MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Linda M. Elliott,
Appellant-Intervenor Claimant,

v.

Nicholas Elliott,
Appellee-Petitioner,

and

Kathleen Elliott,
Appellee-Respondent

May 23, 2023

Court of Appeals Case No. 22A-DC-2483

Appeal from the Boone Superior Court

The Honorable Lori Schein, Special Judge

Trial Court Cause No. 06D01-1710-DC-1222

Memorandum Decision by Judge Crone
Judges Robb and Kenworthy concur.

Crone, Judge.

Case Summary

[1] Linda M. Elliott appeals the trial court's denial of her motion to intervene in the dissolution action between her son Nicholas Elliott (Husband) and Kathleen Elliott (Wife). Linda contends that the trial court erred in failing to sua sponte join her as a necessary party to the dissolution action, and further that the trial court abused its discretion in ultimately denying her motion to intervene, which was filed after the decree was entered, to allow her to assert an alleged interest in money in a bank account that was included in the marital pot and divided between Husband and Wife. We affirm.

Facts and Procedural History

[2] In October 2017, Husband filed a petition for dissolution of marriage from Wife. Initially, Husband indicated to the trial court that the funds in a certain Merrill Lynch investment account, of which both Husband and Wife were co-owners, were marital assets to be divided between Husband and Wife. Indeed, in June 2018, Husband filed a motion with the trial court requesting the release of $20,000 each to Husband and Wife of the funds from their "shared Merrill Lynch account" containing "roughly $120,000" to "cover their respective attorney expenses." Appellee's App. Vol. 2 at 7, 10.

[3] A hearing on Husband's motion was first rescheduled on the court's own motion and then continued at Husband's request. Before that hearing was ever held, in July 2018, Husband filed an emergency motion asking the trial court to "equally divide the Merr[i]ll Lynch account now ($60k each)" for "family financial responsibilities and obligations." *Id*. at 10-11. The trial court set the emergency motion for hearing on August 14, 2018. Husband filed a second emergency motion requesting immediate access to the "roughly $120k in a shared Merrill Lynch account[,]" again requesting the court to immediately "equally divide" the account between Husband and Wife, resulting in "$60k each[.]" *Id*. at 15. The court set Husband's second emergency motion for hearing on August 14, 2018, and it was later continued to September 11, 2018.

[4] At the September 2018 hearing, Husband changed course and testified that the $120,000 in the Merrill Lynch account actually belonged to his mother Linda. Linda also testified that the money in the Merrill Lynch account belonged to

her. Specifically, Husband and Linda claimed that in early August 2016, Linda appointed two of her sons, one of them being Husband, as her attorneys-in fact. Linda delivered to Husband, as one of her attorneys, the proceeds from the sale of her residence in the amount of $194,686.88. At some point, Husband deposited the money entrusted to him by Linda in an account at Merrill Lynch. He claimed that he and Wife used the money in that account to pay Linda's living expenses. At all relevant times, the Merrill Lynch account was titled in the names of both Husband and Wife.

[5] Following the hearing, the trial court issued an order finding in pertinent part as follows:

> 17. There is an account at Merrill Lynch with approximately $120,000.00 jointly titled. Husband in at least two separate filings as well as in open court at previous hearings has advocated for and requested that the funds be divided between the parties evenly….
>
> 18. But at the hearing on September 11, 2018, the Husband changed his position from one of asking the Court to release the funds to pay for household expenses and told the Court that the $120,000.00 belonged to his mother. The funds are what is left of approximately $190,000.00 in proceeds from when she sold her home [at] some indeterminate time. The funds were deposited in the account with [Husband] as "power of attorney." [Husband] admitted to the Court – at least told the Court for the first time – that he "commingled" his mother's property over which he was a fiduciary with his and Wife's property.
>
> 19. Accordingly, as there are no assurances at this point that the money in the Merrill Lynch account belongs to Husband and/or Wife (it appears somewhat likely that it does not) the Court

> ORDERS that the money remain in the account and not be withdrawn until further order of [the] Court.

Appellant's App. Vol. 2 at 56-57.

[6] On November 6, 2018, Husband filed a motion "To Address Funds Remaining in the Merrill Lynch Account and Request for Expedited Hearing." *Id.* at 62 (typography altered). On that same day, Wife filed a "Request to Deny Addressing Remaining Funds in Merrill Lynch Account and for Consolidation of this Matter with the Final Hearing." *Id.* at 65. The trial court denied Husband's motion and granted Wife's motion, stating that the "Merrill Lynch joint account proceeds" would be addressed at the final dissolution hearing. *Id.* at 69.

[7] The final dissolution hearing was set for January 17, 2019. However, on that date, Husband filed a motion to disqualify the trial judge, Judge Matthew Kincaid, from presiding over the dissolution case. On January 18, Judge Kincaid recused himself from the case.

[8] On February 1, 2019, Judge Bradley Mohler was appointed as special judge. The dissolution case went to final hearing on October 15, 2020. On February 23, 2021, the trial court issued its decree of dissolution. In its decree, the trial court divided the marital property, including the Merrill Lynch account. Specifically, with respect to that account, the trial court found and concluded as follows:

> 11. That the parties own a Merrill Lynch account with a current balance of approximately $120,000. The Merrill Lynch account is connected to the Husband's disciplinary matter in 19S-DI-587, i.e., whether the Husband's mother's funds from the sale of her residence were co-mingled with marital property. The Husband provided a break-down/summary of the Merrill Lynch account in his Exhibit 1. The Wife agreed that at least $85,000 of such funds were marital property.
>
> ….
>
> 17. That $85,000 from the Merrill Lynch account … shall be equally divided between the parties.… The remaining balance in the Merrill Lynch [account] shall be maintained (in trust) pending the outcome of the Husband's disciplinary matters and pending further Order by this Court.

Id. at 97, 102.[1]

[9] On March 24, 2021, Husband filed a motion to correct error alleging, inter alia, that the money in the Merrill Lynch account belonged to Linda and that the trial court was without authority to divide it between the parties. On May 21, 2021, Linda filed a pro se motion to intervene. On June 3, 2021, the trial court held a hearing on Husband's motion to correct error. Six days later, the trial court issued its order denying Husband's motion to correct error. Specifically, the trial court stated that Husband's main contention in his motion "is entirely

[1] In its final decree, the trial court specifically noted that "countless" hearings were held in this "difficult, contentious, ongoing divorce." Appellant's App. Vol. 2 at 93 n.1. The court cited Husband's noncompliance with orders, argumentative behavior during hearings, and inability to stay focused and answer questions as opposed to arguing about procedure and prior rulings as the reason for the drawn-out proceedings. *Id.*

at odds with the position contained in [Husband's] pleadings and statements made by [Husband] during the court hearings[.]" *Id.* at 115.

[10] The trial court never ruled on Linda's motion to intervene, and it appears from the record that Linda did not follow up with the trial court until March 18, 2022, when she filed a "renewed motion for recovery of funds and accounting." *Id.* at 125. Thereafter, citing "recent actions" of Husband, Judge Mohler recused himself from further proceedings, and Special Judge Lori Schein assumed jurisdiction. Judge Schein held a pretrial conference and allowed the parties, including Linda, to submit briefs regarding Linda's motion to intervene.

[11] On August 10, 2022, Judge Schein issued her order denying Linda's motion to intervene and for recovery of funds, stating in pertinent part:

> The Court, being duly advised, now finds that [Linda's] claim for recovery is untimely. The Court notes that [Linda] had actual knowledge of the dissolution proceedings but did nothing to assert…any claim relating to funds held in a Merrill Lynch account until after the Court issued its Decree of Dissolution.

Appealed Order at 1. This appeal ensued.

Discussion and Decision

[12] We first address Linda's assertion that the trial court's dissolution decree and property division are somehow invalid because the court failed to sua sponte join her as a necessary party to the dissolution action. Specifically, she argues that when Husband finally alerted the trial court that the funds in the Merrill Lynch account allegedly belonged to her, the trial court at that point "had a

mandatory duty… to join her as a necessary party" to the dissolution proceeding pursuant to Indiana Trial Rule 19(A). Reply Br. at 5. She posits that her absence from the proceeding rendered the trial court powerless "over [her] money." Appellant's Br. at 16. We disagree in all respects.

[13] Indiana Trial Rule 19(A) provides in pertinent part:

> A person who is subject to service of process shall be joined as a party in the action if:
>
> (1) in his absence complete relief cannot be accorded among those already parties; or
>
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:
>
> (a) as a practical matter impair or impede his ability to protect that interest, or
>
> (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.
>
> If he has not been so joined, the court shall order that he be made a party.

[14] "It is within the trial court's discretion to determine the indispensability of a party." *LBLHA, LLC v. Town of Long Beach*, 28 N.E.3d 1077, 1086 (Ind. Ct. App. 2015). "Where an indispensable party subject to process is not named, the

correct procedure calls for an order in the court's discretion that he be made a party to the action or that the action should continue without him." *Id*.

[15] "The rule governing joinder of parties does not set forth a rigid or mechanical formula for making the determination, but rather is designed to encourage courts to apprise themselves of the practical considerations of each individual case in view of the policies underlying the rule." *ResCare Health Servs., Inc. v. Ind. Fam. & Soc. Servs. Admin. - Off. of Medicaid Pol'y & Plan.*, 184 N.E.3d 1147, 1155 (Ind. 2022) (citation omitted). "And the burden of proving joinder is necessary rests with the party asserting as such." *Id*.

[16] Linda's argument in this regard is waived. It is well settled that the failure to raise the issue of non-joinder of otherwise indispensable parties under Trial Rule 19 in a meaningful and timely manner generally results in waiver of that issue. *City of Terre Haute v. Simpson*, 746 N.E.2d 359, 365 (Ind. Ct. App. 2001), *trans. denied*. As we stated in *Ligon Specialized Hauler, Inc. v. Hott*, 179 Ind. App. 134, 384 N.E.2d 1071, 1076 (1979), "[w]e will not allow a party to sit idly by until appellate review before presenting appropriate motions for the joinder of additional parties." While Linda claims that the waiver rule does not apply to her because she was not in a position to raise or prove her own indispensability because she was not already a party to the dissolution, she is mistaken. At any time during the more than five-year pendency of the dissolution action, and before the issuance of a final decree, Linda could have filed a motion to intervene. She did not do so. Accordingly, any error in her non-joinder as a necessary party has been waived.

[17] Linda's reliance on *Marriage of Dall*, 681 N.E.2d 718, 723 (Ind. Ct. App. 1997), to support her proposition that the dissolution court simply had no authority "over [her] money" is wholly misplaced. Appellant's Br. at 16. In *Dall*, we held that a trial court in a dissolution proceeding was without authority to award or otherwise divide property not owned by either of the parties to the dissolution action. *Id*. at 721. Specifically, regarding the marital residence that was titled in a nonparty, the *Dall* panel observed,

> It is axiomatic that a divorce decree does not affect the rights of nonparties. A party to a divorce who claims that the marital estate includes an equitable interest in real property titled in a nonparty should move to join the nonparty and to have the issue determined within the divorce proceedings. Unless the nonparty is joined, the dissolution court is powerless to adjudicate with certainty the extent of the marital property interest in the real estate, and any such determination is illusory. The failure to join a nonparty in whose absence complete relief cannot be accorded the parties to the marriage also runs counter to the statutory mandate that the dissolution court "shall divide" the marital property. Still, while joinder may be necessary to adjudicate the rights of the parties, joinder alone will not convert the property interest claimed into a present vested interest or bring it into the marital estate.

Id. at 723 (citations omitted).

[18] Here, unlike in *Dall,* the trial court was not presented with real property, or any other property for that matter, titled in or owned by a nonparty. The monies at issue were in fact owned by the parties to the dissolution, as it is undisputed that the funds were at all relevant times held in an account jointly owned by

Husband and Wife. Accordingly, the trial court undeniably had the authority to divide the funds in the Merrill Lynch account, and Linda's suggestion to the contrary is without merit.

[19] As for Linda's claim that the trial court abused its discretion in ultimately denying her untimely motion to intervene, we observe that she dedicated a solitary paragraph in her brief to this issue, and she did not include a single citation to legal authority. A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to legal authority. *Clary-Ghosh v. Ghosh*, 26 N.E.3d 986, 989 n.1 (Ind. Ct. App. 2015), *trans. denied*. Therefore, this issue is also waived.

[20] Affirmed.

Robb, J., and Kenworthy, J., concur.