MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Adam Craig Thomas,
Appellant-Respondent,

v.

Amy Thomas,
Appellee-Petitioner.

August 11, 2021

Court of Appeals Case No. 20A-DR-900

Appeal from the Allen Superior Court

The Honorable Charles F. Pratt, Judge

The Honorable Lori K. Morgan, Magistrate

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

Brown, Judge.

[1] Adam Craig Thomas ("Husband") appeals the trial court's decree of dissolution and claims the court erred in awarding legal custody, dividing marital property, and calculating his child support obligation. We affirm in part, reverse in part, and remand.

Facts and Procedural History

[2] This case involves a dissolution of the marriage between two physicians. Over five years passed between the filing of the petition for dissolution and the trial court's Second Amended Decree of Dissolution. It encompasses a myriad of hearings involving twenty-two volumes of transcript and exhibits spanning twenty-five volumes.

[3] Husband and Amy Thomas ("Wife") were married and have two daughters, Le.T., born in August 2008, and La.T., born in December 2010. On April 9, 2015, the parties separated, and Wife filed a petition for dissolution of marriage. On July 21, 2015, the court held a hearing regarding provisional orders. On August 11, 2015, the court entered an order awarding the parties joint legal custody, Wife primary physical custody, and Husband parenting time. It ordered Husband to pay Wife $777 in child support per week effective July 24, 2015, Wife to retain temporary exclusive possession of the marital residence and be solely responsible for the mortgage as well as the mortgage on a cabin in Michigan, and Husband to pay and keep current each of the monthly payments on his Dupont Hospital shares. The order noted that all provisional orders were without prejudice and could be modified, ordered the parties to mediation, and deferred all other issues.

[4] On July 1, 2016, Husband filed a Petition to Modify Child Support Beginning August 1, 2016, asserting that Wife's employment of a full-time au pair for August 2016 through July 2017 was not economically reasonable or needed due to their youngest child's 2016-2017 full-time attendance in public school. On August 18, 2016, Wife filed a response, a request for attorney fees, and a petition for modification of provisional support. She asserted that Husband's petition undermined a previous agreement that the best interest of the children would be served by an au pair's assistance and that Husband had a pay increase of $100,000 over the amount previously considered by the court.

[5] On March 17, 2017, Husband filed an "Amended Verified Petition to Modify Child Support Beginning August 1, 2016" and "Verified Petition for Modification of Provisional Child Support and Request for Attorney Fees." Appellant's Appendix Volume IV at 89 (capitalization omitted). In part, Husband asserted that he was entitled to a modification of his support obligation due to a change in his income during 2016 and 2017 as a result of the Department of Veterans Affairs hiring in-house urologists. On July 19, 2017, Wife filed an "Objection to Presentation of Evidence at Hearing on July 24, 2017 on [Husband's]: 'Amended Verified Petition to Modify Child Support Beginning August 1, 2016, Filed March 17, 2017'" and asserted that Husband's amended petition did not comply with Ind. Trial Rule 15(A). *Id.* at 93 (capitalization omitted). At a July 24, 2017 hearing, the trial court stated that it had reviewed Trial Rule 15 and decided it was "not going to permit the amendment to the Petition to Modify Support or the Petition for the

Modification for Provisional Child Support at this point . . . ." Transcript Volume 2 at 228.

[6] On January 16, 2018, Husband filed a Notice and Motion for Recusal of Magistrate stating the magistrate had advised the parties' counsel that she had or previously had a personal working relationship with Wife's business valuation expert, Greg Green, and asserted the testimony and reports of the valuation experts were expected to be complex and have a significant impact on the court's final orders. That same day, Wife filed a "Notice of Removal of Greg Green, C.P.A., As Witness" and a "Motion to Deny: '[Husband's] Notice and Motion for Recusal of Magistrate,'" asserting that she would immediately withdraw Green "as her valuator and will transition information, files and the difficulties caused by the lack of sufficient information, to a different business valuator." Appellant's Appendix Volume IV at 104-105.

[7] On January 26, 2018, the magistrate held a hearing. She stated that the conflict asserted by Husband was resolved by the withdrawal of Green as the business valuation expert and she would address the matter if Wife wished to call Green to address side issues. During direct examination of Husband, Wife's counsel objected to a question regarding Husband's income in 2016, and the trial court stated that it had "made it pretty clear that the Court is limiting the income to 2015" and sustained the objection. Transcript Volume 4 at 7. That same day, the court entered an order denying Husband's Motion for Recusal of Magistrate.

[8] After multiple hearings, Wife filed a Motion for Leave of Court to Re-Open Case and to Present Newly Discovered Evidence. On August 16, 2018, the court granted the motion.

[9] On October 31, 2018, the court ordered the parties to file and exchange witness lists that include a brief summary of anticipated testimony, by January 15, 2019. The order stated that failure to include a witness may preclude a party from calling the witness. Wife included Green on her witness list, and stated that Green may testify to "his efforts to obtain information for [Husband's] business interests and the costs related thereto" and his concerns "as to his invoices." Appellant's Appendix Volume IV at 247.

[10] Meanwhile, on August 7, 2018, Wife filed a Motion for Interim Award of Attorney's Fees and Litigation Costs alleging that "[v]irtually every issue that might be contested has been contested, and the Court has been presented with scores of motions ranging from the significant and reasonable to frivolous and dilatory." August 7, 2018 Motion at 2. She alleged the attorney fees and litigation costs exceeded $450,000 and had exhausted her financial resources and left her with significant debt. On January 16, 2019, the trial court ordered Husband to pay Interim Attorney Fees and Litigation Costs in the sum of $75,000.[1]

[1] This order was signed by the magistrate on January 16, 2019, and by the trial court judge on January 23, 2019. Husband lists the January 16, 2019 order as an appealed order in his April 17, 2020 notice of appeal

[11] With respect to a 6.25% interest in Lithotripsy of Northern Indiana, LLC ("Lithotripsy"), owned by the parties, Husband's counsel presented the testimony of Jason Thompson, the director of evaluation and mitigation services at the Sponsel CPA Group, at a March 22, 2019 hearing. Thompson referred to a valuation of Lithotripsy performed by Alvarez & Marsal, and Wife's counsel objected and asserted there was nothing in the record about Alvarez & Marsal and a valuation of Lithotripsy. After some discussion related to an Alvarez & Marsal appraisal referred to as Exhibit L5, Wife's counsel stated: "We stipulated to one twenty-five (125). We didn't stipulate to any valuation at all. We stipulated to one twenty-five (125) going to [Husband] because it couldn't go to anybody else at the end of this long drawn out divorce." Transcript Volume 20 at 94. Wife's counsel objected to the admission of Exhibit L5, and the court sustained the objection. Husband's counsel later referenced Exhibit K5, a "Calculation of Lithotripsy of Northern Indiana LLC distributions 2014 to 2018," and, after further discussion, stated: "[W]e're trying to provide the Court with evidence to allow it to conceptualize this distribution being separate from the entity. That's the whole reason for this. We're not valuing Litho. There's been an agreement to that." *Id.* at 104, 108.

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and his April 29, 2020 amended notice of appeal. Husband's July 15, 2020 amended notice of appeal also lists this order as an appealed order and identifies it as the January 23, 2019 order. This order is not included in the Appellant's Appendices, and he does not specifically mention it in his appellant's brief or reply brief.

[12] At a March 29, 2019 hearing, Husband's counsel objected to Green testifying. Wife's counsel stated: "I didn't know I was going to call him as rebuttal until [Husband] got on the witness stand and is trying to convince you Your Honor that although he receives passive distributions from [Lithotripsy] he wants you to believe that he's an employee which he's not." *Id.* at 137-138. He also stated that there was "nothing in evidence right now about the value of the Litho." *Id.* at 138. The court allowed Green to testify regarding "the issue of the fees incurred" and as a rebuttal witness. Green testified that the net present valuation of Lithotripsy was $723,100.66.

[13] On April 20, 2020, the court entered a Second Amended Decree of Dissolution of Marriage.[2] The court found Wife's concerns related to Husband's mental health were credible, awarded Wife sole legal custody of the children, and granted Husband parenting time.

[14] The court found that the parties benefited significantly from two investments made with marital assets, an investment in Dupont Hospital and one in Lithotripsy. In rejecting Husband's assertion that the distributions from the Lithotripsy investment were his separate income, the court found that Husband was not employed by and did not provide contract services for Lithotripsy. It found that $375,158 in distributions from Lithotripsy after the date of the filing of the petition for dissolution constituted marital assets subject to division. The

[2] On March 19, 2020, the court entered a Decree of Dissolution of Marriage. On April 6, 2020, the court entered an Amended Decree of Dissolution of Marriage.

court awarded Wife 31.8 shares of Dupont Hospital at a value of $169,938, post-separation distributions on 31.8 shares of Dupont Hospital at a value of $187,344, and 41.88666 shares of Dupont Hospital at a value of $223,840. It awarded Husband post-separation distributions on 41.88666 shares of Dupont Hospital in the amount of $246,768. It also awarded him the interest in Lithotripsy.

[15] The court stated that the parties disagreed as to the value of Lithotripsy, "[t]he parties have stipulated that in the Operating Agreement for the LLC, the fair market value is listed as $125,000.00," and Wife asserted that the fair market value was much higher than that. Appellant's Appendix Volume II at 180-181. It cited Green's testimony that the present value of the asset was $723,100.66, which it found credible "as the distributions received from the Lithotripsy [] investment during the pendency of the proceedings which are in the sum of $375,158.00 are far greater than the $125,000.00 stated fair market value of Lithotripsy . . . ." *Id.* at 181.

[16] The court valued the net marital estate at $4,283,372.66 and found that a just and reasonable distribution would be to distribute sixty percent of the marital estate to Wife and forty percent to Husband.

[17] The court found that Dr. Bart Ferraro's participation in the proceeding was necessary because the psychological testing that was performed on Husband by Dr. Stephen Ross in October of 2015 was not disclosed and ordered Husband to pay Dr. Ferraro's fees. It entered an attorney fee award against Husband for

$314,872.37, which included seventy-five percent of the costs of Dr. Michelle Miller's Trial Rule 35 evaluation and Dr. Ferraro's costs.[3]

[18] The court denied Husband's July 1, 2016 Verified Motion to Modify Child Support Beginning August 1, 2016. It granted Wife's August 18, 2016 Petition to Modify Child Support and ordered that Husband's weekly child support obligation be increased to $956 retroactive to August 18, 2016, through the date of the entry of the decree. It ordered Husband to pay $785 in weekly child support commencing the date of the entry of the decree.[4]

[19] Husband filed a notice of appeal on April 17, 2020, and an amended notice of appeal on April 29, 2020. Following this Court's June 5, 2020 order which in part temporarily stayed the appeal, the trial court entered an order on July 2, 2020, along with redacted versions of the Decree of Dissolution of Marriage, the Amended Decree of Dissolution of Marriage, and the Second Amended Decree of Dissolution of Marriage. On July 8, 2020, Wife filed a motion to correct error regarding some of the redactions. On September 22, 2020, the trial

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[3] The order states the parties filed a stipulation on February 17, 2016, regarding the selection of a mental health examiner pursuant to Ind. Trial Rule 35, and stipulated to Dr. Ross performing the examination on Wife and Dr. Miller performing the examination on Husband. The court found that, at the time the parties executed the stipulation, Husband had not disclosed to Wife that Dr. Ross was already involved in the litigation, he had been retained as a consultant by Husband, and he had already performed psychological testing on Husband.

[4] The Second Amended Decree of Dissolution of Marriage states that the child support obligation worksheets were attached as Exhibit A with respect to the $956 amount and Exhibit B with respect to the $785 amount. The copy of the Second Amended Decree in the Appellant's Appendix does not contain attached copies of the worksheets. The court's March 19, 2020 Decree of Dissolution and the Nunc Pro Tunc Decree of Dissolution of Marriage dated September 22, 2020, contain child support obligation worksheets which appear to be marked as Exhibits A and B.

court granted in part and denied in part Wife's motion, found that some paragraphs in its previous orders qualified for exclusion from public access under Access to Court Records Rules 1 and 5(B)(8), and entered "Nunc Pro Tunc" versions of the Decree of Dissolution, the Amended Decree of Dissolution of Marriage, and the Second Amended Decree of Dissolution of Marriage.[5] September 22, 2020 Order at 14.

Discussion

[20] Before addressing Husband's arguments, we observe that he does not cite to the record for a number of his arguments. While he cites to the record in his statement of facts, Ind. Appellate Rule 46(A)(8)(a) requires citation to the record in the argument section. *See* Ind. Appellate Rule 46(A)(8)(a) ("Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.").[6] His failure to provide supporting citations compelled this Court to

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[5] "A nunc pro tunc entry is defined in law as 'an entry made now of something which was actually previously done, to have effect as of the former date.'" *Cotton v. State*, 658 N.E.2d 898, 900 (Ind. 1995) (quoting *Perkins v. Haywood*, 132 Ind. 95, 101, 31 N.E. 670, 672 (1892)). Such an entry may be used to either record an act or event not recorded in the court's order book or to change or supplement an entry already recorded in the order book. *Id.* Its purpose is to supply an omission in the record of action really had, but omitted through inadvertence or mistake. *Id.*

Pursuant to this Court's October 7, 2020 order that Husband file his Appellant's Brief within thirty days of the date the Notice of Completion of Transcript was served and following grants of Husband's motions for an extension of time and to amend his brief, Husband filed his Amended Appellant's Brief on February 28, 2021, and his Appendices on January 28, 2021. The Appendices do not include copies of the July 2, 2020, or September 22, 2020 versions of the trial court's orders, which Husband does not mention or cite in his brief.

[6] At points in his brief, Husband mentions exhibits by number but does not specify the volume of the twenty-five volumes of exhibits or page where they appear. Ind. Appellate Rule 22(C) provides: "Any factual statement shall be supported by a citation to the volume and page where it appears in an Appendix, and if not

locate the same material in his statement of facts in his forty-eight page brief and then review the citations in his statement of facts. This burdensome process has impeded our review especially in light of the fact that the trial court's order is 105 pages and the lengthy record. It is not the duty of this Court to search these materials to find support for Husband's arguments. To the extent that Husband's arguments are based on portions of his statement of facts that do not contain citations to the record or when the facts upon which he is relying are unclear, we find that his arguments are waived. *See Legacy Healthcare, Inc. v. Barnes & Thornburg*, 837 N.E.2d 619, 639 n.29 (Ind. Ct. App. 2005) (noting that the court on appeal will not "scour the record in search of evidence in support [of an appellant's] claims"), *reh'g denied*, *trans. denied*; *Vandenburgh v. Vandenburgh*, 916 N.E.2d 723, 727 (Ind. Ct. App. 2009) ("As explained above, we are not obliged to undertake the burden of searching the record and stating [the father's] case for him. We accordingly decline to scour the nearly two hundred pages of transcript . . . in an attempt to find the evidence on which [the father] relies, and we therefore cannot address that allegation of error."). To the extent that Husband's statement of facts or argument cite to relevant portions of the record, we will attempt to address the merit of his arguments.

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contained in an Appendix, to the volume and page it appears in the Transcript or exhibits, e.g., Appellant's App. Vol. II p.5; Tr. Vol. I, pp. 231-32."

[21] The Indiana Supreme Court has expressed a "preference for granting latitude and deference to our trial judges in family law matters." *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993). Appellate deference to the determinations of trial court judges, especially in domestic relations matters, is warranted because of their unique, direct interactions with the parties face-to-face. *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011).

[22] When a trial court has made findings of fact, we apply the following two-step standard of review: whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions. *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind. 1997). Findings will be set aside if they are clearly erroneous. *Id.* Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. *Id.* 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. *Id.*

[23] Husband claims the trial court erred in (A) awarding Wife sole legal custody; (B) dividing the marital property; and (C) calculating child support.

A. *Custody*

[24] Husband argues that the trial court abused its discretion in awarding Wife sole legal custody. He asserts that the evidence establishes that the children are thriving and that he and Wife are highly cooperative with respect to the parenting schedule. He also asserts the court improperly relied upon Dr. Ferraro's testimony.

[25] We review child custody determinations for an abuse of discretion. *See Gonzalez v. Gonzalez*, 893 N.E.2d 333, 335 (Ind. Ct. App. 2008). Ind. Code § 31-17-2-13 provides "[t]he court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child." Ind. Code § 31-17-2-15 provides:

> In determining whether an award of joint legal custody under section 13 of this chapter would be 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. The court shall also consider:
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> (1) the fitness and suitability of each of the persons awarded joint custody;
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> (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;
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> (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;
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> (4) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
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> (5) whether the persons awarded joint custody:
>
> (A) live in close proximity to each other; and
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> (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.

[26] "'Joint legal custody', for purposes of . . . IC 31-17-2-13 . . . and IC 31-17-2-15, means that the persons awarded joint custody will share authority and responsibility for the major decisions concerning the child's upbringing, including the child's education, health care, and religious training." Ind. Code § 31-9-2-67.

[27] The factor under subsection (2) of Ind. Code § 31-17-2-15 is of particular importance in making legal custody determinations. *Milcherska v. Hoerstman*, 56 N.E.3d 634, 641 (Ind. Ct. App. 2016) (citations omitted). Where the parties have made child-rearing a battleground, joint custody is not appropriate. *Id.* at 642. "Indeed, to award joint legal custody to individually capable parents who cannot work together is tantamount to the proverbial folly of cutting the baby in half in order to effect a fair distribution of the child to competing parents." *Id.* (citing *Swadner v. Swadner*, 897 N.E.2d 966, 974 (Ind. Ct. App. 2008)). We will reverse a trial court's grant of joint legal custody when the evidence indicates the joint custody award "constitutes an imposition of an intolerable situation upon two persons who have made child rearing a battleground." *Swadner*, 897 N.E.2d at 974 (citation omitted). The primary concern of the courts with respect to legal custody is the welfare of the children and not the wishes of the parents. *Carmichael v. Siegel*, 754 N.E.2d 619, 635 (Ind. Ct. App. 2001).

[28] The trial court's order detailed the parties' disputes and found that the record was "replete with instances of the parties' inability to communicate and cooperate in advancing the children's welfare" and that "[o]ver the course of the proceedings, this pattern of behavior, the dismissiveness and lack of

responsiveness to one another's inquiries was fairly routine in the parties' interactions with one another." Appellant's Appendix Volume II at 133. It found the parties do not agree on certain medical matters involving the children and have different ideas about post-secondary education. The court found that there was "a lot of unnecessary gamesmanship that occurred between the parties before" parenting time agreements were reached. *Id.* at 136. It also found there were concerns with Husband's lack of empathy for the children and that his poor disciplinary and parenting techniques were problematic in the context of the parties' desire to raise healthy children. The court noted the significant issues with communication and cooperation, the sheer number of pleadings, and the demeanor and comportment of the parties in the courtroom. It found that "[c]hild rearing has become a battleground for these parties and their children are in the middle of their battle and may likely suffer in the future as a result." *Id.* at 147. It found that granting Wife sole legal custody of the minor children was in the children's best interests.

[29] To the extent Husband argues the trial court improperly relied upon Dr. Ferraro's testimony in determining custody, he cites Ind. Evidence Rule 702 and argues expert testimony is admissible only if it is based on reliable scientific principles.[7] However, Husband does not cite to the record to suggest he raised

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[7] Ind. Evidence Rule 702 provides:

> (a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific,

Ind. Evidence Rule 702 before the trial court. Our review of Volume 17 of the transcript, which is the volume in which Dr. Ferraro's testimony appears, reveals that Husband objected to the court's order to reopen the evidence based on newly discovered evidence but does not reveal a specific mention of Rule 702 or objection to Dr. Ferraro's testimony on that basis. Rather, Husband's counsel extensively cross-examined Dr. Ferraro who acknowledged that he had not met with Husband. We find Husband waived this issue.[8]

[30] Based on the trial court's comments and extensive findings regarding custody, we cannot say that reversal is warranted. In light of the parties' history of non-cooperation, we conclude that the trial court did not err in awarding Wife sole legal custody.

B. *Division of Marital Property*

[31] The division of marital property is within the sound discretion of the trial court. *Love v. Love*, 10 N.E.3d 1005, 1012 (Ind. Ct. App. 2014). We consider only the evidence most favorable to the court's disposition of the property. *Id.* Although the facts and reasonable inferences might allow for a different conclusion, we

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> technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.

[8] Under the heading, "The court erroneously relied upon testimony of Dr. Bart Ferraro," Husband asserts that "[t]he court erroneously allowed [Wife] to re-open evidence to call Dr. Bart Ferraro [], and then abused its discretion in relying upon his testimony." Appellant's Amended Brief at 39. Husband does not develop this argument and focuses on the trial court's reliance on Dr. Ferraro's testimony.

will not substitute our judgment for that of the trial court. *Id.* The court must divide the marital property in a just and reasonable manner, and an equal division is presumed just and reasonable. *McGrath v. McGrath*, 948 N.E.2d 1185, 1187-1188 (Ind. Ct. App. 2011) (citing Ind. Code § 31-15-7-5). The presumption may be rebutted by evidence of certain factors including the contribution of each spouse to the acquisition; the extent to which the property was acquired before the marriage or through inheritance or gift; the economic circumstances of each spouse at the time of the disposition; the conduct of the parties during the marriage as related to the disposition or dissipation of their property; and the earnings or earning ability of the parties. *See* Ind. Code § 31-15-7-5. The party challenging the court's division must overcome a strong presumption that it considered and complied with the applicable statute. *McGrath*, 948 N.E.2d at 1188. This presumption is one of the strongest presumptions applicable to our consideration on appeal. *Id*. The disposition of the marital property is to be considered as a whole, not item by item. *Id.* We review the valuation of property for an abuse of discretion, which does not occur if the valuation is within the range of values supported by the evidence. *Goossens v. Goossens*, 829 N.E.2d 36, 38 (Ind. Ct. App. 2005).

1. *$206,167 Debt*

[32] Husband argues that the trial court erred by disregarding a $206,167 debt that existed on the date of filing and by failing to give him a credit for payments on the debt during the pendency of the action. He also argues that Wife stipulated to the value of the debt.

[33] We cannot say the trial court disregarded the debt. In its Second Amended Decree of Dissolution, the court found that the parties agreed after the petition for dissolution was filed to deposit money into a joint account in order to pay their monthly financial obligations, Wife would deposit 40% of the amount required to pay their debts, Husband would deposit 60%, the parties arrived at these percentages based upon a consideration of their respective percentages of their combined income, and they utilized this method of bill payment until the court entered its provisional orders. It noted that its August 11, 2015 provisional order required Husband to pay the monthly loan payments on the Dupont Hospital shares while Wife was ordered to pay the monthly expenses associated with the marital residence as well as the monthly mortgage on the Michigan property. It also found that Wife made all of the student loan payments after October 2016. The court found that the three loans attributable to the purchase of the Dupont Hospital shares were reduced from a combined balance of $206,167 near the date of the petition for dissolution to a combined balance of $18,252 on June 26, 2018, while the mortgage on the Michigan property which was in the sum of $350,983 on May 28, 2015, and was assigned to Wife, merely decreased to $271,866 as of August 1, 2018. It found that "[t]he difference is a result of the way that the debt was assigned by the Court and the terms of the loans and other obligations that were being paid." Appellant's Appendix Volume II at 184. It found some of Husband's monthly obligations decreased or were paid off while Wife's payments remained constant or increased. The court found that, in light of the length of the proceedings that was unanticipated at the time of the entry of the provisional

orders and the fact that no order was entered regarding the provisional payment of the parties' student loans which were paid by Wife after October 2016, Wife paid more and a greater percentage of the marital obligations than was intended or anticipated.

[34] In his facts section, Husband states the parties stipulated to the value of the 1st Source Bank loans and cites in part Transcript Volume 15 at 136-137, 193-203. *See* Appellant's Amended Brief at 10.[9] However, the cited pages do not refer to a $206,167 debt. Husband also cites Wife's Exhibits 136 and 183. Exhibit 136 is dated August 20, 2018, includes a table of assets and liabilities, and includes signature lines for Wife's counsel and Husband's counsel but is not signed by either.[10] With respect to Husband's citation of Wife's Exhibit 183, that exhibit contains a spreadsheet of assets and debts with a notation at the top which states, "Red = Items NOT stipulated," the only specific reference in the amount of $206,167 in Exhibit 183 is as the total debt of Husband and the amount of $206,167 appears in red text. Exhibits Volume 6 at 159. When Wife's counsel handed Wife Exhibit 183 and asked her if those were her assets and Husband's assets on the balance sheet, she answered affirmatively. When asked if she

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[9] In his statement of facts, Husband states that Wife "reversed course, and argued to the court that the value of the [1st Source Bank loans] should be valued at $0 because the liabilities no longer existed." Appellant's Amended Brief at 10.

[10] Under Liabilities, it lists a "Dupont Unit Loan – 1st Source" valued at $93,236 assigned to Husband, a "Dupont Unit Loan – 1st Source #600" valued at $55,319 assigned to Husband, and a "Dupont Unit Loan – 1st Source" valued at $57,612 assigned to Husband. Exhibits Volume 5 at 207. Following the table, the exhibit includes the following statements: "Dupont Loan #600 $0 as of December 04, 2017"; "Dupont Loan #204 $10,416 as of June 19, 2018"; and "Dupont Loan #674 $7836 as of June 26, 2018." *Id.*

agreed to the distribution, Wife answered: "Yeah so no I do not agree to the distribution." Transcript Volume 18 at 40. Wife's counsel later stated: "183 is not our proposal for property distribution." Transcript Volume 21 at 60.

[35] Even assuming that Wife stipulated to the value of the debt at the time the petition for dissolution was filed, we cannot say she stipulated to the value of the debt at the time the court divided the marital property or valued the debt. To the extent Husband argues that the trial court abused its discretion when it failed to value the 1st Source Bank loans at $206,167 or give him credits for payments during the pendency of the action, the Indiana Supreme Court "has made clear that the trial court has discretion when valuing the marital assets to set any date between the date of filing the dissolution petition and the date of the hearing," "[t]he selection of the valuation date for any particular marital asset has the effect of allocating the risk of change in the value of that asset between the date of valuation and date of the hearing" and "[w]e entrust this allocation to the discretion of the trial court." *Quillen v. Quillen*, 671 N.E.2d 98, 102-103 (Ind. 1996). We cannot say that the trial court abused its discretion in valuing the 1st Source Bank loans in light of its findings that Wife made payments on long-term obligations.

2. *Value of Lithotripsy*

[36] Husband argues the trial court improperly failed to assign the parties' $125,000 stipulated value to Lithotripsy. He argues that the court erroneously allowed and relied upon Green's testimony in determining Lithotripsy's value after

Green was withdrawn as a witness as to business valuation testimony. Wife argues there are no signed written stipulations concerning Lithotripsy, it makes no sense that the investment in Lithotripsy would have a stipulated value of only $125,000 given that the investment produced more than $375,000 in four years, and Husband's anticipated witness list filed on January 15, 2019, listed multiple witnesses to testify regarding the fair market value of Lithotripsy.

[37] The trial court found that the 6.25% interest that the parties owned in Lithotripsy was a marital asset includable in the marital estate, the parties disagreed as to the value of the asset, the parties "have stipulated that in the Operating Agreement for the LLC, the fair market value is listed as $125,000.00," and that Wife asserted the fair market value of Lithotripsy was much higher than the value listed in the operating agreement. Appellant's Appendix Volume II at 180-181. It found that the $375,158 in distributions from Lithotripsy after the date of the filing of the petition for dissolution were marital assets subject to division. It found Green to be a credible valuation expert and found his testimony to be credible "as the distributions received from the Lithotripsy [] investment during the pendency of the proceedings which are in the sum of $375,158.00 are far greater than the $125,000.00 stated fair market value of Lithotripsy . . . ." *Id.* at 181. The court found that the value of the parties' interest in Lithotripsy, $723,100.66, should be reduced by the distributions made since that date because the court had previously found those distributions to be a marital asset. It found that the net value of the parties' interest in Lithotripsy for purposes of its distribution was $347,942.66 and that,

"[s]ince [Husband] is a qualified investor and wants to retain this marital investment, the Court will allocate the marital interest in Lithotripsy [] in the sum of $347,942.66 to [Husband]." *Id.*

[38] To the extent Husband asserts the court erroneously relied on Green's testimony, the admission of evidence is entrusted to the sound discretion of the trial court. *In re A.J.*, 877 N.E.2d 805, 813 (Ind. Ct. App. 2007), *trans. denied*. An abuse of discretion only occurs where the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id.* "The fact that evidence was erroneously admitted does not automatically require reversal, and we will reverse only if we conclude the admission affected a party's substantial rights." *Id.*

[39] Following Wife's filing of her January 16, 2018 Notice of Removal of Greg Green, C.P.A., As Witness, she ultimately included Green on her witness list and her Notice of Compliance with Court Order to Exchange Exhibits and Witness Summaries, which were filed on January 16, 2019, stated that Green may testify to "his efforts to obtain information for [Husband's] business interests and the costs related thereto" and "[t]estimony concerning as to his invoices." Appellant's Appendix Volume IV at 247. The court ruled that Green was allowed to testify on the issue of fees incurred and with respect to

the rebuttal issue. Under these circumstances, we cannot say that the trial court abused its discretion in admitting Green's testimony.[11]

[40] We cannot say that the portions of the record cited by Husband support the idea that the parties stipulated to a value of $125,000 for the interest in Lithotripsy.[12] While the trial court found that the parties "have stipulated that in the Operating Agreement for the LLC, the fair market value is listed as

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[11] In *McCullough v. Archbold Ladder Co.*, which Husband cites, the trial court entered a pre-trial order in November 1989 pursuant to which the parties were to file and exchange witness lists. 605 N.E.2d 175, 177 (Ind. 1993). The order provided that "any witness or exhibit disclosed within thirty days of trial shall be permitted during trial only by leave of court and only for good cause shown," and that "pursuant to Indiana Trial Rule 16, this Order, together with the filings herein ordered, shall control these proceedings, constitute the pre-trial order, and be strictly enforced by the court." *Id.* On appeal, the Indiana Supreme Court held that "the nondisclosure of a rebuttal witness is excused only when that witness was unknown and unanticipated; known and anticipated witnesses, even if presented in rebuttal, must be identified pursuant to a court order, such as a pre-trial order, or to a proper discovery request." *Id.* at 179. Unlike in *McCullough*, Wife included Green on her witness list. We find *McCullough* to be distinguishable.

[12] While Husband does not cite to the record in his argument regarding the valuation of Lithotripsy, he asserts in his statement of facts that the parties stipulated to Lithotripsy having a fair market value of $125,000 and cites page 194 of Volume 15 of the Transcript. Elsewhere in his statement of facts, he asserts that the trial court accepted the stipulation of $125,000 "with the parties reserving the right to 'make the clarifying comments that [they] . . . wish.'" Appellant's Amended Brief at 11 (citing Transcript Volume 15 at 195; and "Ex. 136, p. 206"). Wife's Exhibit 136 is a document consisting of three pages. *See* Exhibits Volume 5 at 205-207. It appears that "Ex. 136, p. 206," Appellant's Amended Brief at 11, is a reference to page 206 of Exhibits Volume 5 on which Exhibit 136 appears.

Page 194 of Volume 15 of the Transcript includes a discussion of Exhibit 136. Wife's Exhibit 136 is an unsigned list of assets and liabilities and includes an estimated value of $125,000 next to the title, "Lithotripsy of Northern Indiana, LLC-[Husband]." Exhibits Volume 5 at 206. While some assets and liabilities are divided in the exhibit, the amount attributed to Lithotripsy is not allocated between Husband and Wife in Exhibit 136. At an August 16, 2018 hearing, Wife described Exhibit 136 as "a marital balance sheet and a – I guess I can describe it as partially filled out [chuckle]." Transcript Volume 15 at 187 (bracketed text appears in original). When asked if she had an objection to Wife's Exhibit 136, Husband's counsel stated: "I'm trying to figure out a way Your Honor to allow us to go forward on this . . . because some values are in here that would be okay only if we have some other – other stipulations that [Wife's Counsel] and I are working on it at present." *Id.* at 188. After some discussion, the court adjourned the hearing. During the next hearing, the court asked: "So 136 is admitted by stipulation is that I just want to make sure is that correct?" *Id.* at 194. Wife's counsel stated "there's a couple of things we must clarify and we're going to point those out so that the Court doesn't take those as absolute based upon this exhibit." *Id.* at 195. The court stated that "we'll show 136 is admitted and then I'll allow the parties to make the clarifying comments that you wish . . . to make . . . ." *Id.*

$125,000," it also found that Wife asserted that "the fair market value of Lithotripsy is much higher than the value listed in the operating agreement." Appellant's Appendix Volume II at 180-181. While Husband points in his statement of facts to certain statements of Wife's counsel, he also acknowledges that Wife ultimately requested that the trial court value Lithotripsy at a significantly higher value than $125,000. We cannot say that Husband has demonstrated that Wife stipulated to a valuation of $125,000 for purposes of the division of marital property, that the trial court accepted such a stipulation, or that reversal is warranted on this basis.

3. *Business Entity Distributions*

[41] Husband next argues the trial court erred when it counted the parties' business entity distributions as income in calculating his child support obligation and also as an asset in the property distribution. He contends that the court treated the parties' distributions as income for nearly five years from the first provisional child support order through the decree and in the post-decree child support order. He also asserts that, even if the court properly double-counted the distributions as both income for child support and an asset, the court erred by failing to reduce said distributions by the taxes paid on the distributions and in valuing his post-filing Lithotripsy distributions at $375,158. In his argument section relating to business entity distributions, Husband cites to the record only once, which is a citation to Wife's proposed findings of fact. In his initial brief, Husband mentions only Lithotripsy in his argument and does not specify the

other business entities to which he refers. In his reply brief, Husband also mentions Dupont.

[42] To the extent Husband points to the record in his statement of facts for his assertion that the trial court included the parties' distributions as income in the provisional child support calculation, we observe that the court ordered Husband to pay Wife $777 per week effective July 24, 2015, in its August 11, 2015 order. In an attached worksheet, the court found Husband's weekly gross income to be $11,417.

[43] The court's Second Amended Decree of Dissolution of Marriage mentioned the provisional orders, stated that it had found Husband's gross weekly income to be $11,417, cited Wife's Exhibit 88, and stated that the court "arrived at its calculation of [Husband's] gross weekly income based upon a consideration of the gross weekly income from his employment at NEIU as well as his gross distributions from Lithotripsy and his Dupont Hospital units."[13] Appellant's Appendix Volume II at 130.

[44] With respect to the Dupont distributions, we note those distributions were included in the Husband's 2014 gross income sources. The court also awarded Husband "Post-sep distributions on 41.88666 Shares Dupont Hospital" in the

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[13] Wife's Exhibit 88 is a 76-page transcript of the July 21, 2015 hearing as well as supplemental exhibits including a financial declaration and a child support obligation worksheet. *See* Exhibits Volume 4 at 118-222. It also includes a document titled "Adam Craig Thomas 2014 Primary Gross Income Sources" and lists "DuPont Share Distributions," "Healthtronics," "NEIU," and "VAMC" with corresponding amounts totaling $593,702.19. *Id.* at 201. This annual amount equates to a gross weekly income of $11,417.34.

amount of $246,768 in its division of the marital estate. Appellant's Appendix Volume II at 206. We conclude that the court erred in considering Husband's Dupont distributions as both income for purposes of determining his child support payments as set forth in its provisional order and later property for purposes of dividing the marital estate. *See Fischer v. Fischer*, 68 N.E.3d 603, 611 (Ind. Ct. App. 2017) (holding that the value of stock options "cannot be both property and income depending on the year and circumstances"), *trans. denied*; *Scoleri v. Scoleri*, 766 N.E.2d 1211, 1218 (Ind. Ct. App. 2002) (observing the trial court entered an order awarding the father his 401(k) as part of the marital property distribution, holding that "to utilize the return from [father's] early withdrawal from his 401(k) in the calculation of his weekly gross income would usurp the equitable split of the marital property in the summary dissolution decree," and concluding that the court erred when it utilized the father's return for the early withdrawal of his 401(k) account in calculating his child support obligation). To the extent Husband challenges an inclusion of Lithotripsy distributions in the calculation of child support and as an asset, we note that Lithotripsy was not specifically mentioned in the document detailing his 2014 gross income sources. However, as indicated above, the trial court's Second Amended Decree of Dissolution of Marriage stated that the calculation of Husband's gross weekly income in the provisional order was based upon a

consideration of distributions from Lithotripsy. Accordingly, we remand for reconsideration of this issue.[14]

[45] With respect to Husband's weekly gross income as it relates to the court's determination of his child support obligation effective as of the entry of the decree of dissolution, the court cited Wife's Exhibit 92, found that Wife removed Husband's four-year average income of $62,597 from the 41.88666 shares of Dupont Hospital in Husband's name as said shares were awarded to Wife in her calculation, and adopted Wife's calculation of Husband's gross weekly income as $10,906. The amount of $10,906 per week equals a yearly gross income of $567,112. Wife testified: "So the first number is his income from the tax return adding in his average 401k employee contribution subtracting out his average four-year Dupont units gives then [Husband's] total four-year average income of five hundred sixty-seven thousand—five hundred sixty-seven and one hundred and thirty-five ($567135.00) and if you divide that by fifty-two (52) that gives his weekly gross income ten thousand nine hundred and six dollars ($10906.00)." Transcript Volume 21 at 91. In her testimony,

[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 that a permanent change of custody is exercised." *Id.* at 820 n.4.

Wife appeared to reference Wife's Exhibit 192, which is titled "Petitioner's and Respondent's Incomes For CSOW Going Forward," and provides in part:

SOURCE	AMOUNT	Notes
RESPONDENT		
Respondent's 4 year average gross income from 1040s	611,607	
Plus Respondent's 4 year employee contributions to his 401 (k) not included in 1040 gross income	18,125	
Less Respondent's 4 year average income from Dupont Units in Craig's name	62,597	I am assuming the Court will award all 41.88666 Dupont Units titled in Craig's name to Amy such that she will receive that income in the future. Craig will receive all of the income from the Lithotripter investment going forward.
Respondent's total four year average gross income	567135	
Respondent's 4 year average weekly gross income	10906	

Exhibits Volume 6 at 206. Husband does not mention any 1040 tax return forms in his briefs on appeal or assert that the tax returns contained distributions from business entities.

[46] Under the heading "Dupont Hospital Shares," the trial court's order states that it found that "the post-filing distributions are marital assets subject to division by the Court," "[t]he distributions that the parties are receiving are the direct result of the investment that the parties made during the marriage using marital funds," and "[t]hey do not represent compensation to either [Wife] or [Husband] for efforts that they made either before or after the filing the [sic] Dissolution Petition." Appellant's Appendix Volume II at 175-176 (some capitalization omitted). With respect to the Dupont Hospital shares in Husband's name, the court found that the "$246,768.00 in distributions from the Dupont Hospital shares held in [Husband's] name are marital assets subject to division by the Court" and "have been retained by [Husband] and will be allocated to him in the Court's property division." *Id.* at 177. Based upon the

foregoing, we cannot say that the trial court included distributions from Dupont in Husband's income for purposes of the post-decree child support calculation.

[47] As for the Lithotripsy distributions, the trial court found that "the $375,158.00 in distributions from Lithotripsy [] after the date of the filing of the Petition for Dissolution are marital assets subject to division in the marital estate," stated it would "allocate the distributions to [Husband] in its property division," and found that the value of the parties' interest in Lithotripsy of $723,100.66 should be reduced by the distributions made since that date because the court had previously found those distributions to be a marital asset. *Id.* at 180. The court deducted the $375,158 in distributions from the $723,100.66 value and allocated the marital interest in Lithotripsy to Husband in the sum of $347,942.66. Accordingly, we cannot say that the trial court, in the decree of dissolution, treated Husband's distributions from Lithotripsy as both income and marital property or that Husband has demonstrated that reversal is warranted on this basis.

[48] To the extent Husband contends the trial court improperly accounted for taxes, he asserts in his statement of facts that "the court valued [his] Dupont distribution at $246,768, [his Lithotripsy] distribution at $375,158, and [Wife's] Dupont distribution at $187,344." Appellant's Amended Brief at 14. He also argues that the court "valued the distributions at their gross value, rather than their net value after the parties paid income taxes on the same." *Id.* (citing Appellant's Appendix Volume II at 175-176). To the extent Husband cited pages 175 and 176 in his statement of facts, these pages contain a portion of the

court's April 20, 2020 Second Amended Decree of Dissolution of Marriage, which discuss the Dupont Hospital shares but make no mention of taxes. Husband does not assert in his initial or reply briefs how the distributions were or will be taxed or specify the proper calculations. We cannot say that Husband has developed a cogent argument, sufficiently cited to the record, or demonstrated that reversal is warranted on this basis.[15]

[49] With respect to Husband's argument that the trial court erred in valuing the Lithotripsy distributions at $375,158, he asserts in his facts section that Wife presented evidence that the post-filing Lithotripsy distributions received by Husband totaled $286,046. *See* Appellant's Amended Brief at 14 (citing Transcript Volume 21 at 57, 60, 67).[16] Our review of these pages does not indicate any mention of $286,046. Wife points to her testimony for the idea that Husband received Lithotripsy distributions totaling $375,158. During the direct examination of Wife, her counsel referenced the amount Husband received from Lithotripsy, and Wife stated that "[t]he total now is three hundred and seventy-five thousand and then some odd hundred dollars that I

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[15] On pages 175 and 176, the court cites Wife's Exhibit 148 and Husband's Exhibit BBBBB. Wife's Exhibit 148 covers nineteen pages and contains Schedule K-1 forms. Husband's Exhibit BBBBB covers seven pages and contains a table titled "Husband's 2018 Dupont Hospital Distributions," copies of checks, and what appear to be invoices. Exhibits Volume 19 at 167. Husband does not cite to either of these exhibits in support of his argument.

[16] Husband also cites "APP481." Appellant's Amended Brief at 14. It is unclear what "APP481" refers to as there does not appear to be a page 481 of the Appellant's Appendices. Page 81 of Appellant's Appendix Volume IV does not appear to relate to the value of the Lithotripsy distributions.

can't remember." Transcript Volume 21 at 55. We cannot say that Husband has demonstrated reversal is warranted on this basis.

4. *Unequal Division*

[50] The court found that an equal division of the marital estate was neither just nor reasonable and noted: the "earnings or earning-ability of the parties is not equal"; Husband's income is approximately 25% higher than Wife's income; Husband has fewer responsibilities for the children's day-to-day activities; Wife had a greater role in creating the marital estate based upon a consideration of her income producing and non-income producing contributions; Husband's actions over the course of the proceedings harmed Wife economically; Husband stopped contributing to the parties' monthly student loan payments in October 2016; "[d]ue to the protracted length of these proceedings, [Wife] assumed a greater financial burden pursuant to the Provisional Order than [Husband] did"; and Husband agreed with the children's participation in ballet and other activities, which totaled $3,000 annually, but declined to contribute financially because he asserted the cost was included in his child support obligation. Appellant's Appendix Volume II at 190, 192.

[51] It is apparent from our review of the record that the court carefully considered the parties' evidence and testimony in its division of the marital property. We consider only the evidence most favorable to the court's disposition, and we cannot say Husband has overcome the strong presumption that the court considered and complied with the applicable statute. Based upon our review of

the record, we cannot say the trial court did not reach a just and reasonable conclusion or that reversal is warranted.

C. *Child Support*

[52] A trial court's calculation of child support is presumptively valid, and we reverse a decision only where the trial court's determination is clearly against the logic and effect of the facts and circumstances before it. *Bogner v. Bogner*, 29 N.E.3d 733, 738 (Ind. 2015). We do not reweigh the evidence and consider only the evidence most favorable to the judgment. *Saalfrank v. Saalfrank*, 899 N.E.2d 671, 674 (Ind. Ct. App. 2008).

1. *Wife's Child Care Costs*

[53] Husband argues that the trial court abused its discretion by awarding credit on the Child Support Worksheet for work-related child care costs that were not incurred as a result of Wife's employment and by failing to account for the time the children spend with Husband. He asserts that the court could not grant a credit for non-work related child care costs. He argues that the cost of Wife's au pair is $8,150 per year and that all other expenses claimed by Wife were not work-related child care expenses pursuant to the Ind. Child Support Guidelines. He asserts that most expenses were not child care expenses, Wife works three to four days per week, and the court made no effort to determine the time the au pair cares for the children while Wife is working or not working.

[54] Ind. Child Support Guideline 3E.1 provides:

> 1. *Work-Related Child Care Expense (Worksheet Line 4A).* Child care costs incurred due to employment or job search of both parent(s) should be added to the basic obligation. It includes the separate cost of a sitter, day care, or like care of a child or children while the parent works or actively seeks employment. Such child care costs must be reasonable and should not exceed the level required to provide quality care for the children. Continuity of child care should be considered. . . .

[55] With respect to the court's order that Husband pay weekly child support commencing on the date of the entry of the decree, the court's worksheet listed Wife's work-related child care expense as $435. Wife testified that the overall weekly costs for the current au pair were $434. She testified that the au pair expenses include amounts that do not appear to relate to child care including a weekly stipend of $200 per week which the au pair can save or spend and $500 that goes towards six hours of credits for the au pair's benefit. Wife also testified that she is frequently present when the au pair performs certain tasks, the au pair occasionally shops for groceries for her, the au pair purchases art supplies and birthday presents when she is at work and at home, and the au pair will wash her clothes.

[56] Under these circumstances, we cannot say that all of the au pair's costs or duties related to child care. Accordingly, we conclude that the trial court abused its discretion by allowing Wife to offset the entirety of the au pair costs, and we remand for the trial court to consider the costs related only to child care while Wife works.

2. *Calculation of Husband's Income*

[57] Husband argues that the trial court abused its discretion when it modified provisional child support post-August 18, 2016, contrary to the evidence of the parties' incomes in that time period and when it imputed VA income to him. He argues that the court's failure to consider his actual income is an abuse of discretion that grants Wife a windfall. He asserts that "[d]espite evidence of [his] significant change in income in 2016, 2017, and 2018 as a result of the termination of the VA contract, the court used only 2015 income figures to modify child support from August 18, 2016 to March 19, 2020." Appellant's Amended Brief at 44. He contends that 2015 included the greatest amount of income from the VA, $188,398, and that the income disappeared entirely as of February 2017. *Id.* (citing Exhibits Volume 18 at 149-158; Exhibits Volume 22 at 237; and Exhibits Volume 23 at 153-230).[17]

[58] Ind. Child Support Guideline 3A.1 provides that weekly gross income includes actual weekly gross income and potential income and includes income from,

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[17] Our review of the exhibits cited by Husband reveals a 2017 W-2 Wage and Tax Statement for Husband from the Department of Veterans Affairs indicating wages, tips, and other compensation as $28,119.70. *See* Exhibits Volume 18 at 157. It also includes a table titled "Adam Craig Thomas' Major Income 2017-2014" and lists the income from the Department of Defense for the years 2017, 2016, 2015, and 2014, as $28,119.70, $134,265.59, $188,398.01, and $96,295.96, respectively. Exhibits Volume 22 at 237 (capitalization omitted). Of the more than seventy pages that Husband cites in Volume 23 of the Exhibits Volume, it appears that the only possible reference to the Department of Veterans Affairs comes from a table titled "Adam Craig Thomas' Major Income 2018-2014" and lists the income from the Department of Defense for the years 2018, 2017, 2016, 2015, and 2014 as $0, $28,119.70, $134,265.59, $188,398.01, and $96,295.96, respectively. Exhibits Volume 23 at 230 (capitalization omitted). Husband does not point to W-2 Wage and Tax statements from the Department of Veterans Affairs corresponding to 2014, 2015, 2016, or 2018. Further, Husband does not cite Ind. Trial Rule 15, which the trial court referenced at the July 24, 2017 hearing when it stated it was not going to permit his March 17, 2017 amended petition or petition.

among other sources, wages, commissions, bonuses, partnership distributions, dividends, and capital gains.

[59] The court heard extensive testimony regarding Husband's work activity. The court's order found Husband's weekly gross income to be $13,102.50 with respect to the Husband's July 1, 2016 Petition to Modify Child Support Beginning August 1, 2016, as well as Wife's August 18, 2016 petition. This amount equals a yearly gross income of $681,330, which is the amount listed as Husband's total gross income for 2015 in Wife's Exhibit 190.[18] With respect to Husband's weekly gross income as it relates to child support effective as of the entry of the decree of dissolution, the court found that Husband's weekly gross income was $10,906. This amount equals a yearly gross income of $567,112. In discussing Exhibit 192, which is titled "Petitioner's and Respondent's

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[18] Wife's Exhibit 190 is titled "Respondent's Income 2015 thru 2017 w/4 Year Average." Exhibits Volume 6 at 204. When asked to explain Wife's Exhibit 190, Wife answered in part:

> Line six is NEIU prostate cancer center as far as we can tell although we did have trouble getting information in discovery there is zero income from that. Line number seven Department of VA or Veteran Affairs this is take [sic] from his W-2's which were exchanged with us of note they phased out their connection or I don't even know what to call it with the VA so that the income dropped off in 2017 as they were phasing out working for the – working with the VA and we no longer have the stream of income from the VA in 2018 so that's zero but the four year average is eighty-seven thousand six hundred ninety-five dollars ($87,695.00). It is noted that as the VA income dropped his NEIU Northeast Indiana Urology income increased because he wasn't working for the VA but he had extra days to work for NEIU. So where as one might think his income dropped because they lack the VA it was made up for by working extra days for NEIU.

Transcript Volume 21 at 79. Petitioner's Exhibit 190 lists the following income related to Northeast Indiana Urology, PC: $306,503.80 for 2015; $303,575.01 for 2016; $433,206.05 for 2017; and $393,785.21 for 2018. It also lists the following income from the Department of Veterans Affairs: $188,398.01 for 2015; $134,265.59 for 2016, $28,119.70 for 2017, and no income for 2018. It listed Husband's "[t]otal gross income per year based on Federal Income Tax Returns (1040's line 22) (this includes capital gains and losses and interest income not included in above line 8 numbers)" for 2015 as $681,330. Exhibits Volume 6 at 204.

Incomes For CSOW Going Forward," Exhibits Volume 6 at 206, Wife testified: "So the first number is his income from the tax return adding in his average 401k employee contribution subtracting out his average four-year Dupont units gives then [Husband's] total four-year average income of five hundred sixty-seven thousand—five hundred sixty-seven and one hundred and thirty-five ($567135.00) and if you divide that by fifty-two (52) that gives his weekly gross income ten thousand nine hundred and six dollars ($10906.00)." Transcript Volume 21 at 91.

[60] Our review of the evidence as set forth above and in the record does not leave us with the firm conviction that a mistake has been made, and we do not find Husband's arguments that the court erred in determining his child support obligation to be persuasive.

3. *Tax Adjustment*

[61] Husband argues that the trial court erred in finding he did not provide sufficient evidence that his effective tax rate was higher than 21.88%. He asserts that a court may deviate from the presumptive 21.88% tax rate present in the Child Support Guidelines when a party's income is effectively taxed at a higher rate.[19]

[19] In his reply brief, Husband cites Exhibit HHHHH but does not point to its location in the twenty-four volumes of exhibits. The table of contents for the exhibits volumes does not mention Exhibit HHHHH, but mentions Exhibit "HHHH – Email Correspondence from Adam Thomas to Amy Thomas, dated March 20, 2017," and Exhibit "H5 – Dr. Craig Thomas, Effective Tax Rate for Income Available for Child Support Calculation, 2105 [sic], 2016 & 2017." Exhibits Volume I at 34, 36. It appears that Husband cites Exhibit H5. In his reply brief, Husband cites "Exhibit BBBBBB." Appellant's Reply Brief at 25. The table of contents for the exhibits volumes does not include an Exhibit BBBBBB, but does mention Exhibit B6.

In his argument section, Husband cites to tables indicating that his effective federal tax rates for 2015, 2016, and 2017 were 34.07%, 30.58%, and 29.86% respectively. He also cites to an exhibit titled "2018 Income Tax Adjustment Calculation ('Bojrab')" which provides that his tax rate for federal and state taxes combined was 34.3% and that a tax adjustment would be 12.42%. Exhibits Volume 24 at 36 (capitalization omitted).

[62] The Commentary to Child Support Guideline 1 provides:

> In devising the Indiana Guidelines, an average tax factor of 21.88 percent was used to adjust the support column.
>
> Of course, taxes vary for different individuals. This is the case whether a gross or net income approach is used. Under the Indiana Guideline, where taxes vary significantly from the assumed rate of 21.88 percent, a trial court *may* choose to deviate from the guideline amount where the variance is substantiated by evidence at the support hearing.

(Emphasis added).

[63] The trial court found that Wife and Husband both earn high incomes that total hundreds of thousands of dollars annually and they each pay income tax at marginal rates somewhat higher than the 21.88% assumed in the Indiana Child Support Guidelines. It stated that it could not conclude that "applying the Child Support Guidelines without deviating from them, would be unjust to [Husband] or the children or that it is necessary to deviate from the Guidelines to prevent an injustice." Appellant's Appendix Volume II at 156. It found it had "not been provided with the necessary evidence in order to make a *Bojrab*

adjustment to the parties' incomes including the excess rate of taxation for both parties, the tax treatment of the various types of income, etc. which precludes the Court from making such a consideration."[20] *Id.* The court found that Wife and Husband were treated equally under the Child Support Guidelines and there was no evidence sufficient to justify a deviation in order to avoid an unjust result. Under the circumstances and in light of the record including that both Wife and Husband earn high incomes and the trial court's finding that each pay income tax at rates higher than the 21.88% assumed in the Indiana Child Support Guidelines, we cannot say that the trial court erred by failing to make an adjustment.

[64] For the foregoing reasons, we reverse and remand for reconsideration of the issue discussed in Part. B.3. and to consider the au pair costs related only to child care while Wife works. In all other respects, we affirm the trial court's order.

[65] Affirmed in part, reversed in part, and remanded.

Bradford, C.J., and Vaidik, J., concur.

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[20] In *Bojrab v. Bojrab*, the husband's actual tax rate was 38.03% and a panel of this Court held that "the trial court should have reduced Husband's gross income by 16.15% before entering it into line one of the child support worksheet." 786 N.E.2d 713, 740 (Ind. Ct. App. 2003), *summarily aff'd in relevant part*, 810 N.E.2d 1008 (Ind. 2004).