt Jewelers. The disposition of marital assets is within the sound discretion of the trial court and we will reverse only for an abuse of that discretion. *Bizik v. Bizik*, 753 N.E.2d 762, 766 (Ind. Ct. App. 2001), *trans. denied*.

The party challenging the trial court's property division bears the burden of proof. That party must overcome a strong presumption that the court complied with the statute and considered the evidence on each of the statutory factors. The presumption that a dissolution court correctly followed the law and made all the proper considerations when dividing the property is one of the strongest presumptions applicable to our consideration on appeal. Thus we will reverse a property distribution only if there is no rational basis for the award.

Smith v. Smith, 854 N.E.2d 1, 4 (Ind. Ct. App. 2006) (citations omitted). Indiana Code section 31-15-7-4 provides for a just and reasonable distribution of marital property, regardless whether the property was acquired by joint efforts of the spouses, or individually by either spouse, as long as it was acquired prior to final separation. Indiana Code section 31-15-7-5 creates a presumption "that an equal division of the marital property between the parties is just and reasonable." However, that presumption may be rebutted by evidence concerning:

- (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.

Christina's argument revolves around one specific premise: Because the trial court apportioned all of the liability for unpaid sales tax by A.J. Schmitt Jewelers to David, the employment tax liability should also be apportioned to David as well. However, this premise fails because of the trial court's broad discretion and its reasoning that the two separate tax liabilities were inherently different. At the hearing on the competing motions to correct error, the following exchange took place:

[THE COURT]: Well, I think what Counsel is arguing is if the Court deviated on the sales tax, why not also deviate on the IRS that wasn't paid? There are two issues; right? There was the IRS taxes, could have been payroll. Then there was the sales tax.

[DAVID'S COUNSEL]: Right. Well, does that mean that the Court is bound if it does one thing with one and has to do it with the other?

[THE COURT]: No. And I mean - -

[DAVID'S COUNSEL]: Sure. And -

[THE COURT]: I, in my mind, the sales tax was much more egregious. You know, that you don't pay the sales tax. You collect that money, you have it, and you spend it on something else. As opposed to just a failure to pay the

IRS. I guess you could say in a way you're doing the same thing. But it was more egregious to the Court that – and I did not think that the wife should have to bear responsibility for the sales tax not being paid even though it was collected from consumers who come and pay that money. And you've got that money, and then you take it and spend it on something else as opposed to everybody – you know, it's a business. It's marital property. The IRS wasn't paid, and it should have been paid. To me is less egregious and seems more like it would be part of the marital debt than the sales tax, which was definitely because of the husband's misuse of –

* * *

[DAVID'S COUNSEL]: - debts, you know. That's what this is. When you're paying employees, every Friday they get a check regardless of whether or not somebody came in and bought jewelry that week. And so when he writes them the check on Friday, if they didn't sell enough jewelry there's not money to pay the IRS. And you hope to get caught up in the next week when thing or good or –

[THE COURT]: - not going to –

[DAVID'S COUNSEL]: - you're going to – yeah.

[THE COURT]: I mean - right. That's a distinction for the Court. If you don't –

[DAVID'S COUNSEL]: And I think that –

[THE COURT]: - have the money to pay it versus you were handed that money by a consumer and you just used it for something else.

(Transcript pp. 208-10). It is apparent that the trial court analyzed both tax liabilities and determined that the employment tax liability was a legitimate form of business debt, but that the sales tax liability was not. For this reason, the trial court reduced the net value of the business by the amount owed in employment taxes, but apportioned the sales tax liability to David. We conclude that Christina has failed to rebut the strong presumption that the trial

court acted within its discretion by concluding that the employment tax liability was a legitimate business debt.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion by determining that the unpaid employment taxes was a legitimate business debt of A.J. Schmitt Jewelers, and reducing the net worth of the business by that amount.

Affirmed.

MATHIAS, J., concurs.

CRONE, J., concurs in result.