

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.

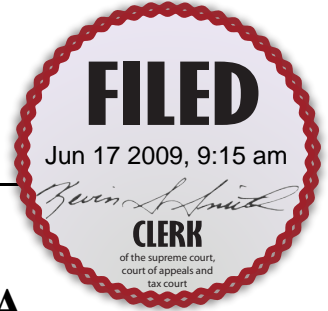
ATTORNEY FOR APPELLANTS:

MARY F. SCHMID
Stewart & Irwin, P.C.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

TERRY L. MONDAY
CHRISTOPHER J. McELWEE
Monday, Jones & Albright
Indianapolis, Indiana

MARK SMALL
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

P&H MOTORS, INC., VIVIAN K. AICHELE,)
and FRANCES A. TUCKER,)
)
Appellants-Defendants,)

vs.)

No. 49A02-0810-CV-907

PAULA M. DAILEY,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David Shaheed, Judge
Cause No. 49D01-0612-PL-48863

June 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

P&H Motors, Inc. (“P&H”), Vivian Aichele, and Frances Tucker (collectively, “Appellants”) appeal a September 18, 2008 judgment of partition. Appellee Paula Dailey has filed a motion for attorneys’ fees. We affirm the judgment and deny the request for attorneys’ fees.

Issues

The parties present various issues, which we restate as follows:

- I. Whether Appellants’ notice of appeal was timely;
- II. Whether Dailey had an interest in the disputed properties that would support the partition of the properties pursuant to Indiana Code Section 32-17-4-1;
- III. Whether the court committed reversible error by finding that the other two-thirds owners were Aichele and Tucker, despite a quitclaim to P&H; and
- IV. Whether Appellants’ appeal is frivolous and/or brought in bad faith such that an award of attorneys’ fees would be appropriate.

Facts and Procedural History

The facts most favorable to the judgment are as follows. On December 24, 1994, Paul Hieb, the father of three daughters, Aichele, Tucker, and Dailey, died testate. At the time of his death, he was the sole owner of P&H and several Indianapolis-area properties. Thereafter, Dailey, secretary of P&H, started managing the day-to-day operations of P&H and the various properties. Her husband helped as well and eventually became a P&H employee. Although Tucker and Aichele were named as P&H president and treasurer,

respectively, neither was actively involved in daily operations at that time. In February 1995, Hieb's will was admitted to probate, and Dailey was appointed personal representative.

In October 1998, the probate court entered its "Order Approving the Personal Representative's Final Report and Accounting, Petition to Allow Accounting, Petition for Order Approving Distribution and Closing Estate." App. at 68-72. As noted in that order, Dailey, Tucker, and Aichele were the sole legatees and devisees under Hieb's will. *Id.* at 69. The order listed nine properties that were owned by Hieb at the time of his death, seven of which were devised to the three sisters pursuant to Hieb's will. In April 1999, Dailey executed a personal representative's deed formalizing the transfer of title to five of those properties, including 716 East Bacon Street and 122 West Raymond Street, to herself and her two sisters as tenants in common. *Id.* at 73-74.¹ No objection to, or appeal from, the October 1998 probate court's order was made.

In October 2006, a dispute arose among Tucker, Aichele, and Dailey regarding the management and control of P&H. *Id.* at 117-18. Consequently, Tucker and Aichele assumed control of P&H, fired Dailey's husband, and ousted Dailey from her secretary position. In December 2006, Tucker and Aichele then allegedly attempted to quitclaim their interests in the Bacon Street and Raymond Street properties to P&H in exchange for issuing themselves additional shares of P&H stock, thereby increasing their percentage ownership of P&H to the detriment of Dailey. *Id.* at 127-41; 75-76. Around that time, Dailey filed a multi-count suit

¹ The April 1999 personal representative's deed was not recorded until November 2006.

in Marion County Superior Court (“trial court”) against her sisters, seeking, *inter alia*, partition of real estate, including the Bacon Street and Raymond Street properties.

Meanwhile, the probate court heard evidence on April 12, 2007 and July 2, 2007 regarding requests by the three sisters to reopen their father’s estate. In an October 29, 2007 order denying the petitions to reopen Hieb’s estate, the probate court found that it was “not the proper forum for resolution of the current disputes between the parties.” *Id.* at 77. Further, the probate court found that Tucker and Aichele were barred from filing an objection to the “final account or supplemental report” because they had not made a timely filing. *Id.* The court made clear that it “would re-appoint the personal representative for the sole purpose of executing a corrected deed to replace a deed executed during administration **only** if [Dailey, Tucker, and Aichele] each consent in writing to the form of an agreed order and to the form of the corrected deed.” *Id.* at 78. Finally, the probate court denied Dailey’s request that the remaining properties of Hieb’s estate be partitioned. *Id.* Tucker and Aichele filed a motion for reconsideration and a motion to correct error regarding the October 29, 2007 order. The probate court heard argument on the matter and then denied the motions on February 13, 2008.

On February 21, 2008, a hearing was held in the trial court regarding Dailey’s complaint for partition. *Id.* at 39-66. On March 25, 2008, the trial court issued a ruling granting Dailey’s partition petition; however, that order failed to appoint any commissioners or set an attorney fee amount. Thus, on July 24, 2008, the trial court issued an “Amended Judgment Order on Partition of Real Estate,” granting Dailey’s petition for partition and

clarifying that Dailey, Tucker, and Aichele were each entitled to a one-third share in the five properties, including the Bacon Street and Raymond Street properties. *Id.* at 31-34. Within that same amended judgment, the trial court also appointed three commissioners to meet and report regarding the appropriate partition, warned that sale would result if their report indicated that partition could not occur without damage to the owners, and denied Dailey's request for attorney fees. *Id.* at 33-34.

On August 11, 2008, the trial court held a hearing. The resulting jacket entry reads:

Parties in person & by counsel. Parties stipulate that property [cannot] be partitioned and that all properties should be sold and proceeds of property except [Bacon Street and Raymond Street], shall be distributed between the parties. Defendant granted leave to appeal the court decision to partition [Bacon Street and Raymond Street]. Witness sworn evidence heard. Cause continued. Set for hearing on appointment of receiver for 102108 at 9AM, full day (4th choice jury).

Id. at 22.

In a September 18, 2008 "Judgment of Partition," the trial court noted the parties' decision to dispense with the report, acknowledged that the *five* parcels could not be divided without damage to the owners, cited the July 24, 2008 "interlocutory Amended Judgment Order on Partition of Real Estate," and appointed three commissioners to conduct the sale of the five properties. *Id.* at 25-29. The trial court further stated that by "entering into this agreement, the Court finds that [Appellents] have not waived their right to appeal either this Judgment of Partition or the Court's interlocutory order of July 24, 2008 entitled Amended Judgment Order regarding the partition and sale of the parcels identified as [Bacon Street and

Raymond Street].” *Id.* at 28. The trial court reiterated that the “Judgment Order shall be a final, appealable order respecting [Dailey’s] claim for partition” of the real estate. *Id.* at 29.

On October 7, 2008, Appellants filed a notice of appeal. On December 31, 2008, Appellants filed their appellants’ brief. Dailey requested and received an extension for the filing of her appellee’s brief. On February 16, 2009, Dailey filed her appellee’s brief, an appellee’s appendix, a motion to dismiss the appeal, and a motion for attorneys’ fees. Appellants requested an extension to respond to the two motions and to file a reply brief. We granted an extension to respond to the motion to dismiss and held the other two extension requests in abeyance until the dismissal issue was resolved.

On March 13, 2009, Appellants filed a response to and motion to strike portions of Dailey’s motion to dismiss appeal. Ten days later, Dailey filed a response to Appellants’ motion to strike portions of Dailey’s motion to dismiss. On March 25, 2009, we issued an order denying Dailey’s motion to dismiss appeal and denying Appellants’ motion to strike portions of Dailey’s motion to dismiss appeal. On April 9, 2009, Appellants filed their reply brief and a response to Dailey’s motion for attorneys’ fees.

Discussion and Decision

I. Timeliness of Appeal

Dailey contends that Appellants’ October 7, 2008 notice of appeal was untimely. She asserts that Appellants should have appealed the March 25, 2008 order, the July 24, 2008 order, and/or the August 11, 2008 jacket entry. She made this same argument in her motion to dismiss the appeal. We denied that motion.

Generally speaking, a partition proceeding is an equitable one, in which the court has great flexibility in fashioning relief for the parties. *Willett v. Clark*, 542 N.E.2d 1354, 1358 (Ind. Ct. App. 1989). Extensive statutory procedures have been designed to protect the rights of all parties to a partition action. *Hay v. Hay*, 885 N.E.2d 21, 24 (Ind. Ct. App. 2008); Ind. Code §§ 32-17-4-1 through -24. For instance, the following statute provides tenants the right to a partition of the co-tenancy, along with the right to a sale of the entire tract of land in the event that said land is indivisible:

(a) *If*:

- (1) upon trial of any issue;
- (2) upon default; or
- (3) by consent of parties;

the court determines that partition should be made, the court shall award an interlocutory judgment that partition be made to parties who desire partition.

(b) In issuing a judgment under subsection (a), the court shall:

- (1) specify the share assigned to each party; and
- (2) take into consideration advancements to heirs of a person dying intestate.

(c) If the court issues a judgment under subsection (a), any part of the premises remaining after the partition belongs to the persons entitled to the premises, subject to a future partition.

(d) *If*:

- (1) upon trial of any issue;
- (2) upon default; or
- (3) by confession or consent of parties;

the court determines that the land for which partition is demanded cannot be divided without damage to the owners, the court may order the whole or any part of the premises to be sold as provided under section 12 of this chapter.

Ind. Code § 32-17-4-4 (emphases added).

Thus, an interlocutory appeal may be taken from a decision to partition. *See id.*; *see, e.g., Stauffer v. Kesler*, 191 Ind. 702, 127 N.E. 803 (1920). However, the opportunity to

pursue an interlocutory appeal does not foreclose the option of appealing in the future *if* the court determines that the land for which partition is demanded cannot be divided without damages to the owners *and* the court orders a *sale*. See *Heppe v. Heppe*, 199 Ind. 566, 149 N.E.890 (1925); *Roach v. Baker*, 130 Ind. 362, 30 N.E. 310 (1892); *Hawkins v. Hawkins*, 160 Ind. App. 5, 309 N.E.2d 177 (1974), *trans. denied*. We find this particularly true where, as here, the trial court explicitly stated in its September 18, 2008 Judgment of Partition that the Appellants “have not waived their right to appeal either this Judgment of Partition or the Court’s interlocutory order of July 24, 2008 entitled Amended Judgment Order regarding the partition and sale of the parcels identified as [Bacon Street and Raymond Street].” App. at 28. Further, the trial court clearly stated that the September 18, 2008 “Judgment Order shall be a final, appealable order respecting [Dailey’s] claim for partition” of the real estate. *Id.* at 29.

Therefore, Appellants’ notice of appeal, filed on October 7, 2008, less than thirty days after the September 18, 2008 final order, was timely. See Ind. Appellate Rule 9 (party initiates appeal by filing notice of appeal within thirty days after entry of final judgment); *see also Georgos v. Jackson*, 790 N.E.2d 448, 452 (Ind. 2003) (“there is no requirement that an interlocutory appeal be taken, and [a party] may elect to wait until the end of litigation to raise the issue on appeal from a final judgment.”); *see also Bojrab v. Bojrab*, 810 N.E.2d 1008, 1014 (Ind. 2004) (“even though an interlocutory order may be appealable as of right under Appellate Rule 14(A)(2), there is no requirement that an interlocutory appeal be taken.”).

II. Partition

Appellants' argument is as follows. They assert that Hieb, individually, had no legal interest in the Bacon Street or the Raymond Street properties at the time of his death.² As such, his estate could not transfer a non-existent interest to the daughters. Consequently, Dailey had no tenant-in-common ownership interest in the Bacon Street or Raymond Street properties. Without such an ownership interest, Dailey had no right to compel the partition of the properties pursuant to Indiana Code Section 32-17-4-1.

Neither Appellants nor Dailey requested findings and conclusions, and the court's September 18, 2008 Judgment of Partition does not contain typical findings or conclusions. Rather, as outlined in the Facts and Procedural History *supra*, the Judgment noted the parties' acknowledgement that the parcels could not be divided without damage to the owners, referenced the July 24, 2008 amended judgment, appointed commissioners to sell the five properties, and emphasized that appeal was an option. In the absence of special findings, we review a trial court's decision as a general judgment and, without reweighing evidence or considering witness credibility, affirm if sustainable upon any theory consistent with the evidence. *Perdue Farms, Inc. v. Pryor*, 683 N.E.2d 239, 240 (Ind. 1997); *In re Estate of Highfill*, 839 N.E.2d 218, 224 (Ind. Ct. App. 2005), *trans. denied*.

² Specifically, Appellants claim that the last recorded conveyance of the Raymond Street property prior to Hieb's death was an executor's deed from William D. DeRome, executor of the estate of Dessie Hogan to Russell Dailey, dated August 5, 1993, and recorded November 15, 1993. Appellant's Br. at 11. Appellants allege that the last recorded conveyance of the Bacon Street property prior to Hieb's death was a quitclaim deed from Norma L. Hieb to P&H, dated December 6, 1991, and recorded December 12, 1991. *Id.* at 11-12. Yet, neither Russell Dailey nor P&H challenged the probate court's order or the deed that followed.

A person who holds an interest in the land as a joint tenant or tenant-in-common either in the person's own right or as executor or trustee "may compel partition of land held in joint tenancy or tenancy in common[.]" Ind. Code § 32-17-4-1(a)(1). Indiana's probate code provides:

(a) After the expiration of the time limit for the filing of claims, and after all claims against the estate, including state and federal inheritance and estate taxes, have been determined, paid, or provision made therefor, except contingent and unmatured claims which cannot then be paid, the personal representative shall, if the estate is in a condition to be closed, render a final account and at the same time petition the court to decree the final distribution of the estate. Notice of the hearing of the petition shall be given under IC 29-1-16-6.

(b) *In its decree of final distribution, the court shall designate the persons to whom distribution is to be made, and the proportions or parts of the estate, or the amounts, to which each is entitled under the will and the provisions of this probate code, including the provisions regarding advancements, election by the surviving spouse, lapse, renunciation, adjudicated compromise of controversies, and retainer. Every tract of real property so distributed shall be specifically described therein.* The decree shall find that all state and federal inheritance and estate taxes are paid, and if all claims have been paid, it shall so state; otherwise, the decree shall state that all claims except those therein specified are paid and shall describe the claims for the payment of which a special fund is set aside, and the amount of such fund. If any contingent claims which have been duly allowed are still unpaid and have not become absolute, such claims shall be described in the decree, which shall state whether the distributees take subject to them. If a fund is set aside for the payment of contingent claims, the decree shall provide for the distribution of such fund in the event that all or a part of it is not needed to satisfy such contingent claims. If a decree of partial distribution has been previously made, the decree of final distribution shall expressly confirm it, or, for good cause, shall modify said decree and state specifically what modifications are made.

...

(d) *The decree of final distribution shall be a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interest therein, subject only to the right of*

appeal and the right to reopen the decree. It shall operate as the final adjudication of the transfer of the right, title, and interest of the decedent to the distributees therein designated; but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees.

Ind. Code § 29-1-17-2 (emphases added).

Here, the 1998 “Order Approving the Personal Representative’s Final Report and Accounting, Petition to Allow Accounting, Petition for Order Approving Distribution and Closing Estate” listed the three daughters as the sole legatees and devisees under their father’s will and indicated that Hieb owned both the Bacon Street and the Raymond Street properties at the time of his death. Accordingly, the April 1999 personal representative’s deed purported to transfer title to those two properties to the three sisters as tenants in common. No one disputed the 1998 probate order or the ensuing deed at that time or during the seven years thereafter. Since then, the probate court has denied requests to reopen Hieb’s estate.

Our supreme court recently reaffirmed that where matters in issue between the parties to an action were, or might have been, litigated in a former action, such matters are considered forever at rest. *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 895 N.E.2d 1191, 1198 (Ind. 2008). The *Carlson* court further emphasized, “[n]o matter how erroneous the finding and the judgment of the court based thereon may have been, such finding and judgment cannot be attacked in a collateral proceeding by one who was a party to said judgment or by one in privity with such a party.” *Id.* (footnote omitted). The purpose of the prohibition against collateral attacks is to avoid endless litigation.

Mishler v. County of Elkhart, 544 N.E.2d 149, 151 (Ind. 1989); *Fackler v. Powell*, 839 N.E.2d 165, 169 (Ind. 2005). In the probate context, once a probate court has approved an estate's final report and has discharged the personal representative, the probate court's order cannot be collaterally attacked. *See Fire Police City County Fed. Credit Union v. Eagle*, 771 N.E.2d 1188, 1192 (Ind. Ct. App. 2002).

It appears that only when disputes arose regarding the management of P&H, and the possibility of partition was raised, that rumblings about Hieb's ownership of the two properties surfaced. That said, when Dailey filed her petition for partition, and a hearing was held thereon, she introduced the 1998 probate order. Again, that order vested title to the Raymond Street and Bacon Street properties in the three sisters and was conclusive as to them. Any ownership allegations to the contrary should have been raised by the three sisters a decade ago. Appellants cannot now collaterally attack the probate proceeding, which was a "conclusive determination" and "final adjudication" as to the interests of the devisees. *See* Ind. Code § 29-1-17-2 (d).

III. No Reversible Error

Appellants next challenge the judgment that Aichele and Tucker were two-thirds owners of the Bacon Street and Raymond Street properties. Rather, they claim that Aichele quitclaimed her interest in the properties to P&H.

Appellants spend barely a half page on this argument in their brief. They cite no authorities. Our resolution is equally brief. Dailey filed her partition action against Aichele, Tucker, and P&H. App. at 127. One of her allegations was that the corporate form had been

ignored, controlled, and/or manipulated such that each daughter owned a one-third interest as a tenant in common of the properties titled in P&H's name. In any event, whether the particular one-third belonged to Aichele or had been legitimately quitclaimed to P&H, Dailey's share was a separate one-third. Accordingly, she was entitled to bring the partition action. *See* Ind. Code § 32-17-4-1(a)(1).

IV. Attorneys' Fees

In arguing for appellate attorneys' fees, Dailey contends that Appellants' appeal is frivolous and/or brought in bad faith. She asserts both substantive and procedural bad faith, claiming an untimely notice of appeal, failure to include certain events in the statement of facts and procedural history, and an impermissible collateral attack on the 1998 probate order.

Indiana Appellate Rule 66(E) provides, "The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees. The Court shall remand the case for execution." Such an award may be ordered when an appeal is replete with meritlessness, bad faith (either procedural or substantive), harassment, vexatiousness, or purpose of delay. *See Carter-McMahon v. McMahon*, 815 N.E.2d 170, 179 (Ind. Ct. App. 2004). The sanction of appellate damages for lack of merit should be applied only when the party's contentions and arguments are utterly devoid of all plausibility. *See Trost-Steffen v. Steffen*, 772 N.E.2d 500, 514 (Ind. Ct. App. 2002), *trans. denied*. Procedural bad faith "is present when a party flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, omits and

misstates relevant facts appearing in the record, and files briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court.” *Wallace v. Rosen*, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002). Substantive bad faith implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. *Gabriel v. Windsor, Inc.*, 843 N.E.2d 29, 49 (Ind. Ct. App. 2006).

We agree that Appellants’ statement of the facts was heavily weighted toward supporting their arguments. In addition, their procedural history could have been more detailed. However, Appellants’ brief does not appear to be written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. *Id* at 49-50. Thus, we are not inclined to award appellate attorneys’ fees for procedural bad faith. *See, e.g., Graycor Indus. v. Metz*, 806 N.E.2d 791, 801 (Ind. Ct. App. 2004) (holding that the appellee was not entitled to appellate attorney fees even though the appellant’s brief did not appropriately conform to the appellate rules, did not set out the facts in accordance with the standard of review, set out facts incorrectly, and based arguments upon less than a full consideration of the evidence presented at the hearing), *trans. denied*.

Having already determined that Appellants’ appeal was timely under these particular circumstances, we would not award attorneys’ fees on that issue. As for the collateral attack, while we ultimately find against Appellants, we cannot say that their argument was utterly devoid of all plausibility. “[W]e must use extreme restraint when exercising our discretionary power to award damages on appeal because of the potential chilling effect upon

the exercise of the right to appeal.” *Trost-Steffen*, 772 N.E.2d at 514. Accordingly, an award of Appellate Rule 66(E) damages/fees against Appellants would be inappropriate.

Affirmed.

BAKER, C. J., and BROWN, J., concur.