

Case Summary

This is the second appeal in the dissolution of the marriage of Jeff Whitmer and Nancy Whitmer. In 2004, the trial court ordered a roughly equal distribution of the marital property. To effectuate this division, the court ordered that most of the parties' real estate, which had been in Nancy's family for several generations, be sold and the proceeds divided. Nancy appealed the court's distribution of the property, and we affirmed.

In 2006, the land was sold at auction, but the parties could not come to an agreement on how to distribute the proceeds. On July 27, 2010, a hearing was held, at which each party testified as to how the proceeds should be distributed and submitted exhibits in support. On December 15, 2010, the court issued an order that set aside substantial sums to Nancy for various expenses that she claimed to have incurred, which Jeff challenges on appeal. We conclude that most of the expenses that Nancy requested were either untimely raised or were an improper attempt to relitigate the equal property distribution. Therefore, we affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

In a previous appeal, we stated the facts as follows:

Jeff and Nancy were married on September 6, 1980. Two children were born of the marriage[, Natalie and Adam, who are now adults]. For all but one of the years in which they were married, Jeff and Nancy lived on the farm which had been in Nancy's family for seven generations. They began by renting a small home from Nancy's parents for \$200 per month. After they determined that the home was too small, Jeff and Nancy exchanged homes with her parents. In order to facilitate that transaction, Jeff and Nancy purchased the larger home and 1.06 acres upon which it sits for \$36,000. In the following years, Jeff assisted Nancy's father in the hog operation and received a share of the profits in exchange for his labor. In 1991, Nancy's

father decided that he no longer wished to farm and rented part of the farm operation to Jeff and Nancy. In order to assist their endeavor, he allowed them to use his equipment. The following year, after Nancy's father passed away, Jeff and Nancy took over the entire farm operation. Nancy's mother subsequently transferred title of the property to Jeff and Nancy. In exchange, they assumed payment for the debt on the farm and its assets, but the mortgages and loans were not placed in their names.

Jeff and Nancy worked the farm together. During this time, Nancy was sporadically employed off the farm. Jeff also worked as a full-time police officer for the Wabash Police Department. At the time of the dissolution hearing, Jeff was the Assistant Chief. Through her employment, Nancy had been able to acquire a small pension and a Public Employee's Retirement Fund ("PERF") account. Jeff also had a PERF account which was valued at \$37,590.45 at the time of separation. [In the final dissolution order, dated February 20, 2004], the trial court ordered that the property of the parties be split nearly equally, although Nancy did receive a larger portion of the farm equipment and personal property, including bank accounts. In distributing the property, the trial court stated that the value of the pension and PERF accounts at the time of separation would be split evenly between the parties. The trial court also ordered that Nancy could keep the marital residence and either the 1.06 acres upon which it sits or a larger tract of three acres. However, Nancy was required to refinance the mortgage for the marital residence and pay Jeff for half of its appraised fair market value. Jeff and Nancy were also ordered to sell the remaining portions of the farm and to split the proceeds evenly, subject to the payment of some appraisal and attorney fees, after the mortgages and loans were paid.

Appellant's App. at 52-53 (copy of our memorandum decision in *Whitmer v. Whitmer*, No. 85A02-0403-CV-250 (Ind. Ct. App. Jan. 10, 2005) (citation omitted).

Nancy appealed the 2004 order, raising three issues, which we restated as:

- I. Whether the trial court erred in failing to order Jeff to pay child support;
- II. Whether the trial court erred in determining that the parties did not have to contribute to their son's education; and
- III. Whether the trial court erred in distributing property.

Id. at 52. As to the first issue, Jeff conceded that the trial court had erred in its calculation,

and we remanded for the trial court to determine the amount of child support that Jeff owed to Nancy. As to the second issue, we affirmed because the court's order was supported by Jeff's testimony. As to the property distribution, Nancy argued that Jeff's PERF account should have been assigned a greater value and that "the trial court discounted the legacy status of the family farm and forced her to sell what would be her source of income." *Id.* at 59. We affirmed the trial court's valuation of Jeff's PERF account, because it was not fully vested and was contingent on several factors. While noting that the trial court might have been able to come up with a more creative solution that would allow Nancy to continue working the farm, we found no abuse of discretion in the nearly equal division of the property because both parties had worked on the farm and had assumed responsibility for paying its debts. Thus, we affirmed the division of marital property and remanded for the court to recalculate child support. Our decision was handed down on January 10, 2005, and transfer was denied on April 28, 2005.

On October 28, 2005, Jeff filed a motion to appoint a commissioner to sell the farm. On November 8, 2005, Nancy filed a "Report of Miscellaneous Unresolved Issues," in which she claimed that the following issues were pending:

1. Appeal Expenses due and owing to Nancy Whitmer, approximately \$1,500.00;
2. Payment to Nancy Whitmer for the corn head sold by Jeff Whitmer, \$2,000.00;
3. Repayment to Nancy Whitmer of the farm money Jeff Whitmer used for payment of his 2000 personal income taxes owed, \$3,951.00;
4. Child support arrearage Jeff Whitmer owes to Nancy Whitmer,

\$1,483.00;

5. Medical bills for Adam Whitmer to be repaid to Nancy Whitmer, \$657.00; and
6. Repayment of ... the 2002 farm taxes paid by Nancy Whitmer from her personal earnings, \$2,000.00.

Id. at 64. On November 10, 2005, the court ruled that issues 1, 2, 3, and 6 were untimely.

On March 28, 2006, the trial court appointed a commissioner to sell the farm. Nancy opted to keep the marital residence and the 1.06-acre tract. The remainder of the land was divided into seven tracts and was sold at auction on August 10, 2006. A trust purchased six of the tracts for \$830,000, and Nancy successfully bid \$15,000 for the remaining tract. The parties agreed that the \$15,000 would be taken from the final distribution of marital assets. On August 24, 2006, the court approved the sale. The closing took place on October 6, 2006, and the proceeds were placed in an escrow account pending final distribution.

On September 14, 2006, Nancy moved for a change of judge, and Special Judge Stephen M. Jessup assumed jurisdiction on December 19, 2006. While attempts at mediation were ongoing, \$50,000 from the escrow account was distributed to each party. After the parties failed to resolve their issues through mediation, a hearing was held on July 27, 2010. Jeff and Nancy both testified as to how they believed the remaining assets should be distributed and submitted exhibits in support.

Each party submitted proposed findings of fact and conclusions of law thereon. On December 15, 2010, the court adopted Nancy's proposed findings and conclusions. The court's order decreed that:

1. Pursuant to the attached CSOWs, Nancy is awarded \$1,506.50 for back child support, all reduced to judgment.

2. Nancy is awarded her inheritance and which is hereby set-aside in the sum of \$152,049.22.

3. Nancy is awarded \$127,309.64 to be set aside as reimbursement for expenses Jeff owes Nancy.

4. Jeff is awarded \$150.00 for expenses Nancy owes Jeff.

5. Nancy is awarded the interest on the escrow account in the sum of \$34,445.66. Nancy shall hold Jeff harmless on any and all taxes due on this sum.

6. Both parties are awarded \$50,000.00, which the Court notes has already been distributed.

7. Both parties are awarded \$7,500.00 pursuant to the February 24, 2004 Order.

8. Nancy is awarded \$17,146.92 pursuant to the February 24, 2004 Order.

9. Nancy is awarded \$83,852.19 representing her farm labor costs and increased value in the land.

10. After all expenses set forth above, the remaining equity is \$134,810.91. The parties shall divide this sum equally minus the previously distributed monies.

Id. at 29-30. Jeff now appeals.

Discussion and Decision

Where, as here, the trial court issues findings of fact and conclusions of law thereon, we employ a two-tiered review:

First, we must determine whether the evidence supports the findings, and then whether the findings support the judgment. We will reverse the judgment only when it is clearly erroneous. Findings are clearly erroneous when the record

lacks any evidence to support them. Upon review, we will neither reweigh the evidence nor assess witness credibility.

Hyde v. Hyde, 751 N.E.2d 761, 765 (Ind. Ct. App. 2001) (citations omitted).

In dissolution actions, the trial court has broad discretion when valuing and distributing property. *Wyzard v. Wyzard*, 771 N.E.2d 754, 757 (Ind. Ct. App. 2002). If the evidence favorable to the judgment supports the court's judgment, no abuse of discretion occurs. *Id.* In this case, however, there has been a previous appeal. Our 2005 opinion is the law of the case, and the trial court had no discretion to alter our interpretation of the 2004 dissolution decree. *See Am. Family Mut. Ins. Co. v. Federated Mut. Ins. Co.*, 800 N.E.2d 1015, 1022 (Ind. Ct. App. 2004) ("The trial court is not a coordinate court to this court; thus it has no power to alter an appellate decision."). "In general, facts established at one stage of a proceeding, which were part of an issue on which judgment was entered and appeal taken, are unalterably and finally established as part of the law of the case and may not be relitigated at a subsequent stage." *Id.* at 1019 (quoting *Landowners v. City of Fort Wayne*, 622 N.E.2d 548, 549 (Ind. Ct. App. 1993), *trans. denied*). "All issues decided directly or by implication in a prior decision are binding in all further portions of the same case." *Id.*

The parties do not dispute that: (1) Jeff owes Nancy child support in the amount of \$1506.50; (2) Nancy owes Jeff \$150 for an appraisal fee; (3) each is entitled to the \$50,000 that they have already received from the escrow account; (4) each is entitled to \$7500.00 for the land that Nancy purchased at auction; and (5) Nancy is entitled to \$17,146.92 to equalize their retirement funds. These issues correspond to paragraphs 1, 4, 6, 7, and 8 of the court's decree. *See Appellant's App.* at 29-30. Jeff challenges the amounts set aside to Nancy in

paragraphs 2, 3, 5, 9, and 10 of the court's decree.

The court adopted Nancy's proposed division of the assets, which is explained in detail in Respondent's Exhibit B. Nancy's calculations begin with the premise that the court was tasked with distributing the property's equity. Nancy started with the appraised value of the real estate, and then deducted the farm and mortgage debt, her inheritance, and the \$17,146.92 that Jeff owes to equalize their retirement funds. Included in Nancy's inheritance are the equity in the farm equipment at the time of her father's death, the equity in the land at the time of her mother's death, and life insurance proceeds from her parents.¹ The total value of her inheritance is \$152,049.22. Using these figures, Nancy concluded that the equity to be divided is \$134,810.91. Nancy also claimed to be entitled to certain expenses, the interest on the escrow account, and the increase in the land's value.

Nancy's argument is essentially that the court was required to divide the equity and that the trial court had discretion to pick a date for valuing the equity and divide it in any fair manner. We disagree. The 2004 dissolution decree gave Nancy the option of retaining a 1.06-acre or a 3-acre tract. Regarding the remainder of the land, the order states:

The remaining real estate owned by Jeff and Nancy, after deducting the tract which is awarded to Nancy above, shall be sold and, after paying all indebtedness and any and all costs of sale associated therewith, the proceeds shall be divided as follows:

¹ The record before us does not contain much detail concerning how the parties acquired the real estate and farm equipment. Based on our previous opinion, it appears that the parties purchased a portion of the real estate and that Nancy's mother gave them the rest of the property before she died in exchange for Nancy and Jeff assuming the mortgage and farm loans. Thus, it appears that most, if not all, of the items that Nancy included in her "inheritance" were not actually inherited. However, Jeff does not dispute that they received substantial assets from Nancy's parents. For the sake of simplicity, we will use the same terminology employed by Nancy and the trial court.

Jeff shall be reimbursed One Hundred Fifty Dollars (\$150.00) for the Appraisal fees owed to Mark Metzger on the farm equipment; Jeff shall further receive Three Thousand Dollars (\$3,000.00) to be used for payment of attorney fees which is equal to the sum Nancy used from the farm account to pay her attorney, Mark Guenin; Nancy shall then receive the sum Seventeen Thousand One Hundred Forty Six Dollars and 92/100 (\$17,146.92), representing her portion of Jeff's Police Department Pension; and, thereafter, the remaining balance of the proceeds of the sale of real estate shall be divided equally.

Pending sale of the real estate, Nancy shall continue to pay the indebtedness associated therewith with the proceeds from the cash rent.

....

Any capital gains taxes payable as a result of the sale of the real estate ordered herein shall be shared equally between Jeff and Nancy.

Id. at 48. The order unambiguously states that the *proceeds* of the sale were to be divided equally after deducting certain items. Nancy's calculations are based on a false premise and are largely an attempt to relitigate the equal distribution, which we affirmed in the previous appeal. Thus, we conclude that the case must be remanded for the court to distribute the assets in a manner consistent with the 2004 dissolution order. To guide the trial court, we will address Jeff's arguments concerning which expenses may be deducted from the sale proceeds.

A. Nancy's Inheritance

Nancy's inheritance includes equity in the farm equipment at the time of her father's death, the equity in the land at the time of her mother's death, and life insurance proceeds from her parents, which, according to Nancy's testimony, were invested in the farm. The court considered the fact that Nancy had received substantial assets from her parents when it

issued its dissolution order in 2004, yet ordered that the proceeds of the sale be divided equally. Thus, Nancy is not entitled to set aside a portion of the equity for herself. Regardless of how the life insurance proceeds were used, both of Nancy's parents passed away before the court issued its 2004 order, and therefore, the insurance funds were part of the marital pot that the court divided at that time. These issues should not be revisited.

B. Expenses

Nancy requested reimbursement of \$127,309.64 in expenses that she incurred. That figure includes the following items:

- Farm management fee: \$9,360
- Child support: \$1,506.50
- Corn head: \$2,000
- Farm income used for Jeff's 2002 personal income tax: \$3,951
- Nancy's personal income used to pay 2002 farm income tax: \$2,000
- Transcript for the previous appeal: \$1,500
- Filing fee for the previous appeal: \$250
- Farm operating loan payment: \$4,115.14
- Auctioneer commission: \$41,500
- Auctioneer supplemental charges: \$4,070
- Attorney fees used to release money from escrow account: \$2,397
- Wages for labor and upkeep of farm: \$9,000
- Estimated capital gains tax on sale of farm real estate: \$45,660

Respondent's Ex. B.

Nancy testified that she took sole responsibility for managing and maintaining the real estate after the parties separated. The farm was rented from 2002 to 2006. Nancy testified that managing the farm consisted of “[f]inancial management, always meeting with the lenders ..., taking care of cash flows, projections ..., taking care of bills and then the management of what kind of labor that I was going to have to do.” Tr. at 59. Nancy stated

that she researched what a farm management company would charge and concluded that her services were worth \$9360. She testified that upkeep of the property included mowing, repairing buildings, and weed control. Based on the number of hours she spent maintaining the property, she valued these services at \$1500 a year for a total of \$9000.

Jeff argues that the 2004 order does not make any provision for reimbursing Nancy for her labor. We disagree. The order states that costs associated with the sale of the land were to be deducted from the proceeds. Nancy's work in maintaining the property enabled them to earn income while the sale was pending and were reasonable actions to secure a good price for the property. We conclude that Nancy's work should be treated as a cost associated with the sale. The amounts awarded to Nancy are supported by her testimony, and Jeff did not present any contrary evidence of the value of her work. Therefore, we conclude that the trial court did not err by awarding these amounts to Nancy.

Jeff does not dispute that he owes \$1506.50 for child support. He also concedes that Nancy should be reimbursed for the attorney's fees in the amount of \$2397, which Nancy incurred to obtain a release of funds from escrow.

Before this case was transferred to Special Judge Jessup, Special Judge Daniel Banina had already ruled that Nancy had untimely requested reimbursement for money that Jeff received from the sale of a corn head for a combine, farm income that was used to pay Jeff's personal income taxes, and Nancy's personal income that was used to pay the farm's income taxes. All these issues were known before the 2004 dissolution order was issued; therefore, we agree that these requests are untimely.

Nancy testified that she thought that the cost of the prior appeal should be divided between them because they both benefited from it. Nancy does not explain how the appeal benefited Jeff. We determined that Jeff owed child support to Nancy but otherwise left the 2004 dissolution order intact. Although Nancy could have asked us to award costs pursuant to Appellate Rule 67, she did not. Appellate Rule 67 requires a motion to be filed within sixty days of a final order. Nancy cites no authority in support of her argument that she could request appellate costs from the trial court after the time for filing an Appellate Rule 67 motion has lapsed. Special Judge Banina found Nancy's request for appellate costs untimely, and we agree.

The 2004 dissolution decree stated that Nancy was to use the rent from the farm to pay the loans until the land was sold. Once the land was sold, any remaining debt was to be paid from the proceeds. The record before us is unclear as to whether the escrow account includes income from the farm or whether that money has already been spent. Nancy testified that she paid the farm operating loan with her personal income. We do not have sufficient information to determine whether and to what extent Nancy should be reimbursed for the farm operating loan.

The closing statement for the land sold to the trust at auction was admitted as Petitioner's Exhibit 7 and shows that the auctioneer was paid a commission of \$41,500 and a supplemental fee of \$4070 out of the proceeds of the sale. Thus, Nancy did not personally pay these expenses and should not have been reimbursed for them. The 2004 dissolution decree explicitly states that the capital gains taxes are to be taken from the proceeds of the

sale. Nancy's proffered justification for the reimbursement of these expenses is that the farm was sold against her will. Once again, Nancy is improperly attempting to relitigate the equal distribution made by the 2004 dissolution decree.

C. Interest

Nancy argued that she was entitled to all the interest earned on the escrow account because she paid income tax on the interest. Even setting aside the fact that this award overcompensates Nancy for any out-of-pocket expense, the record does not support her claim that she paid all the income taxes herself. Nancy admitted that she issued Jeff a 1099 form, and Jeff testified that he paid taxes on the income reported in the 1099 form. The interest should have been divided equally.

D. Increased Value of the Land

Nancy testified that she believed that she should receive the amount by which the value of the land increased after the parties separated because she took sole responsibility for maintaining and managing the property. Her work was compensated by a total of \$18,360, which we have found to be appropriate. Her argument is yet another improper attempt to relitigate the equal division mandated in the 2004 order.

E. Issues Not Addressed by the Appealed Order

The 2004 dissolution decree awarded Jeff \$3000 for attorney fees. Jeff was also supposed to receive half the fair market value of the land awarded to Nancy. Jeff represents that he is owed \$27,274.90 for the land that Nancy kept. Nancy does not dispute that Jeff is entitled to these amounts, yet the appealed order made no provision for them.

Other than the \$3000 awarded to Jeff, the 2004 dissolution decree ordered that the parties pay their own attorney fees. Three attorney fee liens were paid out of the sale proceeds at closing. Jeff argues that these amounts should be added back to the proceeds and the parties be required to pay their attorney fees from their own shares. It is not clear from the record whether part or all of these fees were incurred prior to the 2004 order. On remand, the court should determine how the attorney fee liens should be divided between the parties.

Finally, we note that because the trial court started with Nancy's calculation of the equity, the court may not have disposed of the entire amount in the escrow account. *Compare* Respondent's Ex. B (calculating the total equity to be divided at \$464,764.55) *with* Petitioner's Ex. 11 (representing that the proceeds of the sale were \$529,285.88). In addition, the record before us does not reflect the current balance of the escrow account and whether it includes solely the proceeds of the sale or whether it also includes income from the farm. On remand, the court should be sure to distribute all remaining assets.

Conclusion

We affirm in part, reverse in part, and remand to the trial court to recalculate the property distribution in accordance with this opinion. On remand, the court shall ascertain the value of the escrow account and any other remaining assets. In accordance with the 2004 dissolution decree, the court shall deduct the following amounts from the sale proceeds: (1) \$17,146.92 to Nancy to equalize the retirement funds; (2) \$18,360 to Nancy for her work in managing and maintaining the farm; (3) \$150 to Jeff for the appraisal fee; (4) \$3000 to Jeff for attorney fees; and (5) \$27,274.90 to Jeff, representing half the value of the land that

Nancy was awarded. If the court finds that the rent was insufficient to cover the farm loans and that Nancy made loan payments out of her own income, the court shall also reimburse Nancy for that expense from the sale proceeds. The court shall also determine whether any of the attorney fee liens paid from the sale proceeds should be added back to the proceeds. After making these adjustments, the remaining proceeds and the interest from the escrow account shall be divided equally. From Nancy's share, Jeff is entitled to \$7500 for the land that Nancy purchased. From Jeff's share, Nancy is entitled to \$1506.50 in child support and \$2397 in attorney fees.

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and MATHIAS, J., concur.