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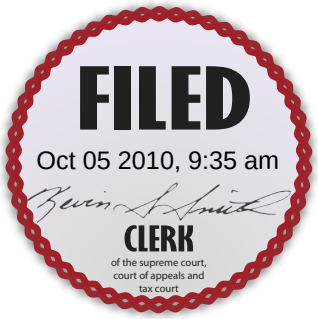

IN THE
COURT OF APPEALS OF INDIANA

MARDI CLEMENS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-1003-DR-118
	)	
DANIEL CLEMENS,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Mark C. Chambers, Judge Pro Tempore
Cause No. 02D07-0306-DR-292

October 5, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Mardi Clemens (Wife), appeals the trial court's Order pursuant to the verified petition for Contempt and for Sanctions filed by the Appellee-Respondent, Daniel Clemens (Husband), regarding surrendered life insurance policies.

We affirm in part, reverse in part, and remand for further proceedings.

ISSUE

Wife presents two issues for our review, which we restate as the following issue: Whether the trial court committed clear error when it ordered her to pay to Husband damages equal to the death benefits of two surrendered life insurance policies rather than the cash surrender benefits.

FACTS AND PROCEDURAL HISTORY

On May 3, 1958, Husband and Wife were married and lived together for over forty-five years. During their marriage, they accumulated a significant amount of property, both real and personal. On June 10, 2003, Wife filed a petition for the dissolution of their marriage in the Allen Superior Court. On May 16, 2005, they executed the Marriage Settlement Agreement (Agreement), which called for specific procedures to facilitate an equal distribution of the "net cash value" of all insurance policies held by Husband and Wife. (Appellant's App. p. 101). The Agreement stated, in pertinent part:

> Each party shall be declared the owner of all policies of life insurance currently in existence and insuring the life of that party. To the extent that a different ownership of said policies currently exists, both parties shall cooperate with the other in executing any and all such documents as may be

> necessary to transfer ownership of such policies so that each party is the owner of any policy insuring that party's life.
>
> Within thirty (30) days of the date of this Agreement, the parties shall obtain an accounting of all cash value of life insurance policies insuring the lives of the parties less any outstanding policy loans and shall, within thirty (30) days of said accounting, make such adjustment by payment to the other party, if necessary, such that the *net cash value of all policies is equally divided between the parties.* Each party warrants and represents to the other that, since the date of the filing of this action, neither party has caused any additional loans to be placed against any of the afore-referenced life insurance policies nor have they cancelled or otherwise transferred ownership of any policies existing as of the date of separation.

(Appellant's App. p. 101) (emphasis added).

On May 17, 2005, the marriage was dissolved and the Agreement was examined and approved by the trial court, and a Decree of Dissolution (Decree) was entered. After the trial court issued the Decree, it was discovered that certain insurance policies had been liquidated by Wife. On December 7, 2007, Husband filed two separate verified petitions for contempt against Wife stemming from her liquidation of the insurance policies. The first policy, Mass Mutual policy number ***043, had a death benefit of $15,000. Upon surrender, Wife received cash for the surrender value of policy in the amount of $5,958.34. Wife used the cash surrender benefits to pay living expenses. The second policy, Mass Mutual policy number ***414, had a death benefit of $46,500 and she surrendered it for $44,450.

On April 24, 2008, the trial court held a hearing on Husband's first contempt petition. That same day, the trial court issued its Order finding Wife in contempt and it issued written notice of this. In the Ruling and Order on Contempt (April 24th Order), the trial court entered the following conclusions, in pertinent part:

1. The [Wife] is found in contempt and is ordered to purge herself of contempt by doing the following:
    a. [Wife] is ordered to secure a life insurance policy with a death benefit of $15,000.00 insuring the life of the [Husband] and furnish to him forthwith;
    b. [Wife] is ordered to provide an accounting of the policies that she held and failed to surrender as ordered to [Husband]. Said accounting is to be provided to [Husband] forthwith.

(Appellant's App. p. 22).

On August 4, 2008, Wife filed a motion requesting relief from the Order. Wife argued that the Agreement established that the only "property" and "value" associated with their insurance policies was their cash surrender values. In her motion, Wife asserted that the trial court erred by valuing the surrendered insurance policy by the amount of its death benefit rather than its cash surrender value. The hearing on the motion was continued by stipulation and was not reset.

On July 23, 2009, Husband filed a second verified petition for contempt arguing that Wife had yet to satisfy the requirements of the April 24th Order. On December 4, 2009, the trial court issued an Order finding and concluding in pertinent part:

5. The [c]ourt finds the [Wife], through counsel, did submit an accounting to Respondent in a letter dated September 22, 2008.

6. The [c]ourt finds that said accounting revealed that [Wife] liquidated another insurance policy covering [Husband's] life, said policy being Mass Mutual policy number ***414 with a value of $44,450.00 and that she retained the proceeds therefrom.

7. The [c]ourt finds that [Wife] did not secure a life insurance policy to replace Mass Mutual policy number ***043, and that the parties have acknowledged that it is probably impossible for [Wife] to replace the two policies that she liquidated because of the age of [Husband].

8. The [c]ourt finds that because of [Wife's] liquidation of two policies which insured [Husband's] life and which could have been used by him either as a part of his estate or which could have been liquidated by him, [Husband] has lost the sum of $44,450.00 for policy number ***414 plus $15,000.00 as determined by this [c]ourt's Order of April 24, 2008, for a total of $59,450.00 and that [Wife] has been enriched by that same amount.

9. The [c]ourt finds that, pursuant to the [Agreement] entered herein, the parties were to have exchanged such funds as would have equalized the parties' interests in life insurance policies, which equalization amount is in the sum of $9,541.02 to be paid by [Husband] to [Wife].

10. The [c]ourt orders that a judgment be entered against [Wife], in favor of [Husband], in the sum of $49,908.98 which is the total amount of loss incurred by [Husband] less the equalization amount set out above. . . .

11. The [c]ourt finds that [Wife] has not complied with the Order of April 24, 2008, in that she has failed to secure a life insurance policy to replace the one she liquidated, but because it was practically impossible for her to do so, the [c]ourt does not find her in contempt.

(Appellant's App. pp. 24-25).

On January 19, 2010, Wife filed a motion to correct error. In her motion, Wife again asserted error with the trial court's decision to value and order her to pay the insurance policies at their death benefit amounts as opposed to their cash surrender values. On February 1, 2010, the trial court entered an Order modifying its prior Order and clarifying that neither party had been found in contempt. The Order also denied all other pending motions.

Wife now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Generally, when, as here, a trial court enters findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52 (A), we apply a two-tiered standard of review. *Davis v. Davis*, 889 N.E.2d 374, 379 (Ind. Ct. App. 2008). We must first determine whether the evidence supports the findings and second, whether the findings support the judgment. *Balicki v. Balicki*, 837 N.E.2d 532, 535 (Ind. Ct. App. 2005), *trans. denied*. We will disturb the judgment only where there is no evidence supporting the findings or the findings do not support the judgment. *Id.* We do not reweigh the evidence and consider only the evidence favorable to the trial court's judgment. *Id.* Appellants must establish that the trial court's findings are clearly erroneous, which occurs only when a review of the record leaves us firmly convinced that mistake has been made. *Id* at 535-36. The purpose of Ind. Trial Rule 52(A) findings and conclusions is to provide the parties and reviewing courts with the theory upon which the case was decided. *Id*.

We note that Husband did not file an appellee's brief in this appeal, thus altering our standard of review. In such a situation, we will not undertake the burden of developing arguments for the appellee, but instead, we will apply a less stringent standard of review, and we may reverse the trial court's decision if the appellant can establish *prima facie* error. *Nornes v. Nornes*, 884 N.E.2d 886, 888 (Ind. App. 2008) (citing *Everette v. Everette*, 841 N.E2d 210, 212 (Ind. Ct. App. 2006)). In this context, "*prima facie* error is error at first sight, on first appearance, or on the face of it." *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006).

Wife contends that the trial court committed clear error when it ordered her to pay to Husband damages equal to the death benefits associated with the *two* surrendered life insurance policy. We will first address whether the trial court ordered Wife to pay the equivalent of the death benefit on two separate life insurance policies. On Mass Mutual policy number ***414, the trial court ordered Wife to pay $44,450, which is the amount she obtained when she cashed in the policy. However, on Mass Mutual policy number ***043, Wife surrendered the policy with a death benefit of $15,000 and received cash in the amount of $5,958.34. Because Wife surrendered Mass Mutual policy number ***043, and was not able to replace the policy because Husband's advanced age would make him uninsurable, the trial court ordered Wife to pay the amount equivalent to the death benefit of policy number ***043, which is $15,000. Thus, we will only consider whether the trial court erred by ordering Wife to pay an amount equal to the death benefit for Mass Mutual policy number ***043.

Wife and Husband drafted an Agreement which required the parties to first obtain an accounting of their various life insurance policies and then divide equally between them the "net cash value" of all their policies. (Appellant's App. p. 101). However, Wife liquidated two of the insurance policies to be transferred to Husband. Although the trial court ordered Wife to pay the cash surrender value of insurance policy number ***414, the trial court ordered Wife to pay to Husband damages equal to the death benefits of life insurance policy number ***043.

The terms of a marital settlement agreement are incorporated and merged into the dissolution decree and the parties are ordered to perform them. Indiana Code § 31-15-2-

17. The legislature intends finality as to the disposition of property contained in dissolution decrees. *Voigt v. Voigt*, 645 N.E.2d 623, 626 (Ind. Ct. App. 1994), *trans. denied*. As such, disposition of property settled by an agreement and incorporated and merged into the decree is a binding contract and not subject to subsequent modification by the court, except as the agreement prescribes or the parties subsequently consent, or upon a showing of fraud, duress, or undue influence. I.C. § 31-14-2-17. It is also well settled that a property settlement provision in a dissolution decree is not subject to modification by the court merely because of changing circumstances of the parties. *Myers v. Myers*, 560 N.E.2d 39, 42 (Ind. 1990). By ordering Wife to pay an amount equivalent to the death benefit of Mass Mutual policy number ***043, the trial court essentially modified the Agreement.

Pursuant to governing law and the Agreement, the parties' insurance policies were to be valued and divided based upon their cash surrender value, and not their death benefits. (Appellant's Br. p. 17). Therefore, we conclude that the trial court committed error in ordering Wife to pay damages to Husband equal to the amount of the death benefits of the surrendered life insurance policy ***043.[1] Even if the trial court could modify the Agreement, we would still reach the same result, *i.e.*, that the value of a life insurance policy be based on its cash value. We have previously stated that "[a]n insurance policy's value, for purposes of marriage dissolution, is its cash value."

[1] Because Husband did not file a brief, we need not address the issue of whether damages should be assessed against Wife for cashing the life insurance policy on Husband's life contrary to the trial court's order and particularly when the policy cannot be replaced due to Husband's age rather than simply establishing the cash value.

Peddycord v. Peddycord, 479 N.E.2d 615, 617 (Ind. App. 3 Dist. 1985) (citing *Wisner v. Wisner*, 631 P.2d 115, 120 (Ariz. App. 1981)). However, we acknowledge that the discussion on insurance policies in a marriage dissolution in *Peddycord* is dicta, as we were addressing the valuation of an interest in a law firm partnership, not insurance, in that appeal. The *Peddycord* court recognized the analogy between a partnership agreement and a life insurance policy due to the similarities between the payout provisions. Although the guiding principle from *Peddycord* is dicta, it is consistent with other jurisdictions that have ruled that life insurance policies are to be valued at their cash surrender values. Specifically, courts in other states have ruled that, for purposes of the division of property upon divorce, life insurance policies are to be valued at their cash surrender values and not at the amount of the death benefit. *See, e.g., Fox v. Fox*, 626 N.W.2d 660 (N.D. 2001); *Wisner*, 631 P.2d 115, 120 (Ariz. App. 1981); *Bishop v. Eckhard*, 607 S.W. 2d 716, 717-18 (Mo. App. 1980).

To support her contention, Wife cites to *Lindsey v. Lindsey*, 492 A.2d 396, 401-02 (Pa. 1985). In *Lindsey*, the court looked for guidance to precedent from foreign jurisdictions, which held that "only the cash surrender value and not the proceeds of a spouse's life insurance policy is presumed to be marital property." *Id*. The *Lindsey* court reasoned that insurance policies constitute marital property, but only to the extent of their cash surrender value. *Id*. In particular, the court in *Lindsey* noted that had husband not died, and had the case reached the equitable distribution stage, the cash surrender value of the policy owned by husband would have been included as part of the marital property

subject to distribution. *Id.* at 403. The court made clear that the expectancy, or death benefit, did not constitute marital property. *Id*.

Moreover, applying the cash value to insurance policies is consistent with how we have valued other marital assets with potential post-dissolution value increases. In dissolution proceedings, the trial courts are asked to perform tasks such as place values on pensions which have vested in possession only, but for which the amount of future benefits has yet to be determined. *In re Marriage of Preston*, 704 N.E.2d 1093, 1097-98 (Ind. Ct. App. 1999). When trial courts do so, they must determine the value of the asset as it is currently held because trial courts cannot divide future earnings of a party in anticipation that they will be earned. *See Berger v. Berger*, 648 N.E.2d 378, 383 (Ind. Ct. App. 1995). Thus, in light of *Peddycord*, we can say that for the purposes of marital dissolution, the value of life insurance policies are their present day cash value.

CONCLUSION

Based on the foregoing, we conclude that the trial court committed clear error by ordering Wife to pay damages to Husband equal to the amount of the death benefits of the first life insurance policy ***043 surrendered by her. We remand for the trial court to adjust its Order so that Wife pay to Husband the amount that Wife received when she

liquidated Mass Mutual policy number ***043 plus any interest that has accrued accordingly.

Affirmed in part, reversed in part, and remanded for further proceedings.

KIRSCH, J., and BAILEY, J., concur.