MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Adam C. Thomas,
Appellant-Respondent,

v.

Amy Thomas,
Appellee-Plaintiff.

June 9, 2023

Court of Appeals Case No. 22A-DR-2516

Appeal from the Allen Superior Court

The Honorable Lori K. Morgan, Judge

Trial Court Cause No. 02D08-1504-DR-452

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

[1] The marriage of Adam Craig Thomas ("Husband") and Amy Thomas ("Wife") was dissolved in 2020, and the initial dissolution order counted their combined distributions from marital investments ("the Distributions") as both income for purposes of calculating provisional[1] child support and as marital assets to be divided between them as part of the marital estate. Husband appealed that portion of the trial court's dissolution order, and a different panel of this Court held that the trial court had erred when it considered the Distributions to be both income for child support purposes and property for marital estate division purposes. *See Thomas v. Thomas*, 20A-DR-900, 2021 WL 3520933, at *10 (Ind. Ct. App. Aug. 11, 2021). We remanded "for reconsideration of this issue." *Id*.

[2] On remand, the trial court determined that only ten percent of the Distributions had been counted as income for purposes of the provisional child support order, a factual finding that Husband does not contest. Therefore, in order to comply with our prior decision in this case, the trial court deducted that ten percent from the marital estate so as not to count that ten percent as both income for child support purposes and as an asset that is part of the marital estate. Husband now appeals that determination and asserts that the trial court's order was an impermissible retroactive modification of child support that once more

[1] The only child support at issue in this case is the provisional child support for the period of August 1, 2016, through March 19, 2020.

"double-count[ed]" the Distributions as both income and marital property. Appellant's Br. at 5.

[3] We affirm.

Facts and Procedural History

[4] The parties were married and have two children. On April 9, 2015, Wife filed a petition for dissolution of marriage. On August 11, 2015, the trial court entered a provisional order, which included child support. Both parties subsequently—and separately—filed petitions to modify child support beginning on August 1, 2016.

[5] Following a lengthy trial, the court issued a Decree of Dissolution of Marriage on March 19, 2020, and a Second Amended Decree of Dissolution of Marriage on April 20, 2020. The court found that the parties had two investments made with marital assets, i.e., Dupont Hospital ("Dupont") and Lithotripsy, which had issued distributions during the pendency of the dissolution action. The trial court included those Distributions as income for purposes of calculating provisional child support and as assets of the marital estate.[2]

[2] Because the investments were obtained during the marriage using marital assets, the trial court found that the Distributions from the Dupont and Lithotripsy investments were all part of the marital estate, rather than one party's separate income, regardless of which party's name appeared on the investments. Neither party appealed that finding.

[6] Husband appealed, and a different panel of this Court concluded under Part B(3), "Business Entity Distributions," of the memorandum decision that the trial court had "erred in considering … [the D]istributions as both income for purposes of determining [Husband's] child support payments as set forth in its provisional order and later property for purposes of dividing the marital estate." *Thomas*, 2021 WL 3520933, at *10. Therefore, we reversed on that issue and "remanded for reconsideration of the issues discussed in Part B.3."[3] *Id.* at *16. In doing so, we stated in footnote 14:

> In *Becker v. Becker*, the Indiana Supreme Court held that "[t]he modification of a support obligation may only relate back to the date the petition to modify was filed, and not an earlier date ...." 902 N.E.2d 818, 820 (Ind. 2009). The Court noted: "Retroactive modification is permitted in two instances: (1) when the parties have agreed to and carried out an alternative method of payment which substantially complies with the spirit of the decree; or (2) the obligated parent takes the child into the obligated parent's home and assumes custody, provides necessities, and exercises parental control for a period of time [such] that a permanent change of custody is exercised." *Id.* at 820 n.4.

Id. at *10.

[7] On February 22, 2022, the trial court held a hearing on the issues presented for remand and issued an order dated June 14, 2022, in which it agreed with Husband that "footnote 14 of the Memorandum Decision prohibits this court

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[3] We also remanded for consideration of the au pair costs related only to childcare while Wife works. *Id.* at *16. That issue is not raised in this appeal.

from recalculating the child support obligations because doing so would amount to a retroactive modification of child support." Appellant's App. v. 3 at 4. Therefore, the court concluded that "[t]he only remaining remedy for the inclusion of the … distributions … as income for purposes of determining [provisional] child support payments … and later for purposes of dividing the marital estate … is to order [Wife] to reimburse [Husband] the amount of those distributions that were included in the Court's property distribution." *Id*. at 5. The trial court removed the entire amount of the Distributions (i.e., $621,926.00) from the marital estate, recalculated each parties' portion of the newly calculated marital estate, and ordered Wife to pay Husband $373,155.20 as the amount she was overpaid in the prior marital estate order.

[8] On July 14, 2022, Wife filed a motion to correct error, and the court subsequently held a hearing on that motion. On October 10, 2022, the trial court issued an order granting Wife's motion and stating, in relevant part:

> 21. This Court, upon further consideration and review, finds that footnote 14 in the August 11, 2021, Indiana Court of Appeals Memorandum Decision does not prohibit the Court from revisiting the Court's Modified Provisional Orders … or from making any changes to address any error or inequity "because doing so would amount to a retroactive modification of child support." Rather, it serves as caution that[,] should the court determine that altering the modified provisional child support [is necessary] in order to address the directives of the Court of Appeals on remand, the modified provisional order cannot go back further than the date the Petition for Modification was filed.

Id. at 11 (quotations in original).

[9] The trial court further found that its provisional child support order had only included ten percent of the total amount of the Distributions when calculating the amount of child support.[4] This finding was based upon Indiana Child Support Guideline 3(A)(1) that defines "weekly gross income" as including income from marital investments, and the Indiana Guideline Schedule for Weekly Support Payments that limits to ten percent the amount that "shall be applied to calculate basic child support when the parties' combined weekly adjusted income is above $10,000" and they have two children (as was the case here). Thus, because the parties had a combined weekly adjusted income above $10,000 that did not include the amount of the Distributions, only ten percent of the Distributions had been counted improperly as both income and property of the marital estate. The trial court determined that the remedy for that improper double-counting was to decrease the Distributions included in the marital estate by ten percent.[5] Husband now appeals the October 10, 2022, order.

Discussion and Decision

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[4] Neither party contests this finding.

[5] The trial court noted that the remedy for "double-counting" the distributions that it had issued in its previous June 14, 2022, order erroneously had counted the *full* value of the distributions rather than only ninety percent (i.e., the distribution minus the ten percent counted toward provisional child support) toward the marital estate, thus "creat[ing] a windfall in favor of [Husband] that must be corrected." Appealed Order at 15.

[10] Husband appeals the grant of Wife's motion to correct error in the trial court's decision on remand. We review a ruling on a motion to correct error for an abuse of discretion. *Sims v. Papas*, 73 N.E.3d 700, 705 (Ind. 2017).

> An abuse of discretion occurs when a trial court's decision is against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. When reviewing a decision for an abuse of discretion, we consider only the evidence and reasonable inferences favorable to the judgment.

Mitten v. Mitten, 44 N.E.2d 695, 698-99 (Ind. Ct. App. 2015).

[11] The trial court's decision on the motion to correct error included specific findings of fact and conclusions of law. In that situation,

> we apply a two-tiered standard of review. Without reweighing the evidence or assessing the credibility of witnesses, we must determine, first, whether the evidence supports the findings, and second, whether the findings support the judgment. Findings are clearly erroneous if there are no facts in the record to support them either directly or by inference, and a judgment is clearly erroneous if the wrong legal standard is applied to properly found facts. In order to determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. We consider only the evidence favorable to the trial court's judgment.

Id. (quotations and citations omitted). Moreover, when we reverse and remand a case to the trial court without specific instructions, as we did here, "the course of further proceedings is within the discretion of the trial court." *Chubb Custom*

Ins. Co. v. Standard Fusee Corp., 2 N.E.3d 752, 763 (Ind. Ct. App. 2014) (quotation and citation omitted).

[12] In our prior decision in this case, we cited *Fischer v. Fischer*, 68 N.E.3d 603, 611 (Ind. Ct. App. 2017), *trans. denied*, for the rule that the value of an investment "cannot be [counted as] both property and income" in a dissolution action. *Thomas*, 2021 WL 3520933, at *10 (also citing *Scoleri v. Scoleri*, 766 N.E.2d 1211, 1218 (Ind. Ct. App. 2002)). Thus, we held that the trial court had erred when it had included the Distributions both as income for the provisional child support calculation and later as property for purposes of dividing the marital estate. *Id*. We remanded "for reconsideration of this issue," citing *Becker v. Becker*, 902 N.E.2d 818, 820 (Ind. 2009), for the proposition that "'the modification of a support obligation may only relate back to the date the petition to modify was filed, and not an earlier date.'" *Id.*, n.14.

[13] On remand, the trial court determined its provisional child support order had counted only ten percent of the Disbursements in the child support calculation, based on the Guideline Schedule for Weekly Support Payments. That table, which is included in the Indiana Child Support Rules and Guidelines, provides that the amount that "shall be applied to calculate basic child support when the parties' combined weekly adjusted income is above $10,000" and they have two children is limited to "10.0%." Ind. Guideline Schedule for Wkly. Support Payments. The trial court found that the parties' combined weekly income, not including the Distributions, was "significantly above $10,000." Appealed Order at 14. Therefore, the court found that the provisional child support

calculation had only included ten percent of the Distributions as income. Neither party argued in the trial court or on appeal that that factual finding is incorrect.

[14] The trial court then acknowledged that, under this Court's prior decision in this case, the ten percent of the Distribution could not be counted as both income and marital property. Therefore, the trial court deducted ten percent of the Distributions from the calculation of the marital property division and recalculated the property division accordingly. Thus, the trial court's remedy on remand was to (1) acknowledge that ten percent of the Distributions had been included in the provisional child support calculation; and (2) consider the remaining ninety percent of the Distributions as assets in the martial estate, which it then divided between the parties. Contrary to Husband's contentions, that remedy did correct the "double-counting error" previously noted by a panel of this Court.

[15] Husband asserts that, on remand, the trial court modified the provisional child support order and that such modification was impermissible under our prior decision in this case and *Becker v. Becker*. We agree with the trial court that neither of those opinions prevented the trial court from modifying the child support order[6] but that such a modification was not, in fact, done. Rather, the

[6] As Wife notes, our prior decision and *Becker* simply state that a modification of child support may not relate back further than the date the motion to modify support was filed; they do not hold that provisional child support may not be modified at all, as Husband seems to contend.

trial court simply acknowledged that the original provisional child support order had only included ten percent of the Distributions as required under the Child Support Guidelines.

[16] Husband maintains—without citation to any supporting authority—that the trial court was not permitted to divide the Distributions between income for child support and property for marital estate distribution. We hold that, because the trial court's remedy on remand did not count any portion of the Distributions toward both income and marital property, the court's remedy complied with this Court's prior order and was not an abuse of discretion.

[17] Affirmed.

Tavitas, J., and Kenworthy, J., concur.