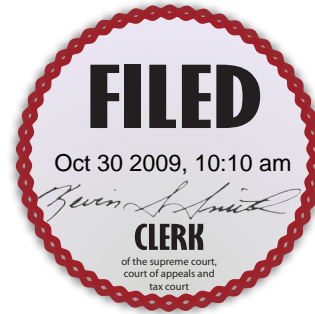


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MARRIAGE OF SHIRLEY)
WILLIAMS,)
)
Appellant-Petitioner,)
)
vs.)
)
ROBERT B. WILLIAMS,)
)
Appellee-Respondent.)

No. 45A03-0904-CV-151

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
Cause No. 45C01-0602-DR-102

October 30, 2009

MEMORANDUM DECISION—NOT FOR PUBLICATION

Baker, Chief Judge

Appellant-petitioner Shirley Williams appeals the trial court's division of property upon the dissolution of her marriage to appellee-respondent Robert B. Williams. Specifically, Shirley argues that the trial court erred in determining the value of various business interests that she and Robert held during their marriage. Shirley maintains that although the court-appointed business evaluator valued the business interests at nearly \$1.4 million, the trial court erroneously concluded that the businesses "were worth nothing and awarded all of the parties' businesses, in their entirety, to . . . [Robert]." Appellant's Br. p. 14.

Concluding that the trial court erred in placing zero value on the businesses, we reverse and remand for further proceedings with instructions that the trial court recalculate the value of the businesses based on the evidence presented at the final hearing, enter supplemental findings, and distribute the marital estate accordingly.

FACTS

Shirley and Robert were married on August 16, 1980, and separated in February 2006. Although there were no children born to the marriage, the parties each had two children from previous marriages.

Robert is employed in his family's cemetery and burial vault business and has worked for various family businesses throughout the marriage. There were a total of eight businesses that were purchased or started by Robert's father. Robert has earned a maximum yearly amount of approximately \$64,000 during his employment with the businesses. Shirley worked at various places during the marriage and spent some time at home raising the parties' children from their previous marriages.

During the course of their marriage, Shirley and Robert acquired various real and personal property, which included a 25% interest in Ridgelawn-Mount Mercy Cemetery (Ridgelawn-Mount), a 50% interest in Fern Oak Cemetery (Fern Oak), a 33% interest in Van Gard Vault, a 25% interest in Fifth Avenue Associates, and a 40% interest in Williams Casket Company (Williams Casket). Robert paid no cash for his interest in those businesses, and the businesses were held solely in his name. Robert's father controlled and managed the eight businesses. At some point, Robert transferred his interests in Williams Casket to his father.

As of October 15, 2008, the Williamses businesses were indebted to Fifth Third Bank for loans in the sum of \$2,150,868.33. Robert, his brother, and his father, personally guaranteed those loans. The largest loan—with an unpaid balance of \$1,577,762.60—matured on November 1, 2008. Fifth Third Bank agreed to extend the maturity date for an additional ninety days to February 1, 2009, on a one-time only basis. The second largest loan, which has an unpaid balance of \$461,259.69, matured on December 5, 2008.

On February 8, 2006, Shirley filed a verified petition for dissolution of marriage. During a four-day trial, the court-appointed evaluator, Robert Moise, valued the businesses and apparently included cash in the businesses' perpetual care fund accounts as assets of the businesses. Pursuant to Indiana Code section 23-14-48-2,

cemeteries are required to maintain a perpetual care fund.¹ However, these funds are not to be considered business assets. Id.

At some point, Shirley filed a motion pursuant to Indiana Trial Rule 52, requesting that the trial court enter specific findings of fact and conclusions of law. Following the presentation of the evidence, the trial court issued its findings and conclusions. In the final order that was entered on February 23, 2009, the trial court divided the property between Robert and Shirley. Although Moise's testimony established that the family businesses were valued in excess of \$1.4 million, the trial court concluded that the businesses had no value and awarded all of the parties' businesses and stock in those entities to Robert. The relevant findings and conclusions provided that

¹ Pursuant to this statute:

- (a) The owner of each cemetery shall provide for the creation and establishment of an irrevocable perpetual care fund.
- (b) The principal of a perpetual care fund established under this section shall permanently remain intact, except as provided in this chapter. The principal shall be known as the "perpetual care fund" or "endowment care fund" of the cemetery.
- (c) Fifty percent (50%) of any appreciation of the principal of the fund may be withdrawn annually not more than forty-five (45) days after the end of the fund's fiscal year.
- (d) Any income earned by the fund during the fiscal year may be withdrawn quarterly during the fund's fiscal year.
- (e) The income from a fund established under this section and any withdrawal of the appreciation of the principal under subsection (c) shall be devoted to the perpetual care of the cemetery.
- (f) The fund established by this chapter is not subject to attachment by a creditor unless the underlying debt was incurred for the perpetual care or endowment care (as defined in IC 23-14-33-30) of the cemetery for which the fund was established.

I.C. § 23-14-48-2.

9. Respondent is employed in his family's cemetery and burial vault business, earning \$64,580 annually. Respondent has worked in the family businesses throughout the marriage.

10. Petitioner is currently employed and earns approximately \$37,440 annually. Petitioner was employed at various jobs during the marriage and spent some time periods at home raising the children. At one point during the marriage Petitioner left a better paying job with more benefits to work in Respondent's family's cemetery and burial vault business.

...

14. The parties have acquired the following items of personal property during the course of the marriage:

[i.] 25% ownership interest in Ridgelawn-Mount Mercy, Inc., held in Respondent's name.

j. 50% ownership interest in Fern Oak Cemetery, Inc., held in Respondent's name.

k. 33 1/3% ownership interest in Van Guard Vault Co., Inc., held in Respondent's name.

l. 25% ownership interest in Fifth Avenue Associates, held in Respondent's name.

m. 40% ownership interest in Williams Casket Co., Inc., held in Respondent's name.

...

18. The evidence showed that in 2005 the parties' holdings in Van Gard Vault and Fifth Avenue Associated produced income to the parties of approximately \$25,000.00.

19. Ridgelawn-Mount Mercy Cemetery, Inc., Fern Oak Cemetery, Inc., Van Guard Vault Co., Inc., Fifth Avenue Associates, and Williams Casket, Co., are all closely-held corporations, some with intertwining ownership; besides Respondent, the only other owners of these entities are

Respondent's father, Respondent's brother and Respondent's sister. The testimony showed that the parties' relationship with the other three owners has historically been rocky and difficult; at various times Respondent's father has taken steps to limit the parties' influence within the businesses and/or cause their ownership interest to be devalued.

20. The parties' ownership interest in the family business is not readily marketable, because it is a minority interest and holds no real control.

21. The testimony indicated that some or all of the stock in the family businesses may be covered by buy-sell agreements or other restrictions on their transfer; no documents to corroborate these agreements or restrictions were introduced into evidence.

22. The Court heard testimony from Robert Moise, a business evaluator, as to the valuation of the family business and of the parties' portion of those businesses. Mr. Moise valued the parties' portion of the family businesses as follows:

Ridgelawn-Mount Mercy, Inc.
\$460,000

Fern Oak Cemetery, Inc.
\$497,755

Van Guard Vault Co., Inc.
\$357,000

Fifth Avenue Associates
\$113,600

Williams Casket Co., Inc.
\$ 26,700

23. Respondent contends that Mr. Moise's business valuations are incorrect for various reasons, and presented the testimony of Accountant Jill Jones to refute those valuations.

24. Ms. Jones testified that Mr. Moise improperly included the cash in the businesses' perpetual care fund accounts as assets of the business, when those funds should be treated as a trust fund held for the benefit of others.

25. Ms. Jones valued the parties' business interest as follows:

Ridgelawn-Mount Mercy, Inc.
\$340,192

Fern Oak Cemetery, Inc.
\$396,165

Van Guard Vault Co., Inc.
\$320,094

26. Mr. Moise had an appraisal of Ridgelawn-Mount Mercy, Inc., done by the Foresight Companies, LLC; this appraisal showed a total value of the company as \$1,459,000, making the parties' 25% interest worth \$364,750 before any discount for minority share status.

27. The testimony also showed that there are approximately \$2,150,000 in business loans owed by the various family businesses to Fifth Third Bank, and that all of the family businesses are pledged as collateral securing this debt.

28. Respondent testified that his opinion of value of the parties' share of the businesses is as follows:

Ridgelawn-Mount Mercy, Inc.
\$210,000

Fern Oak Cemetery, Inc.
\$ 56,250

Van Gard Vault Co., Inc.
\$ 64,000

29. Respondent contends that the parties did not own any portion of the Williams Casket Company on the date of filing, and therefore no part of the value of Williams Casket Company is includable in the marital pot.

30. The evidence strongly suggested that these interests in the family business were gifts to Respondent or, in the alternative, were meant to be an advance on his inheritance. The totality of the evidence indicated that these interests were not purchased by the parties, and that the parties were paid salaries and/or wages for their work for the companies, which does not support the contention that the stock was compensation paid in connection with employment.

31. Petitioner is not now employed in Respondent's family cemetery and burial vault business; at the hearing herein Petitioner expressed her desire to not have any further involvement with the family businesses.

32. Petitioner testified that she does not want any ownership interests in the family businesses, but wants her shares of the marital estate paid to her from other assets and from Respondent's future income, secured by a judgment against Respondent.

33. Upon examination of the totality of the evidence the Court finds that the business interests in Respondent's family's business are to be deemed as having no value as marital assets due to Respondent's father's overwhelming control of all aspects of the business and his demonstrated ability and willingness to cut the minority owners out of benefitting from the business, the overwhelming business debt secured by the business property, and the shares' apparent status as family gifts to Respondent.

...

37. Petitioner claims Respondent signed over to his father the parties' stock in Williams Casket Co., Inc. while this action was pending; Respondent contends the date on the transfer was a scrivener's error and the transfer was made prior to the filing of the dissolution. At the time of the final hearing the parties no longer owned a portion of Williams Casket.

...

44. Respondent should be awarded as his own individual property the following of the parties' personal assets:

h. The stock in Respondent's family's businesses.

...
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

...
3. Respondent Robert Williams is hereby awarded as his own individual property the following of the parties' personal assets:

...
h. The stock in Respondent's family's businesses, specifically the stock in Ridgelawn-Mount Mercy, Inc., Fern Oak Cemetery, Inc., Van Guard Vault Co., Inc., and Fifth Avenue Associates.

Appellant's App. p. 16-23 (emphases added). Shirley now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that the valuation of the marital assets is committed to a trial court's sound discretion. Berger v. Berger, 648 N.E.2d 378, 382 (Ind. Ct. App. 1995). The valuation of marital assets will be reversed on appeal only if there has been an abuse of discretion. Webb v. Schleutker, 891 N.E.2d 1144, 1151 (Ind. Ct. App. 2008). An abuse of discretion occurs when the valuation is clearly against the logic and effect of the facts and circumstances before the trial court. Cleary v. Cleary, 582 N.E.2d 851, 852 (Ind. Ct. App. 1991). Additionally, a trial court will be found to have abused its discretion when there is no evidence to support its valuation. Thompson v. Thompson, 811 N.E.2d 888, 917 (Ind. Ct. App. 2004). Indeed, the valuation must be within the scope of the evidence in order to fall within the logic and effect of the facts and reasonable inferences. Skinner v. Skinner, 644 N.E.2d 141, 144 (Ind. Ct. App. 1994). Also, a trial court's valuation must fall within the range of values supported by the

evidence. Balacki v. Balicki, 837 N.E.2d 532, 536 (Ind. Ct. App. 2005). When a trial court's valuation of a business differs dramatically from the evidence presented at trial, the trial court abuses its discretion and will be reversed. Axsom v. Axsom, 565 N.E.2d 1097, 1101 (Ind. Ct App. 1991).

Pursuant to Shirley's request, the trial court entered written findings of fact and conclusions of law pursuant to Trial Rule 52(A). As a result, we will not set aside the findings or judgment unless clearly erroneous. We must first determine whether the evidence supports the findings of fact and then whether the findings support the judgment. S-Mart, Inc. v. Sweetwater Coffee Co., 744 N.E.2d 580, 585 (Ind. Ct. App. 2001). Findings are clearly erroneous if the record contains no facts or inferences supporting them, whereas a judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Garling v. Ind. Dep't of Nat. Res., 756 N.E.2d 1029, 1032 (Ind. Ct. App. 2001). We consider only the evidence most favorable to the prevailing party and we do not reweigh the evidence or judge the credibility of witnesses. Id.

II. Shirley's Claims

Shirley challenges ten of the trial court's findings, which involve the valuation of the various business interests that the parties acquired during the marriage. More particularly, Shirley argues that the evidence presented at trial did not support the trial court's conclusion that the businesses should be valued at zero. Shirley asserts that the trial court's "assigning zero value to the parties' \$1.4 million of business interests" was

clearly erroneous and the order regarding the property division must be set aside. Appellant's Reply Br. p. 7.

A. Relationship Between Robert and His Father

Shirley initially contends that the trial court erred in finding that the value of the parties' interest in the businesses could be devalued in light of Robert's "rocky" and "difficult" relationship with his father. Appellant's Br. p. 18; Appellant's App. p. 17. Moreover, Shirley challenges a different part of that finding, which states that Robert's father "controlled and "limit[ed] the parties' influence within the businesses," which contributed to the devaluation of the businesses. Appellant's App. p. 17.

At trial, the only testimony that was offered regarding Robert's allegedly difficult relationship with his father was Robert's testimony that there had been "one" problem over a forty-year period regarding Ridgelawn Funeral Home (Ridgelawn). Tr. p. 466. However, Ridgelawn was not valued as part of the dissolution proceedings and was not included in the marital estate. Moreover, Robert described the incident as "a difference of opinion," and the problem was settled amicably. *Id.* at 128, 155, 568-69. In our view, such an isolated incident does not support a finding of a "historically rocky" relationship. Moreover, there is no evidence that Robert's father ever limited the parties' influence and exerted control over the businesses in a way that should have caused the parties' ownership interests to be devalued. Thus, there is no evidence supporting the trial court's finding that the businesses could be "devalued" on these bases, so the finding was clearly erroneous.

B. Findings Regarding Business Valuations

Shirley attacks findings 23 and 25, in which the trial court found that Jill Jones, an accountant, who had valued Ridgelawn-Mount at \$340,192, Fern Oaks at \$396,165, and Van Gard Vault at \$320,094. Appellant’s App. p. 18. In examining these findings and the transcript of the hearing, however, we note that Jones testified that she did not value the businesses because she never conducted a proper evaluation of those entities. Moreover, she was not retained to actually value the businesses. Id. at 437, 438, 460-61, 462-63, 553. Rather, Jones testified that she was retained as a “correction” to “subtract out” certain investment accounts that Robert had identified as the perpetual care accounts, from the valuations of Moise, the court-appointed business evaluator. Id. at 454; Appellant’s App. p. 65. Jones performed the mathematical calculations so the trial court would not have to do them. Tr. p. 463. Jones also testified that she would have violated the standards of her profession had she testified about the value of the businesses without doing a complete evaluation. Id. at 437.

The evidence also establishes that Jones only computed the mathematical calculations to show the trial court the value of three of the parties’ businesses, if the perpetual care fund accounts—which were not assets of the businesses—were subtracted from the business valuations. Tr. p. 454, 458, 460. Jones stated that if the accounts in question were not perpetual care accounts, her subtraction calculations should not have been performed, and the values that Moise placed on the businesses were correct. Id. at 460. And, contrary to the trial court’s findings, Jones did not testify that the funds were improperly included in the valuations and were required to be subtracted. In short, Jones did not offer her professional opinion as to the businesses’ values. Id. at 438. As a result,

we must conclude that the trial court's findings regarding Jones and her purported valuation of the parties' businesses were clearly erroneous.

Shirley also attacks the trial court's finding regarding Robert's testimony about the value of the businesses. As noted above, the trial court stated in finding number 28 that Robert "testified that his opinion of value of the parties' share" of Ridgelawn-Mount was \$210,000, Fern Oak's value was \$56,250, and Van Gard Vault's value was \$64,000. Appellant's App. p. 19.

Robert initially testified that Ridgelawn-Mount was worth \$2.15 million, that a million dollar value for Fern Oak was "way too high" and that, as of the date of the final hearing, Fern Oak "may be worth \$150,000." Id. at 497. As to Van Gard, Robert testified that the business evaluator's value was "way too high" and that, as of the date of the final hearing, the entire corporation was worth "maybe somewhere close to \$300,000." Id. at 503-06.

Robert subsequently recanted those estimates and acknowledged on cross-examination that his figures regarding the valuation of the businesses were only "guesses." Id. at 565. Although the trial court expressly found that Robert testified about the specific worth regarding each business, appellant's app. p. 19, his testimony does not remotely reflect the amounts that were found by the trial court. Even more compelling, Robert admits in his appellate brief that he "never testified to the specific values set forth in [the findings]." Appellee's Br. p. 14.

When considering the evidence that was presented at the final hearing regarding the valuation of the businesses, there is no support for the trial court's findings regarding

Robert's valuations. Therefore, the finding was clearly erroneous. See Thompson, 811 N.E.2d at 917 (holding that a trial court's decision to value an asset based upon a party's proffered estimate will be reversed as not supported by the evidence); see also Axsom, 565 N.E.2d at 1101 (holding that the trial court will be found to have abused its discretion in assigning a value that is much lower than established by the evidence).

C. Fifth Avenue Associates

Shirley also challenges the trial court's finding with regard to the parties' interest in Fifth Avenue Associates (Fifth Avenue). The trial court issued a written finding that Moise, the court-appointed business evaluator, valued the parties' interest in Fifth Avenue, a real estate holding company, at \$113,600. Appellant's App. p. 18.

Moise arrived at this amount after applying a 15% discount for lack of the business's marketability and a 15% discount because of the minority interest. Despite that value and notwithstanding evidence and an additional finding that Fifth Avenue provided Robert with free housing for a number of years,² the trial court determined that the company had no value.

The only evidence that was offered to contradict the evaluator's determination as to the value was Robert's testimony that he "thought" the value should be "zero because of the mortgage against the funeral home." Tr. p. 512. Again, as with the other properties, Robert acknowledged that he could not give "an exact figure," and to do so would be "pretty hard." Id. at 565.

² Fifth Avenue owns a condo in Griffith where Robert lives rent free. Tr. p. 143.

In light of the evidence that was presented regarding the valuation of Fifth Avenue, we must again conclude that the trial court's finding regarding the value of that business was clearly erroneous.

D. Williams Casket—Exclusion From the Marital Pot

Shirley also challenges the trial court's finding with regard to the parties' ownership in the Williams Casket Company (Williams Casket). The trial court's finding number 29 provides that

29. Respondent contends that the parties did not own any portion of the Williams Casket Company on the date of filing, and therefore no part of the value of Williams Casket Company is includable in the marital pot.

Appellant's App. p. 19.

In a prior finding, the trial court determined that the parties "have acquired . . . during the course of their marriage, . . . a 40% ownership interest in Williams Casket Co., Inc., held in Robert's name." Id. at 17. In support of that finding, Robert's former counsel in the dissolution proceedings testified that Robert owned an interest in Williams Casket when the petition for dissolution was filed. Tr. p. 566. Williams Casket's corporate counsel also testified that Robert owned such an interest in that company as of the date of filing, and bank documents further established that interest. Id. at 567.

It appears that the only value for Williams Casket that was established at trial is set forth in finding 22, where Moise testified that the business is valued at \$26,700. Appellant's App. p. 18. Notwithstanding this evidence, the trial court erroneously concluded that "no part of the value of Williams Casket Company is includable in the

marital pot.” Appellant’s App. p. 19. As a result, this finding is likewise erroneous, and Robert’s interest in Williams Casket should have been included in the marital pot.

E. Businesses as Gifts or Inheritance

Shirley next claims that the trial court erroneously found that the parties’ interests in the family businesses were gifts to Robert or should be considered as advances on his inheritance. Therefore, Shirley maintains that the trial court should not have used these purported factors to devalue the businesses.

Contrary to the trial court’s findings, our review of the record reveals that no evidence was presented at the final hearing that “strongly suggested” that Robert received his interest in the businesses as a gift or as an advance on inheritance. Indeed, Robert made no argument and presented no evidence that the business interests were gifts, and he testified that the business interests should be divided equally. Tr. p. 547-48. Although Robert did not pay any money for the business interests, Robert’s father testified that the business interests were transferred to his son in exchange for his “sweat equity” and “hard work.” Id. at 412. He never mentioned that the business interests were gifts or were to be considered advances on an inheritance. As a result, the trial court improperly used these factors to devalue the businesses.

F. “Overwhelming” Business Debt

Shirley next claims that finding 33 was clearly erroneous where the trial court determined that the businesses had no value in light of the “overwhelming business debt of” \$2.15 million. Appellant’s Br. p. 31. While the evidence indeed establishes a \$2.15 million debt for the businesses, the record reflects that the loan is secured by all of the

businesses discussed above, along with another company that is owned solely by Robert's father. Moreover, the debt had already been subtracted from the value of the businesses when Moise assigned his values to the various businesses. Tr. p. 152, 415, 456, 556. The debt appears on the net assets worksheet for Fifth Avenue and reduces the overall value of that partnership by \$2,487,412. Appellant's App. p. 35. Hence, to count the amount of the loan twice and reduce all the values of the businesses to zero—is not supported by the evidence and, therefore, clearly erroneous.

CONCLUSION

After reviewing the record and considering the evidence, we reject Robert's contention that "the evidence clearly establishes that [his] business interests in his family's business has no value." Appellee's Br. p. 19. The evidence supports neither the trial court's findings as to the valuations of the businesses nor its ultimate conclusion to value the businesses at zero. Rather, the evidence supported significantly higher business valuations.³ As a result, we reverse and remand for further proceedings consistent with this opinion. On remand, the trial court is instructed to enter findings as to the valuation of the businesses in accordance with the evidence that was presented at the final hearing, and to divide the marital property accordingly.

FRIEDLANDER, J., and VAIDIK, J., concur.

³ As an aside, we note that Moise may have erroneously included perpetual care funds as assets of the businesses in violation of the provisions of Indiana Code section 23-14-48-2. If it is determined on remand that such sums were included as assets of the businesses, those amounts must be deducted in the valuation.