MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Christopher M. Forrest
Forrest Legal LLC
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE

John B. Powell
Shambaugh, Kast, Beck, &
Williams, LLP
Fort Wayne, Indiana

IN THE COURT OF APPEALS OF INDIANA

Douglas P. Schenkel,
Appellant-Petitioner,

v.

Jennifer S. Schenkel,
Appellee-Respondent.

December 12, 2023

Court of Appeals Case No. 23A-DR-220

Appeal from the Allen Circuit Court

The Honorable Wendy W. Davis, Judge

The Honorable Jesus R. Trevino, Magistrate

Trial Court Cause No. 02C01-1104-DR-195

Memorandum Decision by Judge Bailey
Judge Kenworthy concurs.
Judge Tavitas concurs in part and dissents in part with separate opinion.

Bailey, Judge.

Case Summary

[1] In August 2019, several years after Douglas Schenkel's ("Father") marriage to Jennifer Schenkel ("Mother") was dissolved, Father filed a motion to modify his child support obligation. The court granted Father's motion, but initially made the modification effective as of the date of the order—October 7, 2022. Father then filed a motion to correct error, which the court granted, and the court changed the effective date to January 5, 2022. Father now appeals, and Mother cross-appeals, from those orders. We affirm.

Issues

[2] Father presents two issues for our review:

1. Whether the trial court abused its discretion when it granted his motion to correct error but did not make the modification retroactive to the date he filed his petition to modify.

2. Whether the court clearly erred when it did not credit him for the cost of Child's private school education.

On cross-appeal, Mother also presents two issues for our review:

1. Whether the court clearly erred when it granted Father's motion to modify his child support obligation.

2. Whether the court abused its discretion when it granted Father's motion to correct error and made the effective date of the modification retroactive to a date prior to October 7, 2022.

Facts and Procedural History

[3] Father and Mother were married on July 14, 2001, and have one child together, Child, who was born on July 7, 2004. On April 13, 2011, Father filed a petition to dissolve his marriage to Mother. On October 20, Father and Mother entered into a Mediated Marital Settlement Agreement ("MSA") to dissolve their marriage. Pursuant to the MSA, Father and Mother agreed that they would have joint legal and physical custody of Child; that Father would pay $450.00 per week in child support; that Father would pay "all parochial/private school tuition, fees and related expenses," which totals approximately $8,000 per year; and they agreed to a division of the property. Appellant's App. Vol. 2 at 8. Among other items, Father was awarded an investment account[1] and his ownership interest in his business. The court accepted the MSA and dissolved the parties' marriage.

[4] For the majority of his adult life, Father worked for, and ultimately owned, a manufacturing company called L&L Fittings ("L&L"). Father's employment at L&L was his main source of income, but he also passively earned income

[1] At the time of the MSA, Father was separately awarded a trade account and his 401(k). Following the dissolution of his marriage to Mother, Father converted his trade account into an investment account, and he rolled his 401(k) into the new investment account.

through various investments, including his investment account. In November 2019, Father closed L&L due to financial difficulties and liquidated its assets. During the last year of its operation, Father received an annual income of $100,000.00, or $1,923.00 per week. Following the closure of L&L, in July 2020, Father purchased an insurance agency and paid himself $400.00 per week. Also in 2020, Father received $240,000 from the sale of an investment and $111,000 when he closed another business he had started. Father owned the insurance agency until he entered into an asset purchase agreement to sell it on January 5, 2022. The transaction ultimately closed on April 1. Since the sale of the insurance agency, Father has not reentered the workforce but has remained "[s]emi-retired" to focus on his health. Tr. at 86. As a result, his only reliable source of income is the interest and distribution income from his investment account, which is currently valued at $3,290,224.60.

[5] Mother is not employed but receives social security disability income in the amount of $520.00 per week and $160.00 per week from a disability insurance policy. She also receives social security disability income for the benefit of Child in the amount of $260.00 per week. In addition, Mother has an investment account worth $231,883.67 from which she receives interest, dividends, and distribution income.[2]

---

[2] The court did not make a specific finding regarding the amount of income Mother receives every week from her investment account. However, Mother testified that she receives approximately $1,000 per month from the investment account. *See* Tr. at 59.

[6] On August 28, 2019, Father filed a motion to modify his child support obligation.[3] On June 1, 2022, the court held a hearing on Father's motion. During the hearing, both parties presented testimony and evidence related to their respective financial positions, including the personal and real property that they each own, as well as the expenses they each incur on behalf of Child.

[7] Following a hearing, the court entered its findings of facts and conclusions thereon. In particular, the court found that: Father pays for Child's private school tuition as well as Child's books, registration, and school lunches; Father pays for Child's vehicle; both parties purchase clothing for Child; both parties contribute to Child's extracurricular activities; Father pays for Child's cell phone; Father maintains a checking, savings, and 529 educational account for Child; Mother is "disabled for federal benefits purposes"; and both Mother and Father "own significant assets such that they are both able to provide for" Child. Appellant's App. Vol. 2 at 29.

[8] The court concluded that, while Father has an investment account and had earned capital gains from the sale of L&L, those assets were awarded to Father as part of the MSA "in exchange for Mother's receipt of various other property and payments," and, as such, "it would be improper to include the capital gains attributable to the principal (rather than interests and dividends) to Father's income." *Id*. at 33. The court also concluded that, while "Father

---

[3] Neither party has provided a copy of Father's motion in their respective appendices.

independently satisfies the majority of [Child's] controlled expenses," he will "not receive a credit for controlled expenses in calculating child support." *Id*. at 34. In particular, the court determined that Child receives a parochial education "per Father's request" and that Father had "agreed to pay for this education in the MSA." *Id*. The court also noted that, "[p]resumably, Father assumed the responsibility for [Child's] controlled expenses in the parties' divorce as the result of exchange and negotiations" between Mother and Father such that it would "be improper to now reduce Father's child support obligation because he pays for [Child's] controlled expenses." *Id*.

[9] The court then determined that, based on Mother's disability income and distributions from the investment account, Mother's weekly gross income is $1,413.00.[4] The court also determined that Father's weekly gross income is $3,637.00 and calculated Father's child support obligation to be $123.00 per week. Accordingly, the court granted Father's motion to modify his child support obligation. But based on "Father's overall wealth," the court declined to make the order retroactive and instead made it effective as of October 7, 2022, the date of the order. *Id*. at 35.

[10] Father then filed a motion to correct error on November 1, 2022. At a hearing on Father's motion at which the parties presented oral argument, Father argued that the court had erred when it did not make the effective date of the

[4] Neither party disputes this amount.

modification retroactive to the date he filed the motion to modify child support.[5] Following the hearing, the court agreed with Father that it had "erred by granting the modification of support only from the date of the court's order." *Id*. at 39. But the court declined to make the order retroactive to the date Father filed his motion. In particular, the court found that Father's "liquidation of L&L Fittings resulted in significant capital gains" to Father; that following the sale of L&L Father was still "actively working" and "capable of earning a salary comparable to his gross annual salary at L&L Fittings"; that he had "voluntarily declined to seek comparable employment"; and that he had purchased another company in July 2020, which he ultimately sold on January 5, 2022. The court then found that the January 5, 2022, date of Father's sale of the insurance agency was a "significant date with respect to the child support modification." *Id*. at 41. As such, the court granted Father's motion to correct error and made the effective date of the child-support modification retroactive to January 5, 2022. This appeal ensued.

Discussion and Decision

[5] Neither party has provided a copy of Father's motion to correct error in their respective appendices. However, Father acknowledged at the hearing that he did not brief the issue of controlled expenses in his motion. And because Father did not brief the issue in his motion, the court did not address that issue in its order on Father's motion to correct error.

Modification of Child Support

[11] Because it could be dispositive of the appeal, we first address Mother's argument on cross-appeal that the court erred when it granted Father's motion to modify his child support obligation. "Upon review of a modification order, 'only evidence and reasonable inferences favorable to the judgment are considered.'" *Bogner v. Bogner*, 29 N.E.3d 733, 738 (Ind. 2015) (quoting *Kinsey v. Kinsey*, 640 N.E.2d 42, 44 (Ind. 1994)). The order will only be set aside if clearly erroneous.[6] *Id*. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake was made. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). Further, where, as here, the trial court enters specific findings of fact and conclusions, we review its findings and conclusions to determine whether the evidence supports the findings, and whether the findings support the judgment. *Id*.

[12] Indiana Code section 31-16-8-1 governs modification of child support orders and provides in relevant part:

> (a) Provisions of an order with respect to child support . . . may be modified or revoked.
>
> (b) Except as provided in section 2 of this chapter, . . . modification may be made only:

---

[6] Our Supreme Court clarified that, although it and our Court "have phrased the standard as both abuse of discretion and clear error, . . . clear error should be the standard upon review." *Bogner*, 29 N.E.3d 733 at 738 n.2.

> (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
>
> (2) upon a showing that:
>
> > (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
> >
> > (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

[13] On appeal, Mother does not dispute that Father is semi-retired, that he is no longer actively in the workforce, or that his only consistent income consists of the interest and dividends that he receives from his investment account. And, importantly, Mother does not assert that the court incorrectly calculated Father's income, that the court should have imputed any income to Father, or that the court should have otherwise included any additional income in its calculation. Rather, Mother contends that the court should have disregarded Father' income as calculated by the Child Support Guidelines because of Father's overall financial position.

[14] In particular, Mother points to the fact that Father's investment account has a value that exceeds three million dollars; that he owns real estate, airplanes, automobiles, and watercrafts; and that he had recently sold two businesses.

And Mother argues that, in contrast, she "is receiving disability income" and does not have the financial resources "to come close to providing their son with the lifestyle and experiences Father does[.]" Appellee's Br. at 21. As such, Mother contends that the award reached through the application of the Guidelines was unjust, that the court should have deviated from that amount, and that the court should not have granted Father's motion to modify.

[15] The Child Support Rules and Guidelines provide that the court may deviate from the guideline amount if the amount reached under the guidelines is unjust. *See* Ind. Child Support Rule 3 ("If the court concludes from the evidence . . . that the amount of the award reached through application of the guidelines would be unjust, the court shall enter a written finding articulating the factual circumstances supporting that reason."). *See also* Ind. Child Support Guideline 3(F) ("If, after consideration of the factors contained in IC 31-16-6-1 and IC 31-16-6-2, the court finds that the Guideline amount is unjust or inappropriate in a particular case, the court shall state a factual basis for the deviation and proceed to enter a support amount that is deemed appropriate.").

[16] Here, it is clear that the court heard evidence about, and fully considered, the totality of both parties' financial circumstances and nonetheless determined that the amount as calculated by the guidelines was not unjust. Indeed, the court heard evidence regarding Father's assets, including his three-million-dollar investment account; the money he received from the sale of two businesses; the cars, watercrafts, and plane; and his real estate. And the court acknowledged each of those assets in its original order. *See* Appellant's App. Vol. 2 at 24-30.

However, the court also recognized that Father was awarded at least some of those items in the MSA—including the largest asset, the investment account—in exchange for Mother receiving other property and payments and that Father should not "be penalized for liquidating or otherwise accessing his share of the marital estate in this regard."[7] *Id*. at 33.

[17] Again, there is no dispute that Father spent the majority of his adult life working at, and ultimately owning, L&L. However, in 2019, Father had to close the business and liquidate its assets because the business was facing financial difficulties. There is also no dispute that Father drew an income of $100,000 during the last year he worked at L&L. However, that income ceased when he sold the company. Then, a few months later, Father purchased an insurance company and paid himself $400 per week while he owned it. Once that business started to experience financial difficulties, Father sold it in January 2022. After that point, Father did not re-enter the workplace but instead "[s]emi-retired" to focus on his health. Tr. at 86. And while Father receives passive income in the form of interest and dividends from his investment account, the trial court already took that into consideration when it calculated his weekly income.

---

[7] Indeed, in regard to Father's investment account, which consists at least in part of retirement accounts, our Commentary to the Child Support Guidelines specifically provides that "[r]etirement funds which were in existence at the time of dissolution and which were the subject of the property division would not be considered 'income' when calculating child support." Ind. Child Supp. G. 3(A) Cmt. 2(e).

[18] We acknowledge that Father has several assets, including a $3.2 million-dollar investment account. However, that does not negate the fact that Father has not been in the workforce since he sold the insurance agency in January 2022, a sale which ultimately closed in April of that year, or that Father no longer earns a salary because he is semi-retired. The court took all of the relevant facts into consideration and ultimately determined that the amount as calculated by the child support guidelines was not unjust. Based on the facts and circumstances of this case—including the fact that Father's largest asset was awarded to him in the dissolution and offset by other property and payments to Mother—we cannot say that the trial court clearly erred when it modified Father's child support obligation. We therefore affirm the court's grant of Father's motion to modify his child support.

Effective Date of Modification

[19] We next address an argument made by both parties that the trial court abused its discretion when it granted Father's motion to correct error and modified the effective date of the modification order. As this Court has previously explained:

> We review the grant or denial of a Trial Rule 59 motion to correct error under an abuse of discretion standard. On appeal, we will not find an abuse of discretion unless the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law.

Spaulding v. Cook, 89 N.E.3d 413, 420 (Ind. Ct. App. 2017) (internal citations omitted).

[20] Further, upon reviewing a motion to correct error, this Court also considers the standard of review for the underlying ruling. *Luxury Townhomes, LLC v. McKinley Properties, Inc.*, 992 N.E.2d 810, 815 (Ind. Ct. App. 2013). And it is within a trial court's discretion to make a modification of child support relate back to the date the petition to modify is filed or any date thereafter. *Quinn v. Threlkel*, 858 N.E.2d 665, 674 (Ind. Ct. App. 2006).

[21] Both Father and Mother challenge the court's effective date of January 5, 2022. Father contends that the court should have made the modification effective as of August 2019 when he filed his motion to modify. According to Father, it was at that time that "he experienced a significant change in his financial circumstances when his business began to struggle, and he was ultimately forced to close it." Appellant's Br. at 15. Mother responds and contends that the court should not have granted Father's motion to correct error and should have kept the effective date as October 7, 2022, because of Father's overall economic circumstances. In the alternative, Mother contends that, if the court was within its discretion to modify the effective date, the court should have chosen the date the sale of Father's insurance agency actually closed.[8]

[22] However, we hold that neither party has shown that the court abused its discretion here. L&L began to experience financial difficulties in 2019 such that

---

[8] Mother states that Father's sale of the insurance agency closed on March 31, 2022. However, Father testified, and the court found, that the sale closed on April 1, 2022. *See* Tr. at 85; Appellant's App. Vol. 2 at 23.

Father ultimately closed the business and liquidated its assets in November of that year. However, as the court found, Father did not immediately exit the workforce, and he received substantial income from other sources. In particular, the liquidation of L&L resulted in significant capital gains to Father in 2020. Also in that year, Father received $240,000 from the sale of an investment and $111,000 from the sale of another business. Then, in July 2020, Father purchased an insurance agency and paid himself a salary of $400 per week on top of the capital gains that he had obtained from the sale of his assets. It was not until January 5, 2022, when Father entered into the asset purchase agreement to sell the insurance agency, that Father left the workforce and stopped receiving income beyond the distributions from his investment account.

[23] Again, it is within a trial court's discretion to make a modification of child support relate back to the date the petition to modify was filed *or any date thereafter*. *Quinn*, 858 N.E.2d at 674. Here, the court chose the date that Father entered into an asset purchase agreement to sell his insurance company as the effective date of the order. We acknowledge that the court may have been within its discretion to choose any of the dates requested by Father or Mother. However, based on the facts of this case, we cannot say that the court was without discretion to choose January 5, 2022, as the effective date of the modification order. We therefore affirm the court's grant of Father's motion to correct error.

Controlled Expenses

[24] Finally, Father contends that the trial court erred when it did not credit him for the payment of Child's educational expenses. As outlined above, when reviewing a modification order, we will consider only the evidence and reasonable inferences favorable to the judgment. *See Bogner*, 29 N.E.3d at 738. We will set aside the order only if it is clearly erroneous. *Id*. On appeal, Father contends it was error for the court to acknowledge that he "pays the majority of the controlled expenses" but nonetheless "refuse[] to afford Father a credit for the same." Appellant's Br. at 19.

[25] Father is correct that the court found that he "independently satisfies the majority of [Child's] controlled expenses." Appellant's App. Vol. 2 at 34. However, it is clear that the court was referring to Child's private school expenses when it entered that finding. Indeed, the full language of that finding is as follows:

> Pursuant to the parties' MSA, Father independently satisfies the majority of [Child's] controlled expenses. Father shall remain responsible for [Child's] controlled expenses. However, Father will not receive credit for controlled expenses in calculating child support. Mother testified that [Child] receives a parochial education per Father's request and [Father] agreed to pay for this education in the MSA. Further, Mother contends that Father's responsibility for [Child's] controlled expenses was negotiated as part of the MSA. Presumably, Father assumed the responsibility for [Child's] controlled expenses in the parties' divorce as the result of exchange and negotiations between Mother and Father, and it would be improper and inequitable to now reduce Father's

> child support obligation because he pays for [Child's] controlled expenses.

Id. (footnote omitted). Thus, while Father discussed other expenses in his brief—Child's cell phone, car, clothing, and extracurricular activities—it is apparent that the court was only discussing Father's expense for Child's education.

[26] We first note that the parties dispute whether the court properly categorized Child's educational expense as a controlled expense. Father contends that it is a controlled expense, while Mother contends that it should be considered an extraordinary expense. The Commentary to Child Support Guideline 6 defines controlled expenses to include "education" expenses. It then defines "education" expenses to include "ordinary costs assessed to all students, such as textbook rental, laboratory fees, and lunches[.]" Child Supp. G. 6 Cmt. In contrast, Child Support Guideline 8 defines "extraordinary educational expenses" as expenses that "may be for elementary, secondary or post-secondary education, and should be limited to reasonable and necessary expenses for attending private or special school[.]" Here, it is clear that the expense for Child's private-school education is more properly categorized as an extraordinary educational expense under Guideline 8 rather than a controlled expense. However, the fact that the trial court improperly identified the expense does not alter our analysis.

[27] Again, the court entered a lengthy finding that Father paid for Child's private-school education, at the cost of approximately $8,000 per year. And Father is

correct that the court declined to credit Father for that expense. However, we cannot say that the decision by the trial court was clearly erroneous. The court found, and Father does not dispute, that Child only received a private school education because of Father's wishes. And Child Support Guideline 8(a) specifically provides that a court "may want to consider whether the expense is the result of a personal preference of one parent[.]" Further, pursuant to the parties' MSA, Father agreed to "pay all parochial/private school tuition, fees and related expenses," which clause was separate and distinct from Father's agreement to pay $450 per month in child support. *Id*. at 49.

[28] Stated differently, Father agreed to pay for all of Child's private-school tuition in the MSA because it was Father's desire for Child to attend private school. As such, we agree with the court that it would now be "improper and inequitable" to further reduce Father's child support obligation simply because he continues to pay for an expense he agreed to cover in the MSA. Appellant's App. Vol. 2 at 34. We cannot say that the court clearly erred when it declined to credit Father for the cost of Child's education. As such, we affirm the trial court's modification order.

Conclusion

[29] The trial court did not clearly err when it followed the Child Support Guidelines and modified Father's child support obligation. In addition, the court did not abuse its discretion when it granted Father's motion to correct error and selected January 5, 2022, as the effective date for the modification.

And the court did not clearly err when it declined to credit Father for the cost of Child's private-school education. We therefore affirm the trial court.

[30] Affirmed.

Kenworthy, J., concurs.

Tavitas, J., concurs in part and dissents in part with separate opinion.

Tavitas, Judge, concurring in part and dissenting in part.

[31] I respectfully concur in part and dissent in part. Although I agree that the trial court did not err when it did not credit Father for the cost of Child's private school education, I cannot agree with the trial court's substantial reduction in child support here.

[32] The trial court here excluded Father's capital gains from his income, but Indiana Child Support Guideline 3 provides:

> Weekly gross income of each parent includes income from any source, except as excluded below, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, overtime, partnership distributions, dividends, severance pay, pensions, interest, trust income, annuities, structured settlements, **capital gains**, social security benefits, worker's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, prizes, and alimony or maintenance received.

(emphasis added). Moreover, the Child Support Guidelines require a consideration of the parents' "**financial resources** and needs, **the standard of living the child would have enjoyed had the marriage not been dissolved** . . . , the physical or mental condition of the child, and the child's educational needs." Child Support Guideline 1 (emphasis added); *see also R.B. v. K.S.*, 25 N.E.3d 232, 235 (Ind. Ct. App. 2015) ("The Guidelines are designed to help trial courts fashion child support awards that provide children, as closely as

possible, with the same standard of living they would have enjoyed had the marriage not been dissolved."). "It is well-established that Indiana courts have the authority to consider the financial circumstances and net worth of the parents in addition to their income when calculating child support." *Gardner v. Yrttima*, 743 N.E.2d 353, 358 (Ind. Ct. App. 2001).

[33] Granted, Mother and Father both have significant assets. Father's assets, however, eclipse Mother's assets, and Mother is receiving disability benefits. Father was initially paying $450.00 per week in child support, which amounts to $23,400.00 per year. The trial court's reduction of Father's child support to $123.00 per week results in Mother receiving only $6,396 per year in child support. This substantial reduction in child support will likely result in a significant change of the Child's standard of living. I conclude that the trial court erred in not considering Father's capital gains and net worth when calculating Father's income. Accordingly, I would remand for a recalculation of Father's child support.