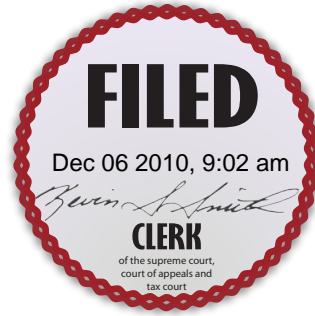


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ATTORNEY FOR APPELLANT:

DANIEL J. MOORE
Laszynski & Moore
Lafayette, Indiana

ATTORNEY FOR APPELLEE:

JENNIFER M. FEHRENBACH
Holder and Fehrenbach
Lafayette, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BARRY WANNER,)

Appellant/Petitioner,)

vs.)

No. 79A02-1004-DR-467

JILL HUTCHCROFT,)

Appellee/Respondent.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0609-DR-307

December 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner Barry Wanner (“Husband”) appeals from the trial court’s order that he pay Appellee/Respondent and former wife Jill Hutchcroft (“Wife”) \$37,074.00 to compensate her for a tax liability assumed when she liquidated part of Husband’s TIAA-CREF retirement account. The trial court’s October 11, 2007, dissolution decree provided, *inter alia*, that Wife could liquidate \$137,500.00 of Husband’s TIAA-CREF account in order to satisfy the amount set over to Wife and that Husband would assume any tax liability incurred by her as a result. The dissolution decree, however, provided that Husband would only be responsible for Wife’s tax liability if the liquidation occurred within six months, which it did not. In this second appeal from the dissolution, Husband claims that the trial court abused its discretion in ordering that he satisfy Wife’s tax liability incurred from the July 14, 2009, liquidation of \$135,000.00 of Husband’s TIAA-CREF account. Concluding that the trial court did not abuse its discretion in this regard, we affirm.

FACTS AND PROCEDURAL HISTORY

The underlying facts of this case were set forth in the opinion we issued following Husband’s appeal of the trial court’s original division of the marital estate:

The parties were married on September 29, 1990. On September 19, 2006, Barry petitioned to dissolve the marriage. A final hearing was conducted on August 30, 2007, at which exhibits were presented and argument of counsel was heard. At that time, Barry was employed as a college professor earning over \$100,000 annually and Jill was unemployed due to clinical depression. She had previously been employed as an assistant professor.

The parties were in substantial agreement as to the appropriate date of valuation and the current value of the marital assets. However, they disagreed as to the proportional distribution. Jill requested that the trial court divide the marital estate equally, while Barry requested that he

receive a larger share. His request was premised upon his acquisition of certain assets before the marriage and the fact that he is thirteen years older than Jill and likely to retire earlier.

On October 11, 2007, the trial court dissolved the parties' marriage and determined that the marital estate (valued as of May 31, 2006) should be divided equally. Barry was to retain the marital residence, investment accounts and pension funds and was ordered to pay Jill \$532,100 as an equalization payment. However, the trial court found that Barry had dissipated assets existing at the time of separation such that the liquid funds were largely depleted. Accordingly, the trial court ordered that Jill could elect (within six months from the decree) to withdraw \$137,500 in pension funds and Barry would be responsible for the tax consequences of the liquidation. Alternatively, Barry could pay Jill \$137,500 in cash, reducing her portion of the pension funds to \$394,600.

....

The trial court found that Barry dissipated marital assets as follows:

Sometime in February of 2006, the Husband began transferring joint funds from an account at Purdue Employees Federal Credit Union to an account set up in his sole name. After May of 2006, the Husband began to dissipate assets of the parties, transferring certificates of deposit into accounts in his name only, and closed out Harvard bank accounts in his name. From the funds contained in those accounts, the Husband began traveling for pleasure, taking several trips to Asia, Japan, and other foreign countries, in most cases accompanied by a female companion whose travels were financed for the most part by the Husband. The Husband admitted spending over \$30,000, at one point, to pay for an apartment in Taipei, China including the costs of residing there, along with his companion, for over a month. In addition, the Husband spent over \$50,000 in other travels over a four month period and transferred over \$80,000 to his son during that time. In June of 2006, the Husband withdrew from joint accounts approximately \$200,000 to set up a trust fund for his son, his daughter, and his granddaughter. After that, the Husband mortgaged the marital home at 910 Vine Street, which, at the time, had no existing mortgage, receiving approximately \$121,000 from the loan which was spent by the Husband on travels, gifts to his children, and other expenditures unaccounted for. Finally, during this period of time, the Husband also transferred \$283,000 out of his TIAA-CREF account at Purdue into a high risk retirement account at UBS in Chicago.

Wanner v. Hutchcroft, 888 N.E.2d 260, 261-62, 264 (Ind. Ct. App. 2008) (footnotes omitted). On November 7, 2007, Husband filed his notice of appeal. Husband appealed the trial court's equal division of the marital estate and the trial court's directive that he bear responsibility for any tax liability that Wife may incur, should she choose to liquidate a portion of his TIAA-CREF account. *Id.* at 261.

Meanwhile, Wife's former counsel prepared a qualified domestic relations order ("QDRO") that the trial court approved on November 28, 2007. In a letter dated January 2, 2008, TIAA-CREF notified Wife that it could not process the QDRO while Husband's appeal was pending. In a published opinion issued on June 10, 2008, we affirmed the judgment of the trial court. *Id.* at 265. Shortly afterwards, Husband voiced objections to the provisions of the QDRO, TIAA-CREF changed its requirements for a QDRO, and a second QDRO was prepared.

On October 28, 2008, the trial court approved the second QDRO, which provided for a percentage allocation among certain contracts within the TIAA-CREF account to reach the \$532,100.00 amount provided for in the original dissolution decree. The administrator for TIAA-CREF, however contacted Wife and informed her that the second QDRO was unacceptable because insufficient funds existed in the specified contracts to meet the threshold amount. The administrator suggested that the QDRO be amended by means of a letter of direction providing that the threshold amount be satisfied among all of the contracts within the account in a manner to be determined by the administrator. On January 19, 2009, a letter of direction reflecting the change was submitted to Husband, which letter Husband refused to sign.

At some point, a third amended QDRO was nonetheless prepared, and, in a letter dated May 28, 2009, TIAA-CREF notified the parties that the third amended QDRO was acceptable. On June 8, 2009, the trial court approved the third amended QDRO. On July 14, 2009, TIAA-CREF disbursed \$135,000.00 to Wife, and she incurred a state and federal tax liability of \$37,074.00 as a result. On December 15, 2009, Wife filed a petition for payment of tax liability and attorney's fees. On March 31, 2010, the trial court ordered that Husband pay Wife \$37,074.00 and that each party pays its own attorney's fees.

DISCUSSION AND DECISION

Whether the Trial Court Abused its Discretion Ordering Husband to Assume Wife's Tax Liability

Where, as here, the trial court *sua sponte* enters specific findings of fact and conclusions, we review its findings and conclusions to determine whether the evidence supports the findings, and whether the findings support the judgment. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). We will set aside the trial court's findings and conclusions only if they are clearly erroneous. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake was made. *Id.* We neither reweigh the evidence nor assess the witnesses' credibility, and consider only the evidence most favorable to the judgment. *Id.* Further, "findings made *sua sponte* control only ... the issues they cover and a general judgment will control as to the issues upon which there are no findings. A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence." *Id.*

“[A] dissolution court may exercise continuing jurisdiction to reexamine a property settlement where ‘the nature of which is to seek clarification of a prior order.’” *Fackler v. Powell*, 839 N.E.2d 165, 167 (Ind. 2005) (quoting *Thomas v. Thomas*, 577 N.E.2d 216, 219 (Ind. 1991)). “This jurisdictional grant to a dissolution court is warranted as an extension of ‘the necessary and usual powers essential to effectuate the marital dissolution, which includes the power to interpret the court’s own decree.’” *Id.* (quoting *Behme v. Behme*, 519 N.E.2d 578, 582 (Ind. Ct. App. 1988)). “[D]issolution courts retain jurisdiction to interpret the terms of their property settlement agreements and to enforce them.” *Id.* at 167-68. *See also Bitner v. Hull*, 695 N.E.2d 181, 183 (Ind. Ct. App. 1998) (quoting *Wilson v. Wilson*, 169 Ind. App. 530, 533, 349 N.E.2d 277, 279 (1976)) (“[C]ourts of this State have long had power, both inherent and statutory, to entertain actions to determine whether a judgment has been carried out and satisfied.”).

Robinson v. Robinson, 858 N.E.2d 203, 205-06 (Ind. Ct. App. 2006) (first set of brackets supplied).

Husband argues that the trial court erred in ordering him to assume Wife’s tax liability arising from the TIAA-CREF distribution because the distribution did not occur within six months, as provided for in the dissolution decree. Even though the distribution finally occurred some twenty-one months after the issuance of the decree, the trial court nonetheless ordered Husband to assume Wife’s tax liability arising therefrom. In light of the trial court’s findings and conclusions, we cannot say that its interpretation of the terms of the dissolution decree is clearly erroneous.

Husband is essentially arguing that any delay in the TIAA-CREF liquidation was Wife’s fault. Husband first argues that his appeal of the dissolution decree should not excuse Wife’s failure to force the liquidation within six months. Any such pursuit, however, would have been futile on Wife’s part.

Generally, we acquire jurisdiction over a matter on the date the trial court clerk issues its notice of completion of the clerk's record. Ind. Appellate Rule 8. "Once an appeal has been perfected to the Court of Appeals or the Supreme Court, the trial court has no further jurisdiction to act upon the judgment appealed from until the appeal has been terminated." *Schumacher v. Radiomaha*, 619 N.E.2d 271, 273 (Ind. 1993). "The rule does not promote form over substance; it facilitates the orderly presentation and disposition of appeals and prevents the confusing and awkward situation of having the trial and appellate courts simultaneously reviewing the correctness of the judgment." *Donahue v. Watson*, 413 N.E.2d 974, 976 (Ind. Ct. App. 1980).

In re Guardianship of Hickman, 811 N.E.2d 843, 848 (Ind. Ct. App. 2004), *trans. denied*.

Here, the trial court clerk issued the notice of completion of clerk's record on December 6, 2007, depriving the trial court of any power to act upon the dissolution decree. Wife cannot be held accountable for failing to pursue the liquidation during the pendency of Husband's appeal.

Husband further argues that any post-appeal delays should also be attributable to Wife. The trial court, however, concluded otherwise. Specifically, the trial court concluded that the drafting of a suitable QDRO was "complex" because of Husband's pre-dissolution withdrawal of over \$200,000.00 from his TIAA-CREF account, "Husband delayed the implementation of the [QDRO,]" and "Husband had opportunities to be more cooperative in the drafting of the QDRO[.]" Appellant's App. pp. 74, 75. All of these conclusions are amply supported by the record. The first QDRO was revised due to Husband's objection, causing the preparation of the second QDRO, which was not approved by the trial court until five months later. Moreover, Husband's previous withdrawal of money from the TIAA-CREF account does indeed seem to have complicated matters and delayed distribution, as TIAA-CREF was forced to reject the

second QDRO due to a lack of funds in the specified contracts, causing another delay of many months, seemingly extended further when Husband refused to sign the letter of direction. The trial court also specifically found another instance where increased cooperation from Husband could have hastened the distribution to Wife by thirty to forty-five days. In light of Husband's actions since the dissolution decree was issued, not to mention his previous dissipation of marital assets, we cannot say that the trial court's conclusion that Husband bears the primary responsibility for delaying the distribution is clearly erroneous.

In the appealed order, the trial court's stated purpose for allowing the shifting of the tax liability was "[t]o effectuate the intent of the Trial Court's Dissolution Decree[.]" which was, in part, "to remedy the wrongs done to the Former Wife as a result of the Former Husband's dissipation of marital assets." Appellant's App. p. 76. Allowing Husband to avoid the tax liability provided for in the dissolution decree as a result of his own dilatory tactics would not seem to serve that purpose. As an exercise of the trial court's continuing power to interpret and give effect to its dissolution decree, we cannot say that ordering Husband to assume Wife's tax liabilities arising from the TIAA-CREF distribution was clearly erroneous.

We affirm the judgment of the trial court.

DARDEN, J., and BROWN, J., concur.