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IN THE  
COURT OF APPEALS OF INDIANA

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Mark A. Wilson,  
*Appellant,*

v.

Teresa C. Wilson,  
*Appellee.*

February 20, 2023

Court of Appeals Case No.  
22A-DC-1949

Appeal from the Hendricks  
Superior Court

The Honorable Rhett M. Stuard,  
Judge

Trial Court Cause No.  
32D02-2107-DC-445

**Opinion by Judge Brown**  
Judges Bailey and Weissmann concur.

**Brown, Judge.**

[1] Mark A. Wilson (“Father”) appeals from the trial court’s dissolution decree and challenges the court’s division of the marital property and calculation of his child support obligation. We reverse and remand.

### *Facts and Procedural History*

[2] Father and Teresa C. Wilson (“Mother”) were married in 2001 and have one child, E., who was born in 2002. On July 6, 2021, Mother filed a petition for dissolution of marriage. On July 28, 2022, the court held a final dissolution hearing at which the parties presented evidence regarding the marital assets and debts, their employment and work history, and their incomes and other resources.<sup>1</sup> Mother testified that E. has special needs and receives about \$840 monthly in Social Security disability. She also testified that E. is on Medicaid which paid most of her medical bills. She testified E. uses her Social Security benefit every month and the amount does not go very far. She introduced a proposed child support worksheet which included a recommended support obligation to be paid by Father of \$262 per week.<sup>2</sup> She further testified the source of the funds in the Ameritrade account was a settlement Father received following the loss of his leg due to a motorcycle accident. When asked if the account “has been spent down,” she replied “[i]t has. He’s traded you know

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<sup>1</sup> Mother testified she worked an average of about thirty hours per week and earned \$16.25 per hour and introduced earnings statements for Father, one of which has a pay date of December 23, 2021, indicating his total year-to-date gross earnings were \$133,777.05 and the other of which has a pay date of December 24, 2020, indicating his total year-to-date gross earnings were \$116,143.37.

<sup>2</sup> The worksheet includes weekly gross income amounts of \$2,623.08 for Father and \$436.58 for Mother.

and lost that way but he also pulled money out of it and spent it yes.”

Transcript Volume II at 21. She indicated her name was on the Ameritrade account but she never touched it. She also indicated Father dissipated marital assets by spending money on another woman. Mother requested sixty percent of the marital property and, when asked the reasons, stated “because I have basically sole care of my daughter . . . and I do not make the kind of money that he makes.” *Id.* at 24. Mother indicated she and E. resided with her parents and did not pay for rent or utilities. She stated that she spent about \$500 per month on groceries and necessities for herself and E. and that she spent about \$60 per month in school fees. Mother also testified that she created a special needs trust for E. which held \$6,000.

[3] Father testified that he carried the financial burden for the family, and when asked “when you were supporting [E.] financially to your knowledge were there any months or was it common for there to be any months where [E.’s] expenses solely for [her] benefit were more than the about eight hundred and forty dollars per month that she would get for her social security disability,” he answered: “No. Never.” *Id.* at 50. He indicated that, based on what he knew, he believed that E.’s Social Security income was sufficient to meet her needs moving forward. Father testified his motorcycle accident occurred seven years earlier, his right leg was amputated, and he has a prosthetic. He indicated he was recently hospitalized due to an infection and testified, “if you get [an] infection in your leg . . . and it spreads then that just means the amputation just has to go higher so I could end up losing the ability of the lifestyle I have now being

below the knee and if I go above the knee that totally changes my capabilities.” *Id.* at 67. As for the funds in the Ameritrade account, he testified he had to use the funds in the past to sustain the parties’ lifestyle such as for house payments during his times of unemployment but that “the long term goal is to have those funds available for medical care.” *Id.* at 69. He indicated that Mother was not with him at the time of the accident and that he was the sole person injured. When asked with respect to the Ameritrade account, “it’s marital property but are you asking that to be set aside solely for your benefit as a result of your loss of limb and any potential medical expenses you may accrue in the future,” Father replied “I am.” *Id.* at 70.

[4] On August 4, 2022, the court issued a decree of dissolution. The court distributed the marital assets and debts between the parties, including awarding the Ameritrade account to Father, and it found “[t]otaling the assets and liabilities set off to each party . . . the Court finds that Mother has been awarded \$50,540 more than Father” and “[t]his reflects a 54% to 46% division of the marital estate, which the Court finds equitable based on all the facts and evidence submitted.” Appellant’s Appendix Volume II at 16. The court ordered that Mother shall continue to receive and be responsible for E.’s Social Security income and shall have the authority to handle all banking and monetary transactions necessary for the care of E. The court ordered Father to pay \$262 per week in child support.

## *Discussion*

[5] Father argues the trial court erred in dividing the marital property and in determining his child support obligation.

### *A. Marital Property*

[6] Father maintains the court failed to enter findings addressing the statutory factors to support a deviation from the presumed equal division of marital property. He further argues the court should have set aside the personal injury funds he received before dividing the marital property, and asserts that the funds were kept in a separate account, he will continue to incur substantial medical costs, and awarding Mother a portion of the funds results in a windfall to her.

[7] Mother contends the court's deviation from an equal division was just and reasonable but states that she "concedes that the Decree does not specifically make these findings or state its rationale under the [s]tatutory factors, other than the conclusory 'based on all the facts and evidence provided' language" and that she "does not dispute that limited remand is necessary under the [s]tatute for the trial court to elaborate on its findings supporting the unequal division of property in [her] favor." Appellee's Brief at 19-20. She also argues the personal injury funds were treated appropriately by the court, the accident occurred during the marriage, the parties used the funds for marital expenses, Father has a successful career despite the accident, and both parties were listed owners of the Ameritrade account.

[8] We review a claim that the trial court improperly divided marital property for an abuse of discretion, and we do not reweigh the evidence or assess the credibility of witnesses. *Eye v. Eye*, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006). The trial court must divide the marital property in a just and reasonable manner, including property owned by either spouse prior to the marriage, acquired by either spouse after the marriage and before the final separation of the parties, or acquired by their joint efforts. Ind. Code § 31-15-7-4. The “one pot” theory specifically prohibits the exclusion of any asset from the scope of the court’s power to divide and award. *Kendrick v. Kendrick*, 44 N.E.3d 721, 728 (Ind. Ct. App. 2015), *trans. denied*. While the court may ultimately determine a particular asset should be awarded to one spouse, it must first include the asset in its consideration as to how the marital estate should be divided. *Id.*

[9] Ind. Code § 31-15-7-5 provides:

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.

[10] When ordering an unequal division, the trial court must consider all of the factors. *Eye*, 849 N.E.2d at 701. Here, the parties presented extensive evidence regarding the marital property including the proceeds of the sale of the marital residence, Mother’s pension, and the parties’ retirement accounts, debts, and vehicles. They testified regarding the settlement funds received as a result of Father’s motorcycle accident, the use of the funds, and the extent of Father’s injuries. They also presented testimony regarding their employment, incomes, resources, and E.’s needs. The court’s distribution of the marital property resulted in Mother receiving \$50,540 more than Father and “reflect[ed] a 54% to 46% division of the marital estate.” Appellant’s Appendix Volume II at 16. While the evidence may support an unequal division of property, the court’s decree is devoid of any reason or explanation for its deviation from the presumption of an equal division. The court did not issue findings addressing the factors in Indiana Code § 31-15-7-5 including the parties’ contributions,

economic circumstances, conduct, and relative earning abilities. Further, we are unable to infer from the findings that the court considered the factors. *See Eye*, 849 N.E.2d at 703 (finding the trial court addressed one but not the other factors in Ind. Code § 31-15-7-5 and, “[a]lthough we acknowledge that ‘[t]he trial court’s exclusion of these factors from its written findings does not mean that it did not consider them,’ *Shumaker v. Shumaker*, 559 N.E.2d 315, 318 (Ind. Ct. App. 1990), we are unable to infer from the findings that the trial court did so”). Also, we are prohibited from reweighing the evidence. Accordingly, we remand to the trial court to either follow the statutory presumption or to set forth its rationale for deviating from the presumption that an equal division is just and reasonable. The court’s findings on remand should include its reasons for its treatment of the personal injury settlement funds remaining in the Ameritrade account. *See Chase v. Chase*, 690 N.E.2d 753, 756 (Ind. Ct. App. 1998) (finding that, while the evidence could have supported an unequal division of property in favor of either party, the decree was devoid of any reason for its deviation from the presumption of an equal division, noting this Court may not reweigh the evidence, and remanding to follow the statutory presumption or to set forth its rationale for deviating from the presumption that an equal division is just and reasonable).

#### B. *Child Support*

[11] Father further argues the trial court erred when it did not consider E.’s Social Security disability payments in calculating his child support obligation. He argues the Child Support Guidelines provide that Social Security disability



based on a parent's disability is included in the parent's income in calculating child support. He states: "The present case differs from the scenarios specifically addressed in the guidelines because the social security disability award for the benefit of the child is not based on a parent's disability but upon the adult child's own disability. Nevertheless, the guideline commentary states disability income should be considered even though it is not listed as [a] specific line item on the child support worksheet." Appellant's Brief at 17. Mother argues the court ordered that she continue to receive E.'s Social Security income and thus did take her benefit into consideration. She argues E.'s benefit is not based on a parent's disability but on E.'s own decreased earning capacity.

[12] We reverse a trial court's decision regarding child support if it is clearly erroneous or contrary to law. *Saalfrank v. Saalfrank*, 899 N.E.2d 671, 674 (Ind. Ct. App. 2008) (citing *Young v. Young*, 891 N.E.2d 1045, 1047 (Ind. 2008)). The Indiana Child Support Guidelines contain statements which appear to relate primarily to Social Security benefits paid based upon the disability of a parent.<sup>3</sup> Nevertheless, we note that the commentary to Indiana Child Support Guideline 3G states, "[a]lthough Social Security benefits are not reflected on Line 7 of the child support Worksheet, the benefit should be considered, and its effect and application shall be included in the written order for support of that child."

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<sup>3</sup> See Ind. Child Support Guideline 3A(1) (providing a definition of weekly gross income and stating "Social Security disability benefits paid for the benefit of the child must be included in the disabled parent's gross income. The disabled parent is entitled to a credit for the amount of Social Security disability benefits paid for the benefit of the child."); Child Support Guideline 3G(5) (addressing Social Security benefits received for a child based upon the disability of the custodial or noncustodial parent).

Here, Mother testified that E. receives a monthly Social Security disability benefit of approximately \$840. The court ordered that Father pay \$262 per week in support, which is the amount recommended in Mother's proposed child support worksheet. Her proposed worksheet included amounts for the weekly gross incomes of the parties but did not include any adjustments.<sup>4</sup> The court heard testimony regarding the amounts spent on behalf of E. for housing, groceries, and school fees, E.'s Medicaid coverage, the amount held in a trust for E., and the extent to which E.'s expenses were covered by her disability income. In light of the record, we remand for the trial court to determine and make findings as to whether E.'s overall financial needs are satisfied in whole or in part by the Social Security benefit she receives and for entry of Father's support obligation which, if appropriate, includes an adjustment for the income E. receives in Social Security benefits.

[13] For the foregoing reasons, we reverse and remand consistent with this opinion.

[14] Reversed and remanded.

Bailey, J., and Weissmann, J., concur.

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<sup>4</sup> Father does not raise an issue regarding the parties' weekly gross incomes.