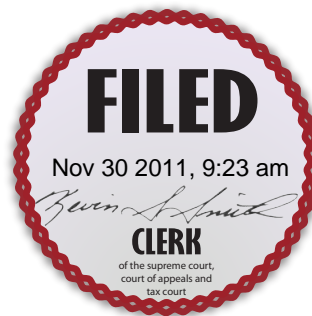


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN EBY,)
)
Appellant-Respondent,)
)
vs.) No. 29A02-1104-DR-318
)
JENNIFER EBY,)
)
Appellee-Petitioner.)
)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0708-DR-870

November 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Brian Eby (“Husband”) appeals from the trial court’s second amended decree of dissolution following remand from a previous appeal. We reject Husband’s contention that the trial court erred by crediting Jennifer Eby (“Wife”) for payments made to preserve marital assets during the pendency of dissolution proceedings. Nevertheless, we conclude that the trial court abused its discretion in crediting Wife for the entire amount of expenses paid during the pendency of dissolution proceedings, and as to this issue, we reverse and remand with instructions.

Facts and Procedural History

Husband and Wife married in November 1995. No children were born of the marriage. Husband worked as a salesman at European Tanning Systems, earning as much as \$200,000 per year. In 2004, he left ETS to start his own company, which was defunct by 2007. Wife was self-employed and ran a graphic design and promotional company called 1-2-One Promotions, and by 2007 earned an annual salary of almost \$100,000. Wife petitioned for dissolution in the summer of 2007, and while proceedings were ongoing, she paid more than \$145,000 to preserve marital assets, including mortgage payments and property maintenance fees. Husband did not contribute to the payment of these expenses. In December 2008, the trial court entered a decree of dissolution. According to the decree, Wife received \$184,928.26, and Husband was entitled to \$151,570.00. Husband received a credit for one-half of the expenses paid by

Wife during the pendency of dissolution proceedings. In making its distribution, the trial court noted that Husband was voluntarily underemployed.¹

Husband filed a motion to correct errors, arguing that the trial court erred in valuing and assigning certain marital assets. The trial court granted Husband's motion in part and issued an amended decree in August 2009. The amended decree modified the parties' respective percentages of the marital estate significantly—Wife received \$162,279.32 and Husband received \$63,037.70. Appellant's App. p. 56-57. In reaching these figures, the trial court assigned to Wife \$58,000 in retirement account funds not previously included in its distribution and valued Wife's business at \$204,000, compared to \$174,000 as reflected in the original decree. The court also increased Wife's total obligations by including an overlooked property settlement. *Id.* at 55. With regard to Husband, the trial court revoked the one-half credit it had assigned to him for Wife's payment of marital expenses during the pendency of dissolution proceedings and provided that Wife be reimbursed for one-half of her expenditures. The court also increased Husband's obligations by including the aforementioned property settlement. *Id.* at 56.

Husband appealed the amended decree, contending that the trial court had erred in deviating from the presumption of an equal division of the marital estate. *Eby v. Eby*, Cause No. 29A05-0909-CV-521, slip op. (Ind. Ct. App. Aug. 16, 2010). In that memorandum decision, another panel of this Court concluded that the trial court had

¹ The trial court noted that Husband claimed that his employment opportunities after leaving ETS were limited due to a wrist injury, yet Husband testified that he performed manual labor at the marital residence, such as gardening. *See* Appellant's App. p. 26.

divided the marital estate unequally in favor of Wife but had failed to mention the statutory factors it was required to consider in deviating from the presumptive equal division.² We determined that there was nothing in the record to support an unequal division in Wife's favor and remanded the case with instructions that the trial court divide the marital estate equally between the parties.

On July 13, 2011, the trial court issued a second amended decree of dissolution. The second amended decree achieved equality in division of the assets by crediting Wife for the entire amount of her expenditures during the pendency of dissolution proceedings, stating:

In order to effectuate an equal distribution of the marital estate between the parties, the Court has considered and applied the expenses advanced to preserve the marital estate by Wife during the pendency of the dissolution proceeding in the amount of \$145,906.52 as an obligation/debt to the Wife. A judgment is entered against the Husband [of] \$3,332.45 and in favor of the Wife. Each party's share of the marital estate is \$39,705.25. The Indiana Court of Appeals has held that a trial court may consider the payment of joint marital debts during the pendency of the action in dividing marital property. *Ellis v. Ellis*, 730 N.E.2d 201, 205 (Ind. Ct. App. 2000) (trial court did not abuse its discretion in considering payments made during pendency of dissolution).

Appellant's App. p. 104. Husband filed a motion to correct errors, which was denied.

He now appeals.

Discussion and Decision

² See Ind. Code § 31-15-7-5.

On appeal, Husband raises multiple issues, which we combine and restate as whether the trial court erred in crediting Wife for payments made to preserve marital assets during the pendency of dissolution proceedings.³

The division of marital assets is a matter within the sound discretion of the trial court. *Webb v. Schleutker*, 891 N.E.2d 1144, 1149 (Ind. Ct. App. 2008). When a party challenges the trial court's division of marital property, he must overcome a strong presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal. *Id.* When we review a claim that the trial court improperly divided marital property, we must decide whether the trial court's decision constitutes an abuse of discretion, considering only the evidence most favorable to the court's disposition of the property, without reweighing the evidence or assessing the credibility of witnesses. *Id.*

In support of his argument that the trial court erred in crediting Wife for payments made by her during the pendency of dissolution proceedings, Husband details Wife's expenditures, claiming that Wife "allegedly" made mortgage payments and "tacked on" landscaping fees. Appellant's Br. p. 18. Husband then concludes that these expenses, "having been incurred post-separation date, are clearly Wife's responsibility." *Id.* We view this as an invitation to reweigh the evidence, which we will not do. Further, in

³ We agree with Wife that Husband has waived a number of his arguments by failing to assert them in his first appeal. We have held that an argument made on second appeal is waived if the issue was ripe for review but not raised in the party's first appeal. *Montgomery v. Trisler*, 771 N.E.2d 1234, 1239 (Ind. Ct. App. 2002), *trans. denied*. Husband has waived the argument that the trial court miscalculated Wife's equity in the real estate awarded to her, his claim regarding Wife's abandonment of the marital residence, and his claim that the trial court should have considered an unequal division of the marital estate in his favor.

Husband's first appeal, this court noted that the amount of Wife's expenditures was uncontested. *See Eby*, slip op. at 4.

In support of her argument that the trial court did not err in crediting her for expenses paid during the pendency of dissolution proceedings, Wife directs our attention to *Ellis*. We agree with the trial court and Wife that *Ellis* is dispositive. In *Ellis*, a wife made payments toward marital debts during the pendency of dissolution proceedings. This trial court credited the wife for a portion of these payments, and we affirmed. *Ellis v. Ellis*, 730 N.E.2d 201, 205 (Ind. Ct. App. 2000). As Wife correctly notes, this Court has upheld similar awards of credit to a spouse for expenses paid during the pendency of dissolution proceedings. *See Fiste v. Fiste*, 627 N.E.2d 1368, 1372 (Ind. Ct. App. 1999) (trial court's award of credit to husband for his payment of household expenses during the pendency of dissolution proceedings was proper); *Herron v. Herron*, 457 N.E.2d 564, 567 (Ind. Ct. App. 1983) (holding that the award of credit to a husband for his payment of joint marital obligations during the pendency of dissolution proceedings was an appropriate means of ensuring that the marital property was divided in a just and reasonable manner).

Husband attempts to limit the application of *Ellis* by noting that the trial court in *Ellis* did not credit the wife for certain unnamed expenses. This fact alone is insufficient to persuade us that *Ellis* is distinguishable from the case at bar. We conclude that the trial court did not err in crediting Wife for payments made during the pendency of dissolution proceedings.⁴

⁴ Husband's contention that the doctrine of necessities precludes the award of any credit to Wife for her post-separation expenditures must fail. The doctrine of necessities imposes limited secondary

While the trial court did not err in crediting Wife for these expenses, it abused its discretion in crediting Wife for the total amount of expenses paid. Notably, the trial court treated Wife's expenditures differently in each of its three decrees, first crediting Husband for one-half of Wife's expenditures, subsequently revoking that credit and providing that Wife be reimbursed for one-half of her expenses from proceeds of the sale of the marital residence, and ultimately crediting Wife for the entire amount of expenses paid. In Husband's first appeal, a panel of this Court determined that it was proper for the "expenses advanced by Wife to be shared equally by the parties" and instructed the trial court to divide the marital estate equally between Husband and Wife. *See Eby*, slip op. at 4. In following the directives of this Court to divide the marital estate equally, the trial court essentially ordered the parties to receive the same property they had received in the previous order, but accomplished an equal distribution by crediting Wife for the entire amount of expenses she paid during the pendency of dissolution proceedings. This was not the intent of our prior order.

We conclude that Wife is entitled to credit for only one-half of the expenses at issue, or \$72,953.26. Because she was erroneously credited for twice that amount, the marital estate was not divided equally—Wife received \$112,658.29 and Husband received \$39,705.25. Both parties should have received \$76,181.77. Therefore, Husband

liability upon a financially superior spouse for *repayment of debt incurred by a dependent spouse*. *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 8 (Ind. 1993) (emphasis added). We fail to see how Husband has incurred debt as a result of Wife's voluntary payment of marital obligations. Further, we have limited the applicability of the doctrine to collection actions, refusing to extend it in dissolution actions. *See Thompson v. Thompson*, 811 N.E.2d 888, 913 (Ind. Ct. App. 2004); *Moore v. Moore*, 695 N.E.2d 1004, 1009 (Ind. Ct. App. 1998); *see also Fuehrer v. Fuehrer*, 651 N.E.2d 1171, 1174 (Ind. Ct. App. 1995), *reh'g denied, trans. denied*.

is entitled to a judgment against Wife in the amount of \$36,476.52. We reverse the trial court's second amended decree as it pertains to the credit received by Wife for expenses paid during the pendency of dissolution proceeds and instruct the trial court to enter a new order which reflects our decision.

Affirmed in part, reversed in part, and remanded with instructions.

FRIEDLANDER, J., and DARDEN, J., concur.