MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Frank J. McKeon,

Appellant/Cross-Appellee-Respondent,

v.

Amanda L. McKeon,

Appellee/Cross-Appellant-Petitioner.

September 25, 2023

Court of Appeals Case No. 22A-DC-2751

Appeal from the Hamilton Superior Court

The Honorable David K. Najjar, Judge

Trial Court Cause No. 29D05-2009-DC-6286

Memorandum Decision by Judge Kenworthy
Judges Bailey and Tavitas concur.

Kenworthy, Judge.

Case Summary

[1] Frank McKeon ("Husband") and Amanda McKeon ("Wife") appeal the trial court's judgment settling child and property issues following the dissolution of their marriage. The parties raise these issues for our review:

- Did the trial court err in its child support calculation?
- Did the trial court err in not awarding the parties joint legal custody?
- Did the trial court err in not awarding Husband more parenting time?
- Did the trial court err in its property disposition regarding the marital residence?
- Did the trial court err in awarding Husband 55% of the marital estate?

Discerning no error in the trial court's judgment as to these issues, we affirm.

Facts and Procedural History

[2] Husband and Wife were married in May 2007, and had four children during their marriage. Wife filed a petition for dissolution in September 2020.

[3] After hearings in February and March 2021, the trial court entered a preliminary order awarding sole legal and primary physical custody of the children to Wife. The court also found "Husband was less than candid with

respect to his income" because he did not list on his financial declaration any of his six rental properties or an apartment he rents located on the marital property. *Appellant's App. Vol. 2* at 46. The trial court ordered Husband to pay Wife $473.79 per week in child support retroactive to the date of the dissolution filing and $615.27 weekly from the date of the order, resulting in support arrears of $14,687.49.

[4] The trial court held a final hearing and granted the dissolution in April 2022 but did not divide property or rule on issues involving the children. The parties presented evidence on all remaining issues at hearings in June and July 2022. The trial court found Husband in contempt for failing to pay child support; found the true value of the marital residence may be determined on the open market and ordered its sale; granted Wife sole legal custody of the children; awarded Husband parenting time in excess of Indiana Parenting Time Guidelines; and granted Husband 55% of the marital estate.

[5] Husband and Wife now appeal. Additional facts are provided as necessary.

Trial Rule 52(A) Standard of Review

[6] Where—as here—the trial court makes findings under Indiana Trial Rule 52(A), we determine "whether the evidence supports the findings and whether the findings support the [judgment]." *In re Paternity of C.S.*, 964 N.E.2d 879, 883 (Ind. Ct. App. 2012), *trans. denied*. We "shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. T.R.

52(A). A judgment is clearly erroneous when no evidence supports the findings or where the findings fail to support the judgment. *K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453, 457 (Ind. 2009).

No Error in Calculation of Child Support

[7] We review child support determinations for an abuse of discretion and will not set such decisions aside unless they are clearly erroneous. *Lea v. Lea*, 691 N.E.2d 1214, 1217 (Ind. 1998). "A trial court's calculation of child support is presumptively valid." *Young v. Young*, 891 N.E.2d 1045, 1047 (Ind. 2008). The Indiana Child Support Guidelines outline the method for calculating each parent's share of child support. The Guidelines define "Weekly Gross Income from self-employment, operation of a business, rent, and royalties" as "gross receipts minus ordinary and necessary expenses." Ind. Child Support Guideline 3(A)(2) (2020).

> In general, these types of income and expenses from self-employment or operation of a business should be carefully reviewed to restrict the deductions to reasonable out-of-pocket expenditures necessary to produce income. These expenditures may include a reasonable yearly deduction for necessary capital expenditures. Weekly Gross Income from self-employment may differ from a determination of business income for tax purposes.

Id.

[8] Wife is the sole owner of a childcare center, The Play School at Saxony Village ("PSSV"). Wife's mother started PSSV over forty years ago and sold the business to Wife. One of Wife's sisters owns a preschool separate from PSSV.

This sister "has been designated by the group as the go-to person for financial matters involving the businesses[.]" *Appellant's App. Vol. 2* at 22. Wife's mother owns the buildings and land where PSSV and the preschool operate. Wife and her sister pay the same amount of rent to their mother for use of the land and buildings. Wife has also taken loans from her mother through PSSV and used one loan to build a gymnasium for PSSV.

[9] The trial court found Husband and Wife's weekly income to be the exact same amount: $2,212. Husband argues Wife's weekly income should have been at least $3,585 (the amount Wife needed to earn to afford her average weekly expenses listed on her financial declaration) or $7,165 (based on PSSV income as listed on Wife's 2020 personal banking financial statement).[1] Husband's proposed calculations would eliminate his child support obligation. Husband argues the trial court's finding of equivalent incomes contradicts its deviation from the presumption of equal property division. But the trial court granted Husband's request for deviation due to the "extreme difference in the parties [sic] earning ability," *Appellant's App. Vol. 2* at 25, which is notably different from the parties' actual income.

[10] Husband further claims the trial court should have included in Wife's income PSSV loans and rent payments to Wife's mother. He claims crediting Wife

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[1] Husband also argues, based on Wife's tax returns, rental payments, and loans, the trial court should have found Wife's weekly income to be $17,529.58 in 2019, $15,422.60 in 2020, and $25,117.02 in 2021. *Appellant's Br.* at 21–25.

with hundreds of thousands of dollars in debt allows Wife to avoid taking PSSV income and violates the parties' stipulation that PSSV had a debt of only $14,000. The trial court found "much of the business' income was paid to Wife's mother as rent but may have been a structured payment to Wife's mother for the sale of the business to Wife." *Id.* at 22. "[L]ittle to none of the income of PSSV beyond what Wife has reported and testified to, passed through to Wife such that it should be considered as income for child support purposes." *Id.*

[11] Husband cites *Merrill v. Merrill*, 587 N.E.2d 188 (Ind. Ct. App. 1992), in support of his arguments. In that child support modification case, Mr. Merrill unsuccessfully argued the trial court erroneously included part of his pharmacy's retained earnings in his income. *Id.* at 190. At the time of divorce, Mr. Merrill owned a fledgling pharmacy with a negative net worth from loans he obtained to buy the business. *Id.* Seven years later, when Mr. Merrill's ex-wife petitioned to modify child support, Mr. Merrill had nearly paid off his loans with retained business income. *Id.* at 190–91. This Court deferred to the trial court's decision to exclude only half of the pharmacy's retained earnings from Mr. Merrill's income. The trial court based this exclusion on specific circumstances—on "the declining viability of small pharmacies in the South Bend/Mishawaka area." *Id.* at 190.

[12] Here, we similarly defer to the trial court's decision to exclude Wife's PSSV payments based on the unique circumstances of this case. Although the trial court found the payments were used for "growth" (presumably referring to

addition of the gymnasium), the court noted they were also used for "ongoing expenses" and "to keep the business afloat during the pandemic." *Appellant's App. Vol. 2* at 22. The record supports those findings. Wife described "substantial loss two years in a row due to Covid." *Tr. Vol. 2* at 26. She explained PSSV's profits were down because of "expenses with regard to . . . food costs, operational costs, staff bonuses, janitorial wages." *Id.* at 98. PSSV gave its teachers "raises to retain them during the hiring crisis so they wouldn't go home and get unemployment or go to another center." *Id.* And PSSV did not raise its tuition rate during the pandemic.

[13] Further, in *Merrill*, accountants for both parties testified that Mr. Merrill's net worth had increased due to his loan payments. 587 N.E.2d at 190. Here, although the parties stipulated PSSV's net worth and debt for the purposes of property division, there was no consensus about the nature of PSSV's payments. Neither party called Wife's sister—who "has been designated . . . the go-to person for financial matters involving the businesses and is intimately familiar with the accounting of the businesses and how they all intersect." *Appellant's App. Vol. 2* at 22. Indeed, Wife demonstrated a lack of knowledge about PSSV's finances several times. *See Tr. Vol. 2* at 84–85, 95, 137, 138, 139, 140, 151; *Tr. Vol. 3* at 60–61, 81, 87. Wife claimed PSSV is "a messy family business," *Tr. Vol. 3* at 74, and that her sister "handles [PSSV's] fiscal matters," *Tr. Vol. 2* at 95.

[14] The trial court could not "conclude much regarding the finances of PSSV due to the incomplete nature of the evidence provided," *Appellant's App. Vol. 2* at 22,

and "[did] not find that Wife was being less than candid" about her lack of knowledge, *id.* at 23. On appellate review, "we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony. . . should have found [the evidence's] preponderance or the inferences therefrom to be different[.]" *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *Brickley v. Brickley*, 210 N.E.2d 850, 852 (Ind. 1965)). We cannot say the trial court erred by excluding PSSV's payments from Wife's income. Husband's arguments amount to a request to judge the credibility of the witnesses and reweigh the evidence, which we must decline.

No Error in Awarding Wife Sole Legal Custody

[15] We review a trial court's custody determination for an abuse of discretion. *Rasheed v. Rasheed*, 142 N.E.3d 1017, 1021 (Ind. Ct. App. 2020), *trans. denied*. In determining whether an award of joint legal custody is in the best interest of the child, "the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody." I.C. § 31-17-2-15 (2008). That is, the trial court decides "whether the parents have the ability to work together for the best interests of their children." *Arms v. Arms*, 803 N.E.2d 1201, 1210 (Ind. Ct. App. 2004). Indeed, "if the parties have made child-rearing a battleground, then joint custody is not appropriate." *Periquet-Febres v. Febres*, 659 N.E.2d 602, 605 (Ind. Ct. App. 1995), *trans. denied*. The court also considers:

> (1) the fitness and suitability of each of the persons awarded joint custody;
>
> (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;
>
> (3) the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age;
>
> (4) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
>
> (5) whether the persons awarded joint custody:
>
> (A) live in close proximity to each other; and
>
> (B) plan to continue to do so; and
>
> (6) the nature of the physical and emotional environment in the home of each of the persons awarded joint custody.

I.C. § 31-17-2-15 (2008).

[16] Husband argues the trial court erred in awarding Wife sole legal custody of the children because the parties did not disagree about medical, educational, or religious decisions. In its preliminary order, the court granted Wife sole legal and primary physical custody of the children. The preliminary order also reduced Husband's parenting time because of his pending criminal cases based on violations of Wife's protective order against him, concerns over Husband's

mental stability due to his PTSD, and his willful violation of the court's parenting time order.

[17] In its final order, the trial court found the parties "do not get along well at this point in time and have exhibited an inability or unwillingness to communicate effectively with one another." *Appellant's App. Vol. 2* at 34–35. Further, "there has been poor communication between the parties throughout the pendency of this matter which must improve on both ends so that the parties may more effectively co-parent their children." *Id.* at 24. The court admonished the parties to follow the court's orders, use resources for conflict resolution, and "strive to avoid future conflict." *Id.*

[18] The record is replete with examples that support these findings. In April 2021, Husband gave an Easter basket—containing drug testing material and a note stating, "You're a bad egg"—to the children to deliver to Wife. *Id.* at 23. Husband alleged Wife failed to tell him about the children's medical appointments and denied him communication with the children. The trial court ordered the parties to use Our Family Wizard to communicate about issues relating to the children, but the parties continued to exchange argumentative and harassing messages. Husband and Wife have disagreed about the children's medication and medical care, which school the children should attend, and changes to the children's physical appearances. Wife testified Husband did not return children to her "so many times" after his visitation. *Tr. Vol. 2* at 35. Wife attended a co-parenting workshop before the final hearing as required by Local Rules, but Husband did not.

[19] In light of this continuing battle, we see no error in the trial court's award of sole legal custody of the children to Wife.

No Error in Award of Parenting Time

[20] We review a trial court's award of parenting time for an abuse of discretion. *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013). The trial court ordered:

> Parenting time shall be as the parties from time to time agree, however, in the event they cannot agree, they shall share time with Husband exercising parenting time on alternating weekends from Friday at 5:00 p.m. through Sunday evening at 5:00 p.m. Husband shall also have parenting time with the children on Thursdays from 5:00 p.m. through Friday morning, when he shall deliver the children to school on time if it is a school day, or to Wife by 9:00 a.m. if it is not a school day. Holidays, special days, and extended parenting time shall be as the parties agree, or if they cannot agree, according to the schedule set forth in the Indiana Parenting Time Guidelines.

Appellant's App. Vol. 2 at 36. The trial court also ordered the parties to select a Parenting Coordinator to help them communicate and resolve conflicts.

[21] Husband argues the trial court abused its discretion by awarding him only parenting time per the Indiana Parenting Time Guidelines. To begin, we note Husband received a mid-week overnight, which is more time than the mid-week evening of up to four hours described in Section II(D)(1)(b) of the Indiana Parenting Time Guidelines. And the trial court left open the option for the parties to agree to more parenting time.

[22] Husband argues Wife's dissolution petition acknowledged both parents as "fit" and "capable of caring for the minor children during parenting time," *Appellant's Br.* at 36 (citing *Appellant's App. Vol. 2* at 40), but the trial court found joint custody was not in the children's best interest, *Appellant's App. Vol. 2* at 35. The parties had trouble communicating and agreeing on parenting time before the final hearing, and the trial court had before reduced Husband's parenting time based on Husband's "willful disobedience" of the court's orders and unstable mental health. *Appellant's App. Vol. 2* at 45. Husband cites his own testimony as evidence the trial court abused its discretion, and essentially invites us to reweigh the evidence. We decline this invitation and find no error in the trial court's award of parenting time.

No Error in Ordering Sale of Marital Residence

[23] We apply an abuse-of-discretion standard of review to a trial court's division of marital assets. *Roetter v. Roetter*, 182 N.E.3d 221, 225 (Ind. 2022). "A trial court abuses its discretion if its decision stands clearly against the logic and effect of the facts or reasonable inferences, if it misinterprets the law, or if it overlooks evidence of applicable statutory factors." *Id.* Indiana Code Section 31-15-7-4(b)[2] provides in relevant part:

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[2] In his description of law relevant to the division of property, Husband uses language from but does not cite to Indiana Code Section 31-15-7-4(b). Husband has nonetheless presented a cogent argument in accordance with Indiana Appellate Rule 46(A)(8)(a). *See, e.g.*, *Bass v. State*, 797 N.E.2d 303, 305–06 (Ind. Ct. App. 2003) ("While [defendant] did not include specific citation to the Indiana Rules of Evidence in his brief, and it is not our role to develop arguments for the parties, the substance of [defendant's] argument is apparent from the information contained in his brief and on the face of the record.")

> The court shall divide the proper in a just and reasonable manner by:
>
> > (1) division of the property in kind;
> >
> > (2) setting the property or parts of the property over to one (1) of the spouses and requiring either spouse to pay an amount, either in gross or in installments, that is just and proper;
> >
> > (3) ordering the sale of the property under such conditions as the court prescribes and dividing the proceeds of the sale[.]

[24] The trial court ordered the sale of the marital residence, with Husband receiving 55% of the proceeds and Wife receiving 45%. The trial court also ordered Husband, upon the sale, to reimburse Wife for mortgage payments she made after she vacated the residence. Husband argues the trial court erred by ordering him to reimburse Wife because there was no evidence that Wife made the payments. However, at the final hearing, Wife testified she had vacated the residence but continued to make monthly mortgage payments from October 2020 through January 2021. Thereafter, Wife was forced to request forbearance for two months because Husband did not follow the court's order to pay the mortgage. The mortgage was in Wife's name, and nonpayment affected Wife's credit. Husband remained in the marital residence throughout the dissolution proceeding. The evidence supports the trial court's order for Husband to reimburse Wife for the mortgage payments.

[25] Husband also argues the trial court should have adopted his appraised value of the residence and allowed him to retain the residence rather than ordering its sale. Husband and Wife each presented evidence of the value of the marital residence. Husband's appraiser valued the residence at $890,000, and Wife's realtor valued the residence at $1,250,000.

[26] The trial court found sale of the marital residence "on the open market" would best reveal the value of the home and allow Husband "to obtain a residence, and mortgage payment, which may fit within his budget." *Appellant's App. Vol. 2* at 28. And sale would "remove one source of ongoing conflict between the parties." *Id.* The evidence supports these findings. In February 2021, the trial court ordered Husband to pay the mortgage starting in March 2021. Husband did not make the March and April 2021 payments, and the court again ordered Husband to pay. Husband had trouble paying the mortgage on time during Summer 2022. *See Tr. Vol. 3* at 51–52. In addition to Husband's demonstrated difficulty with the mortgage payment, Husband is delinquent on child support and is not pre-approved to re-finance the residence because he did not file tax returns for two years. The trial court was within its discretion to order sale of the marital residence under Indiana Code Section 31-15-7-4(b)(3).

No Error in Awarding Husband 55% of Marital Estate

[27] We review a trial court's division of marital assets for an abuse of discretion. *Roetter*, 182 N.E.3d at 225. Wife argues the trial court erred in finding Husband

rebutted the presumption of equal distribution and awarding him 55% of the marital estate. According to Indiana Code Section 31-15-7-5,

> The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:
>
> (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
>
> (2) The extent to which the property was acquired by each spouse:
>
> (A) before the marriage; or
>
> (B) through inheritance or gift.
>
> (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
>
> (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
>
> (5) The earnings or earning ability of the parties as related to:

> (A) a final division of property; and
>
> (B) a final determination of the property rights of the parties.

In dividing marital property, "the trial court must consider all these factors, but it is not required to explicitly address all of the factors in every case." *Montgomery v. Faust*, 910 N.E.2d 234, 239 (Ind. Ct. App. 2009). We presume the trial court considered the factors, but where nothing in the trial court's orders suggests the court considered all the factors, we find error. *Id.*; *see also Eye v. Eye*, 849 N.E.2d 698, 701–02 (Ind. Ct. App. 2006).

[28] The trial court found Husband "carried his burden and that the [c]ourt should deviate from the equal presumption because of the fifth factor namely, the extreme difference in the parties [sic] earning ability as related to (A) a final division of property; and (B) a final determination of property rights of the parties." *Appellant's App. Vol. 2* at 25. Wife first claims there is no evidence of the parties' future earning abilities. We disagree. Wife's 2019 and 2020 tax returns, ownership of PSSV, and her business management and plans, contrasted with Husband's consistent business losses, disability status, and plans to be fully retired within six months, support the trial court's finding of a difference in the parties' earning abilities.

[29] Wife also argues there is no indication the trial court considered factors other than the parties' earning abilities. She claims the trial court did not consider the first two statutory factors as related to Wife's efforts to increase the value of

PSSV and Wife's mother's financial contributions to the marital estate and gift of rental properties that make up Husband's business. But in its final order, the trial court quoted Indiana Code Section 31-15-7-5 in its entirety, suggesting it considered each of the factors it listed. The trial court's consideration of all five factors is implicit even though the trial court expressly found only one factor determinative. This, combined with the entirety of the trial court's thoughtful order and the presumption the trial court considered all factors and need not expressly address every factor, leads us to conclude the trial court did not abuse its discretion.

[30] Finally, Wife argues the awards of a $470,202.50 equalization payment, a larger portion of the proceeds from the sale of the marital residence, and the rental properties place Husband in a superior economic position and cause a hardship to Wife. Wife requests we remand with instructions to award Wife 60% of the marital estate. Wife's argument essentially amounts to a request to reweigh the evidence. The trial court was within its discretion to order the equalization payment, to order that Husband receive 55% of the proceeds from the sale of the marital residence, and to award the rental properties to Husband.

Conclusion

[31] The trial court did not abuse its discretion. We therefore affirm the judgment.

[32] Affirmed.

Bailey, J., and Tavitas, J., concur.