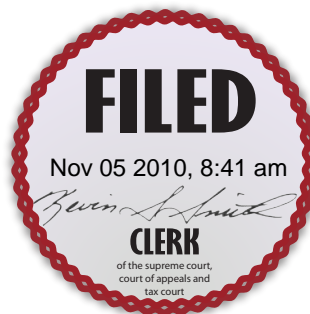


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DEANA CRICKMORE,
Appellant-Respondent,

vs.

JOHN R. CRICKMORE,
Appellee-Petitioner.

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No. 49A04-1003-DR-184

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cynthia J. Ayres, Judge
The Honorable Deborah J. Shook, Master Commissioner
Cause No. 49D04-0109-DR-1446

November 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Deana Crickmore (“Wife”) appeals the trial court’s order, in this post-dissolution proceeding, that she repay John Crickmore (“Husband”) for amounts of spousal maintenance paid to her in excess of the amount required by the parties’ dissolution decree. For our review, Wife raises two issues, which we restate as: 1) whether the trial court erred by ordering Wife to repay Husband based upon its finding that Husband’s overpayments of maintenance were involuntary; and 2) whether the amount of the judgment, \$50,805, is supported by the evidence. Concluding the trial court did not err by finding Husband’s overpayments were involuntary and ordering Wife to repay Husband accordingly, but the amount of the judgment is not supported by the evidence, we affirm in part, reverse in part, and remand.

Facts and Procedural History

Husband and Wife were married and have two children, one of whom is now emancipated. On July 11, 2003, the trial court approved the parties’ mediated settlement agreement and incorporated it into the dissolution decree. Husband was thereby obligated to pay Wife rehabilitative spousal maintenance of \$260 per week for 104 weeks beginning April 1, 2003 and, in addition, \$225 in spousal maintenance per month for three months thereafter. Thus, for the period between April 1, 2003, and July 1, 2005, Husband was obligated to pay Wife a total of \$27,715 in spousal maintenance. Husband was also obligated to pay Wife \$205 per week in child support, beginning March 1, 2003. Concerning child support, the settlement agreement explained:

[Wife] agrees to this amount in view of [Husband] paying substantial maintenance for two (2) years and in light of [Husband]'s substantial maintenance payment agrees to accept child support based upon a 40 hours [sic] work week and not include overtime/profit sharing income. . . . There is no arrearage on [Husband]'s child support obligation at this time.

Appellant's Appendix at 20.

Also on July 11, 2003, the trial court issued a wage withholding order to Husband's employer. The order required withholding \$205 per week for current child support and \$260 per week for spousal maintenance, a total of \$465 per week payable to the trial court clerk's office.

At some point in 2005 or 2006, Husband asked Wife to have the maintenance withholding stopped because it was no longer required by the parties' dissolution decree. Husband and Wife had several discussions concerning this issue, in which Wife acknowledged she was being overpaid. According to Husband, Wife told him she was going to have the payments stopped but never took any action. According to Wife, she told Husband she could not stop the payments but would cooperate by signing anything necessary, and he would have to resolve the matter himself. Husband asked his employer's payroll office to have the payments stopped, and the payroll office referred him to the county courthouse. Husband called the courthouse and also contacted a legal services office, which told him his income was too high to qualify for legal assistance. Husband testified that at the time, i.e. in 2005 and 2006, he could not afford to hire an attorney to assist him in having the withholding order stopped as to the maintenance payments. Wife never offered to repay

Husband for the overpayments of maintenance and testified that she did not do so because he acknowledged she was using the extra money to buy items for the children.

On October 20, 2008, Husband, now represented by counsel, filed a petition for modification of child support and repayment of spousal maintenance overpayments. Therein Husband requested termination of the wage withholding order and judgment against Wife for more than thirty thousand dollars of “involuntarily withheld overpayments of spousal maintenance.” Id. at 30. On January 12, 2009, the trial court issued an order, pursuant to the parties’ stipulation, terminating the withholding order as to maintenance payments. On February 6, 2009, Wife filed a petition for modification for post-secondary educational expenses and response to Husband’s petition for repayment. Therein Wife “acknowledge[d] that spousal maintenance has been garnished from [Husband]’s wages for a longer period than set forth” in the parties’ settlement agreement. Id. at 34. However, Wife contended Husband “voluntarily allowed the withholding to continue” and “avoided having to pay a higher child support payment which Mother would have requested had [Husband] asked the court” earlier to terminate the withholding order for spousal maintenance. Id. at 34-35.

The trial court held an evidentiary hearing on the matter on September 3, 2009. On October 26, 2009, the trial court issued its order, which made the following findings:

9. After the required amounts of spousal maintenance were paid by [Husband] to [Wife], [Husband] made efforts to have withholdings from his wages for spousal maintenance terminated. However, he lacked the ability to do so.
10. [Husband] requested [Wife] to have said withholdings terminated, or to repay him the overpayments wrongfully made to her. [Wife] refused.
11. Even after the filing of [Husband]’s petition, [Wife] continued to keep overpayments of spousal maintenance.

12. [Husband] involuntarily overpaid spousal maintenance to [Wife] in the sum of Fifty Thousand Eight Hundred and Five Dollars (\$50,805.00).

* * *

20. [Husband] shall have a judgment against [Wife] in the sum of Fifty Thousand Eight Hundred and Five Dollars (\$50,805.00) as and for the involuntary overpayment of spousal maintenance.

21. [Wife] shall pay at least Two Hundred Dollars (\$200.00) per month to [Husband] to satisfy the judgment against her; otherwise, [Husband] shall be permitted to seek proceedings supplemental to the judgment to collect same.

Id. at 13-15. Wife filed a motion to correct error, which the trial court denied. Wife now appeals.

Discussion and Decision

I. Standard of Review

The trial court entered findings and conclusions upon Wife's verbal request at the close of the evidence, without either party making a written request for findings pursuant to Trial Rule 52(A). We therefore review the findings and conclusions as if the trial court entered them sua sponte, whereby the specific findings control only as to the issues they cover. Leever v. Leever, 919 N.E.2d 118, 122 (Ind. Ct. App. 2009). A general judgment standard applies to any issue upon which the trial court made no findings, whereby the trial court may be affirmed upon any legal theory supported by the evidence. Id.

First we determine whether the evidence supports the findings, and second we determine whether the findings support the judgment. Dedek v. Dedek, 851 N.E.2d 1048, 1050 (Ind. Ct. App. 2006). We will set aside the trial court's findings and judgment only if they are clearly erroneous. Id. Findings are clearly erroneous when the record contains no facts to support them either directly or by inference, and a judgment is clearly erroneous if it

is unsupported by the findings of fact and conclusions entered upon those findings. Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). We do not defer to the trial court's conclusions of law, which we review de novo. Davis v. Davis, 889 N.E.2d 374, 379 (Ind. Ct. App. 2008).

II. Overpayment of Spousal Maintenance

The parties direct us to no Indiana cases, and research has discovered none, directly addressing whether a former spouse who makes overpayments of maintenance to the other spouse may subsequently recover a judgment to recoup those amounts. However, Indiana cases regarding overpayment of child support are instructive on this issue.

In general, where a parent voluntarily overpays his or her child support obligation in an attempt to receive a prospective credit, the excess amount is treated as a gratuity to the children and no credit is granted. Brown v. Brown, 849 N.E.2d 610, 615 (Ind. 2006). The reason for this rule is that permitting a parent to build up a substantial credit and then later refuse to make support payments would thwart the purpose of providing regular, uninterrupted income for the benefit of the children. Id. This rule does not apply, however, where overpayments of child support are involuntary. Carpenter v. Carpenter, 891 N.E.2d 587, 601 (Ind. Ct. App. 2008). “[W]here an overpayment is not voluntary, the amount may be credited to future child support payments.” Id.

While here the question involves overpayment of spousal maintenance rather than child support, the same reasons for distinguishing between voluntary and involuntary overpayments are similarly applicable. Overpayments of maintenance that are involuntary are not reasonably regarded as gratuities to the former spouse for the benefit of the children,

if any. See Matson v. Matson, 569 N.E.2d 732, 734 (Ind. Ct. App. 1991) (concluding an involuntary overpayment of child support could not be regarded as a gratuity). Whether an overpayment is involuntary is a question of fact. Cf. Carpenter, 891 N.E.2d at 600-01 (analyzing facts of the particular case in concluding father's overpayment of child support was involuntary). While Wife correctly notes that an order for repayment of excess spousal maintenance is a judgment of restitution rather than, as is generally the case with child support, a credit against arrearage or toward prospective obligation, this distinction is without a substantive difference. The effect of all such judgments is to conform the parties' shares of income to the proper amounts as allocated in the dissolution decree or subsequently modified by court order. Cf. Flowers v. Flowers, 799 N.E.2d 1183, 1192 (Ind. Ct. App. 2003) (concluding the amount of involuntary child support overpayment "may then be credited to future child support payments to be made by [Father] or refunded by [Mother]"). For these reasons, we disagree with Wife's argument that spousal maintenance payments in excess of the amount ordered should, as a matter of law, never be required to be repaid.

Wife argues, alternatively, that it was error in this particular case for the trial court to order her to repay Husband any of the excess maintenance. We disagree. The trial court's judgment is supported by its finding that Husband's overpayments of maintenance were involuntary. This finding in turn is supported by evidence in the record. It is undisputed that Husband's overpayments were made by a wage withholding order. Further, Husband took steps to have the maintenance portion of the withholding order stopped. Specifically, Husband asked Wife to do so, and when she did not, inquired at his payroll department and

called the courthouse. Although Husband's efforts were not successful, he was not represented by counsel at the time, and Husband testified he could not afford to hire an attorney to assist him in the matter. Wife contends that Husband could have afforded an attorney based upon his gross income for 2005 and following years, which was upward of \$65,000. However, in addition to the \$465 per week in wage withholding, Husband's wages were subject to other garnishments including loan debts and a judgment debt to Wayne County Schools. Husband's only working vehicle had more than 200,000 miles in 2009 and Husband was living in a mobile home he was buying on contract. In sum, although conflicting evidence was presented regarding Husband's inability to afford legal representation, the trial court weighed the evidence and found that Husband's overpayments of maintenance were involuntary and remained so until the maintenance withholding was finally stopped by stipulation in January 2009. The trial court's finding on this issue is not clearly erroneous.

Wife also argues the equities of her position vis-à-vis Husband and contends the trial court's judgment works an inequitable result by saddling her with a substantial adverse judgment for restitution. To the extent Wife impliedly argues an order for repayment of involuntarily overpaid spousal maintenance should be supported by a finding of ability to repay, we agree. In some cases, a party's concerns regarding inability to repay a judgment for excess spousal maintenance may be addressed by the federal statute that limits the amount of a person's wages that can be garnished by court order. See 15 U.S.C. § 1673; Hamilton v. Hamilton, 914 N.E.2d 747, 755 (Ind. 2009). Moreover, we need not address Wife's ability or

inability to repay the \$50,805 figure or the \$200 monthly payments ordered because, as explained in Part III below, we are remanding to the trial court for a new calculation of the amount of the judgment. If Wife claims inability to pay the judgment as recalculated, that is a matter to be addressed in the first instance by the trial court on remand.

Relatedly, Wife argues Husband's claim for repayment is barred by the equitable doctrine of laches. For laches to apply, three elements are required: inexcusable delay in asserting a right, implied waiver from knowing acquiescence in existing conditions, and circumstances resulting in prejudice to the adverse party. Huber v. Sering, 867 N.E.2d 698, 710 (Ind. Ct. App. 2007), trans. denied. "A trial court has considerable latitude in deciding whether to invoke laches, and its decision will not be reversed on appeal absent an abuse of that discretion." Shriner v. Sheehan, 773 N.E.2d 833, 846 (Ind. Ct. App. 2002), trans. denied. Here, Wife knew both that she was receiving excess maintenance and that Husband claimed the payments were not rightfully hers. Husband never told Wife she could keep the excess payments or otherwise implied a waiver of his right to seek repayment. Thus, regardless of whether Husband's three-year delay in filing his petition for repayment was excusable or not, Wife cannot prevail on a laches defense.

In sum, we conclude the trial court did not err by finding Husband's overpayments of spousal maintenance were involuntary and ordering Wife to repay Husband accordingly. We therefore affirm the trial court as to the first issue raised by Wife. We proceed to Wife's second issue, whether the evidence supports the amount of the judgment.

III. Amount of the Judgment

Wife argues that the \$50,805 judgment is unsupported by the evidence in that while Husband initially testified he overpaid that amount from his wage withholdings, his more specific testimony and the trial court clerk's record admitted into evidence contradict that assertion. Husband does not disagree with Wife's argument and responds that this case should be remanded for recalculation of the amount of his overpayment. We need not undertake an appellee's burden of contravening an appellant's arguments in favor of reversal. Wright v. Wright, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002). Because Husband does not controvert Wife's argument on this issue, Wife need only establish prima facie error in order to prevail. See id. We conclude Wife has met that burden.

Exhibit 1, the summary of Husband's testimony upon which the trial court apparently based the \$50,805 amount, assumes without substantiating in any way that Husband had no maintenance arrearage as of April 1, 2005. It also assumes without substantiating that Husband paid \$260 in maintenance each and every week between April 1, 2005 and January 12, 2009. Although Husband did initially testify he made payments every week during that time, he subsequently admitted Wife received no payments during a two-month period and another unspecified period when both times he was away from work due to physical injury or illness. Moreover, Husband did not testify regarding specific dollar amounts withheld and paid to Wife week by week. The other evidence regarding the amount of Husband's overpayments is the trial court clerk's record of Husband's child support and maintenance

payments for July 11, 2003 through January 2009.¹ Even if Husband had no maintenance arrearage on July 11, 2003 and all of the payments except the maintenance overpayments were conforming – which cannot be determined from evidence in the record – a tabulation of the numbers from the clerk’s record indicates Husband overpaid maintenance by at most \$35,085.52.² But because we cannot conclusively determine the amount Husband actually overpaid, we remand this case to the trial court for new findings on this issue and resulting correction of the amount of the judgment.

Conclusion

The trial court did not err by finding Husband’s overpayments of spousal maintenance were involuntary and ordering Wife to repay Husband accordingly. However, the amount of the \$50,805 judgment is not supported by the evidence. Accordingly, the judgment is reversed as to the dollar amount but affirmed in all other respects, and this cause is remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

MAY, J., and VAIDIK, J., concur.

¹ The first recorded payment in this record is dated June 6, 2003, but it and all other payments prior to July 11, 2003 are crossed out, which may indicate the information is unreliable or not meant to be considered as evidence.

² As noted above, Husband was obligated to pay a total of \$27,715 in maintenance, from which may be subtracted the \$3,640 (\$260 per week multiplied by 14 weeks) due for the period between April 1, 2003 and July 11, 2003. That yields \$24,075 in maintenance due from July 11, 2003, to which must be added the \$58,630 in child support (\$205 per week multiplied by 286 weeks) due between July 11, 2003 and January 12, 2009, for a total of \$82,705 as Husband’s obligation for that time period. Husband’s actual payments during that time were \$117,790.52 as indicated by the clerk’s record. We note the parties do not address the issue, and we therefore make no statement regarding, whether Husband is entitled to credit for paying excess child support in light of the fact that in the trial court’s October 26, 2009 order, Husband’s child support obligation was reset to \$156.79 per week effective October 20, 2008.