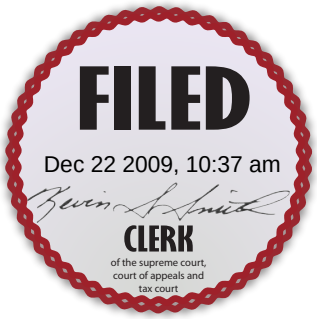

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE MARRIAGE OF:	)	
	)	
BECKY D. KELLY,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 20A03-0907-CV-298
	)	
MICHAEL FRANCIS PATRICK KELLY,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT NO. 6
The Honorable David C. Bonfiglio, Judge
Cause No. 20D06-0406-DR-352

December 22, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Becky D. Kelly (Becky), appeals the trial court's Order on June 15, 2009, clarifying or modifying its previous Order regarding the distribution of marital property issued on June 7, 2005.

We affirm.

ISSUE

Becky raises two issues for our review, which we restate as the following consolidated issue: Whether the trial court permissibly clarified or modified its June 7, 2005 Order by way of its June 15, 2009 Order.

FACTS AND PROCEDURAL HISTORY

On June 26, 2004, Becky filed a petition for the dissolution of her marriage to Michael Francis Patrick Kelly (Michael). On June 7, 2005, the trial court conducted a hearing on the petition where Becky and Michael explained that the only issue which they had not been able to resolve prior to the hearing was how the equity in a home located on County Road 10, in Elkhart County, Indiana, was to be divided. Becky and her sister had used inheritance money from the death of their father to make the down payment on the home during the marriage, and Becky, her sister, and Michael had lived there for three years. The home was titled solely in Becky's name. While living there, Michael had contributed to a significant amount of the household expenses, although he made no payments directly on the mortgage. Becky and Michael explained to the trial court that an "offer [had] been made" on the home, but the sale of the home was not certain. (June 7, 2005 Transcript p. 8). At the close of the hearing,

the trial court ordered the dissolution of the marriage, but took the division of the equity from the home located on County Road 10 under advisement. Later that same day the trial court issued an order stating:

> The Court having taken this matter under advisement concerning property settlement does now find that [the] home on CR 10 is a part of the marital estate and that upon its sale, the proceeds be equally divided between the parties. Indiana law (I.C. § 31-15-7-4(a)(2)(B)) defines as marital property as all property owned or acquired by the parties prior to the filing of the petition for dissolution. Indiana case law states that property acquired through inheritance is included, thus the property purchased with inheritance is included in this marital estate.

(Appellant's App. p. 15).

The potential sale of the home did not go through, and Becky remained living there. On March 6, 2009, Michael filed a motion for clarification of the trial court's June 7, 2005 Order. Michael contended in pertinent part that:

> 8. The Court's June 7, 2005, Order was clearly based on [Becky's] representation that the sale of the real estate was imminent, resulting in the Court's reasonable, under those circumstances, order that, upon that imminent sale, the proceeds would simply be equally divided between the parties.
>
> 9. However, because [Becky's] representation of an imminent sale turned out not to be true, and she has, in fact, never sold the property, the Court's Order as written has been rendered ambiguous and several questions under these circumstances remain unanswered. For example, if [Becky] should sell the property now, and she has increased the available equity because of her payment of the mortgage since June 7, 2005, the Court's Order would seem to indicate that the sale proceeds would still be divided equally, thus seeming to unjustly benefit the [Michael]. On the other hand, if [Becky] has taken out a second mortgage on the property so that no equity is available, and now sells the property so that there are no net proceeds, then the [Michael] clearly, unjustly, forfeits his share of the marital asset. Finally, the Court's Order does not address the situation where the [Becky] never sells the real estate.

(Appellant's Br. p. 54). The trial court held a hearing on Michael's motion on April 14, 2009, and set a briefing schedule. On June 15, 2009, the trial court issued its order, stating in pertinent part:

> The rational for the 6/7/05 Order was that there would soon be a sale and the equity would be divided equally. The parties had been together 17 years. The home never sold and no further attempts to sell have occurred.
>
> In order to effectuate the Order of June 7, 2005, the Court Orders the sale of the marital residence with all reasonable efforts to sell same with no undue delay. The Provisional Order of 7/27/04 required [Becky] to pay the mortgage, [Becky] is allowed the increase in equity since that date, similarly, if additional debt has been added by [Becky] it will be attributed to her. Proceeds after those items have been applied will be an equal division of the remaining equity. What that amount will be is unknown in that market conditions have changed since June 7, 2005.
>
> In the alternative, at [Becky's] discretion, she may pay [Michael] $16,500.00 as his share of the equity. That figure is derived from the testimony of the parties on June 7, 2005.

(Appellant's App. p. 111).

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

DISCUSSION AND DECISION

Becky contends that the trial court did not clarify the June 7, 2005 Order by way of the June 15, 2009 Order, but rather made an impermissible modification. Michael responds by contending that in light of the fact that the property did not sell as the trial court anticipated, the trial court's June 7, 2005 Order has been rendered ambiguous because it contains no guidance as to what course of action to take if a timely sale of the marital residence did not occur. Therefore, Michael contends that the June 15, 2007 Order is a clarification of an

ambiguous order, not a modification. In the alternative, Michael proposes that if we conclude that the June 7, 2005 Order is not ambiguous, we interpret the trial court's June 15, 2009 Order as providing discretionary relief from judgment in accordance with Indiana Trial Rule 60(B)(8).

In its June 15, 2009 Order, the trial court clearly expressed that it had intended for the parties to split the equity in the marital residence soon after the divorce decree was entered. However, this is not what the trial court stated in its June 7, 2005 Order. The operative sentence in that Order stated: "The Court having taken this matter under advisement concerning property settlement does now find that [the] home on CR 10 is a part of the marital estate and that upon its sale, the proceeds be equally divided between the parties." (Appellant's App. p. 15). The language of this sentence is not ambiguous. *See Gilbert v. Gilbert*, 777 N.E.2d 785, 790 (Ind. Ct. App. 2002) ("A judgment is said to be ambiguous when it would lead two reasonable persons to different conclusions as to its effect and meaning"). However, a lack of provisions ordering a sale or providing for a contingency where the residence is not sold leads to a high level of uncertainty or indefiniteness in the division of property between Becky and Michael. By not ordering a timely sale of the residence, the June 7, 2005 Order made it possible for Becky to retain possession of the residence indefinitely. Michael is potentially benefitted by Becky's holding of the residence, considering that the amount of equity in the home may grow over time, and the trial court ordered the proceeds of the sale to be divided equally between Becky and Michael "upon its sale." (Appellant's App. p. 15). That being said, the June 7, 2005 Order did not require

Becky to maintain any certain level of equity, and she could take actions that would destroy the equity in the home and potentially sell the home without receiving any "proceeds."

Michael contends that the uncertainty created by the lack of provisions in the trial court's June 7, 2005 renders it ambiguous seeing as ambiguity can stem from different conclusions as to the *effects* of an order. *See Gilbert*, 777 N.E.2d at 790. Becky responds that the June 7, 2005 Order needed no clarification because she and Michael should be treated as tenants in common with respect to the marital residence since the trial court failed to order its sale as a part of the divorce decree. "It has long been held in this state that a final decree of dissolution converts a tenancy by the entirety into a tenancy in common with both spouses taking equal shares." *Poulson v. Poulson*, 691 N.E.2d 504, 506 (Ind. Ct. App. 1998); *see also* I.C. § 32-17-3-1, 2. However, if we were to rely upon this proposition of law as a basis to reverse the trial court here, we are confident that we would be simply prolonging the litigation process that would inevitably result in a forced sale of the marital residence. As a tenant in common in the property Michael would hold the right to compel the partition of the marital real estate. I.C. § 32-17-4-1. However, since the real estate, consisting of a single family dwelling, cannot be divided without damage to the owners, the trial court would retain the authority to order the sale of the marital residence in accordance with "terms and conditions prescribed by the trial court." *Keller v. Keller*, 878 N.E.2d 525, 528 (Ind. Ct. App. 2007) (citing I.C. § 32-17-4-12). The trial court has already proscribed the terms and conditions which it feels are appropriate for the sale of the marital residence and the division of the proceeds resulting. Therefore, if we reversed the trial court's June 15, 2009 Order and

held that Michael and Becky should be treated as tenants in common with respect to the marital residence, we are confident that more litigation would lead to the same or similar result as the Order which Becky now appeals. In the interest of judicial economy, we choose not to delay the inevitable.

Since the language in the lack of provisions in the June 7, 2005 Order led to an uncertain or indefinite distribution of the property in contravention of the trial court's later explicitly stated intention, Michael could have also characterized his Motion to Clarify Ambiguous Judgment as a motion for relief from judgment in accordance with Trial Rule 60(B)(8).

> T.R. 60(B)(8) is an omnibus provision which gives broad equitable power to the trial court in the exercise of its discretion and imposes a time limit based only on reasonableness. Nevertheless, under T.R. 60(B), the party seeking relief from the judgment must show that its failure to act was not merely due to an omission involving the mistake, surprise or excusable neglect. Rather some extraordinary circumstances must be demonstrated affirmatively. This circumstance must be other than those circumstances enumerated in the preceding subsections of T.R. 60(B).

In re Paternity of P.S.S., 913 N.E.2d 765, 768 (Ind. Ct. App. 2009). By issuing the June 15, 2009 Order, the trial court implicitly conveyed that Michael had timely requested relief from the previous Order. Additionally, the trial court implicitly conveyed that it was fair and equitable to add the terms ordering a timely sale, or alternatively a payment of money from Becky to Michael if she desired to keep the residence. For us to reverse the trial court based upon Becky's contention that the trial court did not simply "clarify" its previous Order as requested by Michael in his motion, but rather made a modification would be to elevate form

over substance, which we generally will not do. *See Rainbow Cmty, Inc. v. Town of Burns Harbor*, 880 N.E.2d 1254, 1263 (Ind. Ct. App. 2008).

Altogether, whether the trial court's June 15, 2009 Order is viewed as a clarification or a modification of the June 7, 2005 Order, we reach the same result: the trial court permissibly exercised its authority when ordering the sale of the marital home without undue delay, or, in the alternative, a cash payment from Becky to Michael to cover Michael's share of the equity at the time of the dissolution of their marriage.

CONCLUSION

Based on the foregoing, we conclude that the trial court permissibly exercised its discretion when issuing its June 15, 2009 Order.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.