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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE THE MARRIAGE OF: )  
 )  
DUANE MAXWELL JENNINGS, )  
 )  
Appellant-Respondent, )  
 )  
vs. )  
 )  
RICHELLE DANEA JENNINGS, )  
 )  
Appellee-Petitioner. )

No. 49A04-1101-DR-60

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Heather Welch, Special Judge  
Cause No. 49D12-0902-DR-5787

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**December 6, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant, Duane Jennings (Husband), appeals the trial court's Decree of Dissolution of Marriage (Decree).

We affirm in part and remand in part with instructions.

## ISSUE

Although Husband raises three issues on appeal, we find the dispositive issue to be: Whether the trial court abused its discretion when it denied Husband's motion for relief from judgment.

## FACTS AND PROCEDURAL HISTORY

Husband and Richelle Danae Jennings (Wife) were married on May 8, 1988. On February 6, 2009, Wife filed a Verified Petition for Dissolution of Marriage and Request for Preliminary Hearing on Attorney's Fees. On February 27, 2009, Husband filed his Verified Cross-Petition for Dissolution of Marriage. On November 3, 2010, the final hearing was held and on November 10, 2010, the trial court entered its Decree.

In its Decree, the trial court awarded Husband an assets and liabilities package with a net worth of \$4,801.46, and it awarded Wife an assets and liabilities package with a net worth of -\$8,199.90. To equalize the division of the marital estate, the trial court ordered Husband to pay Wife \$6,500.68 within 90 days of the Decree. The trial court also ordered Wife to give her 1997 Ford Taurus to Husband and for Husband to transfer the title to the 2003 Ford Expedition to Wife. Finally, the trial court ordered Husband to

pay Wife's attorney's fees of \$4,500 directly to Wife's attorney within 90 days of the Decree.

On December 10, 2010, Husband filed a motion entitled "Motion to Reconsider/Request for Relief from Judgment." This motion requested the trial court to relieve Husband from his obligations under the Decree for three reasons. First, Husband contended that his appraisal of the marital residence should have been admitted into evidence due to a stipulation of the attorneys prior to the final hearing. Further, Husband's counsel was mistaken about the law of the date of valuation of the assets and Husband believed the trial court should consider additional evidence in light of such mistake. Finally, Husband alleged that the trial court had made clerical errors in awarding attorney's fees to Wife and in the distribution of their automobiles. On December 14, 2010, the trial court denied Husband's Motion, finding in pertinent part:

1. During the final hearing on the matter, [Husband's] attorney did not object to [Wife's] Exhibit #3 [containing a property tax report for the marital residence]. When [Husband's] attorney attempted to admit [his] uncertified appraisal report, [Wife's] counsel objected on the grounds that the report was hearsay. The [c]ourt sustained the objection because [Husband's] attorney was unable to provide an exception to the hearsay rule. [Husband's] counsel never mentioned that the parties had discussed or reached a stipulation on the admission of evidence. [Husband] requests the [c]ourt set aside the [Decree] under [Ind.] Trial Rule 60(B)(3) because [Wife's] conduct constituted fraud, misrepresentation or other misconduct of an adverse party. There was no evidence of fraud on behalf of [Wife]. In addition, [Husband] claims the above described events were a surprise to [Husband's] counsel; however, [Husband's] counsel never raised this issue during the final hearing. The [c]ourt does not find this to be a surprise or mistake but a failure to present such an argument to the [c]ourt in a timely fashion. This argument was available and [Husband's] counsel was aware of this argument on November 3, 2010. In addition, under [T.R.] 60[(B)(1)] and (3), [Husband] must allege a meritorious [sic] claim or defense.

The [c]ourt does not find that the above argument would permit the [c]ourt to admit inadmissible evidence [...].

2. [Husband's] counsel now informs the [c]ourt he was not aware of the current case law in Indiana on the trial [c]ourt's discretion to determine the date of valuation of assets for the marriage and because of his lack of knowledge of the law, he requests the [c]ourt consider additional evidence. Although it appears [Husband] is merely requesting the [c]ourt to reconsider its [Decree] of November 10, 2010, it is unclear to the [c]ourt under what procedural mechanism [Husband] requests the [c]ourt to consider additional evidence. The [c]ourt assumes it might be under [T.R.] 60(B)(2) or under [T.R.] 59, [m]otion to [c]orrect [e]rror. However, the documents attached to [Husband's] Motion to Reconsider are all documents which were available to [Husband] at the time of the final hearing on November 3, 2010. The documents are the appraisal report which is now certified as a business record, a billing statement from [Wife's attorney] to [Wife] dated July 31, 2010, the Mediator's Report, Plaintiff's Motion for Summary Judgment under Cause No. 32D04-1005-MF-83 with a certificate of service to [Husband's] attorney in the foreclosure case dated September 29, 2010, a document from Double 11 Credit Union with a copyright date of 2007 regarding several loan balances, the [c]ourt's order dated September 4, 2009 in this cause, and the [c]ourt's order dated September 10, 2009 in this cause. The [c]ourt does not find any of these documents to be newly discovered evidence which by due diligence could not have been discovered in time for the final hearing. . .

3. The [c]ourt did not make a clerical error in the award of attorney fees in the [Decree]. The [c]ourt did consider the preliminary award of attorney fees in the amount of \$1,500.00. The [c]ourt did not grant [Wife's] request for attorney fees at the final hearing in the amount of approximately \$8,000.00 and determined that an attorney award of \$4,500.00 was appropriate due to the substantial difference in income between [Wife] and [Husband] [...].

4. Furthermore, [Husband] argues that the [c]ourt must have made a clerical error in awarding [Wife] the 2003 Ford Expedition. The [c]ourt carefully considered the evidence and determined that at the time of separation [Husband] took possession of both vehicles, 1997 Ford Taurus and 2003 Ford Expedition. Thus, the [c]ourt based on the evidence did intend to award [Wife] the 2003 Ford Expedition [...].

5. Therefore, the [c]ourt hereby DENIES [Husband's] Motion to Reconsider/Request Relief from Judgment on all issues raised by [Husband].

(Appellant's App. pp. 17-20). Husband now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Standard of Review*

We note that Wife did not file a brief. Where the appellee fails to file a brief, we may reverse if the appellant makes a *prima facie* showing of reversible error. *In re Marriage of Holley*, 659 N.E.2d 581, 583 (Ind. Ct. App. 1995). *Prima facie* error is “error at first sight, on first appearance, or on the face of it.” *Id.* Still, we must apply the law to the facts in the record in order to determine if reversal is required. *Blunt-Keene v. State*, 708 N.E.2d 17, 19 (Ind. Ct. App. 2001).

### *II. Nature of Appeal*

The dispositive issue is the nature of Husband's appeal. In his Notice to Appeal, Husband appears to appeal from both the Decree and the trial court's denial of his “Motion to Reconsider/Relief from Judgment.” However, in his brief Husband urges us to characterize his motion before the trial court as a “*de facto*” motion to correct error. (Appellant's Br. pp. 3-4). Husband bases his argument on our decision in *Hubbard v. Hubbard*, wherein we deemed a motion to reconsider to be a motion to correct error. *Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998). We find Husband's case to be distinguishable from *Hubbard*.

In *Hubbard*, a mother filed a motion to reconsider six days after the trial court's entry of a final judgment. *Id.* at 1220. The trial court granted the mother's motion the

same day, vacating the final judgment. *Id.* Some three months later, the trial court entered a new judgment. *Id.* The father appealed and we determined that the mother's motion to reconsider amounted to a motion to correct error, explaining that:

[...] because this case had proceeded to final judgment prior to Mother's filing of her "motion to reconsider," Mother's motion cannot be considered a true motion to reconsider, as the [trial] court no longer had the power to rule on such a motion. Our review of the trial rules reveals that motions to reconsider are properly made and ruled upon prior to the entry of final judgment. [See T.R.] 53.4(A). After final judgment has been entered, the issuing court retains such continuing jurisdiction as is permitted by the judgment itself, or as is given the court by statute or rule[.] One such rule is [T.R.] 59 which provides the [trial] court, on its own motion to correct error or that of any party, the ability to alter, amend, modify or even vacate its decision following the entry of final judgment. Accordingly, although substantially the same as a motion to reconsider, a motion requesting the [trial] court to revisit its final judgment must be considered a motion to correct error. We decline to favor form over substance and, despite its caption, Mother's motion in the instant case should have been treated as a motion to correct error.

*Id.* at 1221 (footnotes and internal citations omitted). We also noted that the mother's motion "contained an alternate request" for the trial court to treat the motion to reconsider as a motion to correct error if the trial court "could not reconsider its judgment." *Id.* at n.4. Because the trial court failed to follow procedures under T.R. 59, we concluded that the father was denied "notice and opportunity to respond" and reversed and remanded to allow the father such opportunity. *Id.* at 1221-22.

Here, Husband filed his motion with the trial court exactly thirty days following the entry of the Decree, which is the deadline to file a motion to correct error or notice of appeal. *See* Ind. Appellate Rule 9(A)(1). However, this fact alone does not persuade us to consider Husband's motion to be a motion to correct error. Instead, we look to the

substance of Husband's motion. *See Hubbard*, 690 N.E.2d at 1221. Although the caption to Husband's motion invoked both T.R. 53.4(A) (motion to reconsider ruling)<sup>1</sup> and T.R. 60 (relief from judgment), its substance was simply that of a motion for relief from judgment under T.R. 60.

The motion's first ground for relief was "mistake, surprise, and excusable neglect" as well as "fraud, misrepresentation, or other misconduct by opposing counsel" resulting from opposing counsel's violation of an alleged evidentiary stipulation regarding the appraised value of the marital residence. (Appellant's App. p. 47). These grounds for relief appear in T.R. 60(B)(1) & (3). The second ground was also "mistake or excusable neglect" this time based upon Husband's counsel's misapprehension of the trial court's discretion to determine the valuation date for the marital residence. (Appellant's App. p. 49). Based upon this misapprehension, Husband failed to timely provide evidence of his additional indebtedness, thereby indicating a lesser value for the marital residence. This too squarely invokes T.R. 60(B)(1). The final ground consisted of two alleged errors by the trial court which Husband characterized as "clerical mistake, omission or oversight." (Appellant's App. p. 49). Within this context, Husband argued that the trial court did not credit his prior payment of Wife's attorney's fees. Additionally, though ordering Husband to transfer title to the 2003 Ford Expedition automobile to Wife, the trial court did not include a reciprocal order for Wife to transfer title to the 1997 Ford Taurus

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<sup>1</sup> As noted in *Hubbard*, the trial court could not adjudicate Husband's motion as a motion to reconsider under T.R. 53.4 because "motions to reconsider are properly made and ruled upon prior to the entry of final judgment." *Hubbard*, 690 N.E. at 1221. The Decree represents a final judgment, entered on November 10, 2010. *See* Ind. Code § 31-15-2-16. Thus, the trial court was without authority to adjudicate Husband's motion under T.R. 53.4.

automobile, titled in both Wife and her deceased father's name, to Husband. By alleging that the Decree contained clerical errors, Husband invoked T.R. 60(A). Thus, because all of Husband's arguments in his motion involved either T.R. 60(A) or (B), it was appropriate for the trial court to review his motion under T.R. 60, which it in fact did.

Apart from minimal argument that his appeal should be viewed as a motion to correct error, Husband's brief wholly fails to address the propriety of the trial court's December 14, 2010 Order denying Husband relief from judgment. Instead, Husband's brief frames the issues as abuses of the trial court's discretion in valuing and distributing the marital assets in the Decree. However, the December 14, 2010 Order is the only ruling that Husband can appeal, as his time to file a direct appeal from the Decree has elapsed. *See* App. R. 9(A)(1). The Decree was final on November 10, 2010, and Husband filed his Motion to Reconsider/Relief from Judgment thirty days later. Had Husband expressly invoked T.R. 59, he would have had thirty days following the trial court's Order thereon to file an appeal. *See Id.*

Our supreme court addressed a similar situation where an appellant sought to appeal the trial court's T.R. 60 denial, yet argued the merits on appeal. *In re Paternity of P.S.S.*, 934 N.E.2d 737 (Ind. 2010). *P.S.S.* involved the juvenile court's dismissal of a father's paternity petition on jurisdictional grounds. *Id.* at 739. Instead of filing a T.R. 59 motion to correct error or a notice of appeal within thirty days of dismissal, Father elected to file a T.R. 60(B)(2) motion some sixteen days after the thirty day time limit had expired. *Id.* The juvenile court denied the father's T.R. 60(B)(2) motion, and the

father appealed, arguing that the juvenile court lacked jurisdiction to dismiss his paternity petition. *Id.* at 740. The supreme court dismissed the appeal, finding that the father “advance[d] no argument explaining how the trial court may have abused its discretion in denying his 60(B)(2) motion,” and that “[i]nstead the substance of Father’s claim is a challenge to the merits of the trial court’s order of dismissal.” *Id.* at 741. Except as noted below, we therefore summarily reject Husband’s arguments relating to the valuation and distribution of marital assets in the Decree. *See Id.*

Although the Decree ordered Husband to transfer title of the 2003 Ford Expedition to Wife, the Decree does not contain a reciprocal order for Wife to transfer title to the 1997 Ford Taurus to Husband, presumably because it found that Husband had both automobiles in his possession. Though Husband argues on appeal that because the 1997 Ford Taurus was owned by Wife’s deceased father, it should not have been considered marital property, as noted above, we decline to entertain Husband’s arguments on the merits. Nonetheless, we find the omission of a reciprocal obligation for Wife to transfer title to the 1997 Ford Taurus to Husband to be in the nature of a clerical error and therefore remand to the trial court to clarify the Wife’s obligations in this regard.

#### CONCLUSION

Based upon the foregoing, we conclude that the trial court did not abuse its discretion when it denied Husband’s motion.

Affirmed in part and remanded in part.

FRIEDLANDER, J. and MATHIAS, J. concur