MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Michael Shelmadine, Jr.,
Appellant-Respondent,

v.

Nicole Klingaman,
Appellee-Petitioner

September 28, 2021

Court of Appeals Case No. 21A-DN-402

Appeal from the Noble Circuit Court

The Honorable G. David Laur, Judge

Trial Court Cause No. 57C01-2007-DN-000052

May, Judge.

[1] After the trial court dissolved the marriage of Michael Shelmadine Jr. and Nicole Klingaman, Shelmadine filed a Trial Rule 59 motion to correct errors and a Trial Rule 60 motion for relief from judgment. The trial court denied both motions. On appeal, Shelmadine raises four issues, which we consolidate

and restate as whether the denial of those motions was an abuse of discretion because:

> 1. The trial court abused its discretion when it denied the motion for continuance that Shelmadine requested the day before the dissolution final hearing;
>
> 2. The trial court erred in valuing and distributing the marital estate; and
>
> 3. The trial court abused its discretion when it ordered Shelmadine to pay $500 toward Klingaman's attorney fees.

We affirm.

Facts and Procedural History

[2] Klingaman and Shelmadine married on June 20, 2015. On July 13, 2020, Klingaman filed a petition for dissolution of marriage. Following the dissolution final hearing, the trial court determined the marital estate contained $14,466.00 more in debts than assets. At Klingaman's request, the court assigned all eight debt accounts and all three assets to Klingaman. The court found each party responsible for half of the $14,466.00 in excess debt, but it credited Shelmadine $2,000 for his down payment on the mortgage and entered a judgment against him for $5,233.00. The trial court also ordered Shelmadine to pay $500, or approximately half, of Klingaman's attorney fees.

[3] Shelmadine filed both a Trial Rule 59 motion to correct errors and a Trial Rule 60(B) motion for relief from judgment – both of which requested the trial court set aside the judgment and hold a new final hearing at which Shelmadine was represented by counsel. Following a hearing, the trial court denied Shelmadine's motions in an order that provided:

> Court hears arguments on the Respondent's Motion to Correct Errors, examines the transcript of the dissolution hearing, the Dissolution Decree and exhibits, including the affidavit of Respondent's former counsel. Court finds as follows:
>
> 1. Trial Court considered Respondent's Motion to Continue and was within his discretion to deny the motion.
>
> 2. Trial Court weighed the evidence and the decree was within the Court's discretion.
>
> 3. Motion to Correct Errors is DENIED.

(Appellant's App. Vol. 2 at 25.)

Discussion and Decision

[4] Shelmadine appeals from the trial court's denial of his post-judgment motions. We review a ruling on a motion to correct error for an abuse of discretion. *Berg v. Berg*, 170 N.E.3d 224, 227 (Ind. 2021). An abuse of discretion occurs when "the trial court's judgment is clearly against the logic and effect of the facts and circumstances before it or where the trial court errs on a matter of law." *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013). If, however, the trial

court's decision rested on a question of law, our review of that determination is de novo. *Berg,* 170 N.E.3d at 227. The standard of review for an appeal of the denial of a Trial Rule 60(B) motion is also for an abuse of discretion. *Id*.

[5] Shelmadine asserts three reasons why the trial court erred in denying his motions. We will address each in turn.

1. Motion for Continuance

[6] The first error to which Shelmadine points is the trial court's denial of the motion to continue that he filed the day before the final hearing.

> Under the trial rules, a trial court shall grant a continuance upon motion and a showing of good cause established by affidavit or other evidence. A trial court's decision to grant or deny a motion to continue a trial date is reviewed for an abuse of discretion, and there is a strong presumption the trial court properly exercised its discretion. A denial of a motion for continuance is [an] abuse of discretion only if the movant demonstrates good cause for granting it.

Gunashekar v. Grose, 915 N.E.2d 953, 955 (Ind. 2009).

[7] On September 9, 2020, the trial court set the final hearing on Klingaman's divorce petition for November 5, 2020. Then, on September 22, 2020, Shelmadine's counsel moved to withdraw her representation of Shelmadine because "there has been a breakdown in communication." (Appellant's App. Vol. 2 at 11.) The court granted that motion the same day, September 22, 2020. On November 4, 2020, Shelmadine filed a pro se motion for continuance and

therein indicated only: "My lawyer and I had to work through some issues that have been cleared now." (*Id*. at 13.)

[8] The next day at the final hearing, the following dialogue occurred:

> [Court]: Okay; and you'd requested for a continuance more time with your attorney but there's no attorney that's appeared in your case.
>
> [Shelmadine]: Apparently, she just withdrew uh, just walked off.
>
> [Court]: She said she'd not talked to you for quite some time.
>
> [Shelmadine]: I just spoke to her two (2) days ago and I was supposed to meet with her and that's the first time I'd seen out in the hallway.
>
> [Wife's Counsel]: Judge I had a brief encounter with [Shelmadine's former counsel] this morning asking her about her status in the case and she indicated she was not going to be getting back into the case.
>
> [Shelmadine]: She just told me two days ago I gave her fifteen hundred (1500) dollars and she'd get back into it.
>
> [Court]: Do you have any position regarding a continuance?
>
> [Wife's Counsel]: We're ready to proceed today Judge.
>
> [Court]: Okay well I'm going to deny the continuance and go forward.

* * * * *

[Shelmadine]: So, I can't have a lawyer?

[Court]: No, you had a chance to get a lawyer.

[Shelmadine]: My lawyer just walked out.

(Tr. Vol. 2 at 3-4.)

[9] In his motion to correct error, Shelmadine asserted the court abused its discretion in denying his last-minute motion to continue because it was his "first and only request for a continuance," (Appellant's App. Vol. 2 at 18), and because it "was made for good cause shown based on a reasonable basis including his loss of health due to the illness from the COVID pandemic, loss of his employment, and his loss of legal representation due to the personal financial impact of his illness and then losing his job." (*Id*. at 18-19.) However, according to the record, Shelmadine also had filed motions to continue in both July and September, (*see id*. at 2-3) (Chronological Case Summary entries), and his loss of legal representation occurred in September, before his factory closed, because he failed to communicate with his counsel. (*See id*. at 11) (motion to withdraw). In light of the facts that counsel had withdrawn over a month before the final hearing and that Shelmadine's asserted reasons for needing a continuance – both in his written motion and at the start of the hearing – appeared self-serving and false, we cannot find an abuse of discretion in the denial of his post-judgment motions with regard to his motion to continue. *See*,

e.g., *Hlinko v. Marlow*, 864 N.E.2d 351, 355 (Ind. Ct. App. 2007) (finding no abuse of discretion in denial of motion to correct error as to denial of day-of-trial continuance motion based on facts about which party "was, or should have been, aware" prior to day continuance requested), *trans. denied*.

2. Division of Marital Estate

[10] Shelmadine next argues the trial court abused its discretion in denying his motions because the dissolution order contained errors as to the valuation and division of the marital estate. The denial of Shelmadine's post-judgment request indicated: "Trial Court weighed the evidence and the decree was within the Court's discretion." (Appellant's App. Vol. 2 at 25.) Accordingly, we must review the court's division of the marital estate. *See*, *e.g.*, *487 Broadway Co., LLC v. Robinson*, 147 N.E.3d 347, 350 (Ind. Ct. App. 2020) (reviewing of denial of post-judgment motion for relief requires consideration of standard of review for underlying order).

[11] Neither party requested the trial court enter findings in the dissolution order under Trial Rule 52, and thus we will "'not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.'" *Steele-Giri v. Steele*, 51 N.E.3d 119, 123 (Ind. 2016) (quoting *D.C. v. J.A.C.*, 977 N.E.2d 951, 953 (Ind. 2012)). On issues for which the court entered findings, we review whether the evidence supports the findings and then whether the findings support the judgment. *Id*. Issues not covered by the findings are "reviewed under the

general judgment standard, meaning a reviewing court should affirm based on any legal theory supported by the findings." *Id*. at 123-24.

[12] Because Shelmadine challenges the trial court's division of the marital estate, we note Indiana subscribes to a "one-pot" theory of marital property. *Morey v. Morey*, 49 N.E.3d 1065, 1069 (Ind. Ct. App. 2016) (citing Ind. Code § 31-15-7-4). Thus, when parties petition for dissolution of marriage,

> the court shall divide the property of the parties, whether:
>
> (1) owned by either spouse before the marriage;
>
> (2) acquired by either spouse in his or her own right:
>
> > (A) after the marriage; and
> >
> > (B) before final separation of the parties; or
>
> (3) acquired by their joint efforts.

Ind. Code § 31-15-7-4(a); *see also* Ind. Code § 31-9-2-98 (defining "property" for the purposes of dissolution as "all the assets of either party or both parties"). Even if the court later determines that it will set a particular asset aside to one of the parties, it must first include such asset in the marital estate and assign it a value. *Quinn v. Quinn*, 62 N.E.3d 1212, 1223 (Ind. Ct. App. 2016). This "one-pot" theory ensures that all assets are subject to the trial court's power to divide and award. *Morey*, 49 N.E.3d at 1069.

[13] When the court divides the property, it "shall presume that an equal division of the marital property between the parties is just and reasonable." Ind. Code § 31-15-7-5. The trial court has discretion to divide marital property, and we reverse only if the court abused its broad discretion. *Love v. Love*, 10 N.E.3d 1005, 1012 (Ind. Ct. App. 2014). An abuse of discretion occurred if the trial court: (1) entered a ruling clearly against the logic and effect of the facts and circumstances before the court, (2) misinterpreted the law, or (3) disregarded evidence of factors listed in the controlling statute. *Id*. Division of marital property is highly fact sensitive, and we review a trial court's division "as a whole, not item by item." *Id*. When we review a claim that the trial court improperly divided marital property, we consider only the evidence most favorable to the trial court's disposition. *Morey*, 49 N.E.3d at 1069. We will not weigh the evidence, and the party challenging the division of marital property "'must overcome a strong presumption that the court considered and complied with the applicable statute.'" *Love*, 10 N.E.3d at 1012-13 (quoting *Wanner v. Hutchcroft*, 888 N.E.2d 260, 263 (Ind. Ct. App. 2008)). Even if the facts and reasonable inferences might allow for a different conclusion, "we will not substitute our judgment for that of the trial court." *Morey*, 49 N.E.3d at 1069. In essence, we may not reverse a property distribution unless there is no rational basis for it. *Love*, 10 N.E.3d at 1013.

[14] The trial court's order dividing the marital property provided as follows:

DISTRIBUTION OF MARITAL ASSETS

> Set over to [Klingaman] as her sole property free and clear of any claim thereto by [Shelmadine] are the following marital assets as valued by the Court.
>
> Real Estate: [address]
>
> 2015 Ford Escape
>
> 1997 GMC Sierra 1500 – [details of transfer from Shelmadine]
>
> All other personal property shall be the sole property of the person possessing that property.
>
> **DISTRIBUTION OF MARITAL DEBTS**
>
> [Klingaman] shall solely assume and pay the following marital debts and she shall indemnify and hold [Shelmadine] harmless for same.
>
> [list of eight credit line accounts]
>
> The total value of the marital debt as found by the Court is $14,466.00 (which is $7,233.00 value distributed to [Klingaman] and $7,233.00 value distributed to [Shelmadine]).
>
> The court credits [Shelmadine] $2,000.00 for down payment of mortgage, therefore a judgment shall be entered against [Shelmadine] in the amount of $5,233.00.

(Appellant's App. Vol. 2 at 15-16) (formatting altered slightly).

[15] Shelmadine first argues

> the only evidence presented at the Final Hearing was Husband and Wife's testimony and Wife's Balance Sheet regarding the real estate value and the amount of the debt owed for the mortgage. Husband argues that evidence is quite limited and self-serving for Wife. However, at the March 2, 2021 hearing [on Shelmadine's post-judgment motions], the court accepted as

> evidence the Beacon Report for the value of the marital residence; the Kelley Blue Book reports for the vehicles; and Husband's proposed balance sheet. Husband argues this evidence has more credibility and should have been given weight by the court considering Rule 59 or 60.

(Appellant's Br. at 26.)

[16] However, newly discovered evidence can be a ground for relief under Rule 60(B) only if that evidence "by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;" T.R. 60(B)(2), and newly discovered evidence can be a ground for relief under Rule 59 only if that "material evidence . . . with reasonable diligence, could not have been discovered and produced at trial[.]" T.R. 59(A)(1). Here, however, the evidence of asset valuation with "more credibility" on which Shelmadine wanted the court to rely when considering his post-judgment motions, (Appellant's Br. at 26), could have, with reasonable diligence, been discovered and produced at trial. *Cf. Faulkinbury v. Broshears*, 28 N.E.3d 1115, 1126 (Ind. Ct. App. 2015) ("no amount of due diligence could have allowed Shane to swear to the affidavit any sooner than he did"). The fact that Shelmadine did not stay in contact with his lawyer, and thus allegedly did not understand that she would not represent him at the hearing, does not render the post-judgment evidence he submitted "newly discovered" for purposes of Trial Rule 59 or Trial Rule 60. *See Scales v. Scales*, 891 N.E.2d 116, 1121 (Ind. Ct. App. 2008) (holding no error in denial of motion to correct error based on newly discovered evidence when "Husband has failed to demonstrate a reasonably diligent effort

to obtain this information prior to the final hearing"). Accordingly, the trial court did not err by failing to rely on Shelmadine's evidence to overturn the trial court's dissolution order. *See*, *e.g.*, *LTL Truck Service, LLC v. Safeguard, Inc.*, 817 N.E.2d 664, 670 (Ind. Ct. App. 2004) (trial court did not abuse its discretion when it refused to accept evidence of damages by way of a motion to correct error).

[17] The remainder of Shelmadine's challenges to the trial court's division of property are requests that we reweigh the evidence or reassess the credibility of the witnesses. We, however, are not permitted to engage in such activities. *See Steele-Giri*, 51 N.E.3d at 123 ("due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"); *and see Love*, 10 N.E.3d at 1012 (we will not weigh the evidence). To the extent the trial court relied solely on Klingaman's testimony and exhibits, Shelmadine acknowledges she submitted nearly all of the evidence admitted at the hearing. (*See* Br. of Appellant at 27.) We cannot hold that a trial court abused its discretion in valuing property when it relied on the evidence in the record, and Shelmadine has not pointed to a specific item that was assigned a value outside the evidence submitted at the final dissolution hearing. The trial court did the best it could with the evidence before it to effectuate an equal distribution of the assets and debts in the marital estate, and Shelmadine has not demonstrated an abuse of discretion therein. Accordingly, Shelmadine has not demonstrated the trial court abused its discretion when it denied his post-judgment motions as to the distribution and valuation of the marital estate. *See Scales*, 891 N.E.2d at 1121

(affirming denial of motion to correct error that challenged valuation of retirement accounts based on newly discovered evidence).

3. Payment of Attorney Fees

[18] Finally, Shelmadine asserts the trial court should have granted his post-judgment motions to eliminate the order that he pay $500 of Klingaman's attorney fees. We review a trial court's decision to award attorney fees in a dissolution decree for an abuse of discretion. *Ahls v. Ahls*, 52 N.E.3d 797, 802-3 (Ind. Ct. App. 2016). An abuse of discretion occurs if the court's "decision is clearly against the logic and effect of the facts and circumstances before [the court] or if it misapplies the law." *Id*. at 803.

[19] Pursuant to Indiana Code section 31-15-10-1:

> The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment.

In ordering a party to pay legal fees under that statute, the court is to consider "the parties' resources, economic condition, ability to engage in gainful employment and earn income, and other factors bearing on the reasonableness of the award." *Id*.

[20] Shelmadine asserts the trial court, when hearing the post-judgment motions, should have found error in the order that he pay nearly half of Klingaman's

attorney fees based on the financial resources of the parties. In particular he notes that, while Klingaman "remained gainfully employed before and during the dissolution process," (Appellant's Br. at 30), he lost his job when his factory closed in October 2020 and had "used the remainder of his retirement money for groceries, gas, and a place to live with his brother-in-law." (*Id.*) However, without corroborating paperwork, the trial court was not required to believe Shelmadine's testimony that he had liquidated his entire retirement account. *See Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004) ("factfinders are not required to believe a witness's testimony even when it is uncontradicted"). Nor was there any testimony to suggest Shelmadine would be unable to obtain other employment. Instead, what the record demonstrates is that both parties were assigned more debts than assets and that both parties were likely to be in tight financial circumstances. In this situation, and in light of the evidence before the trial court, we cannot find an abuse of discretion in the trial court's denial of Shelmadine's request for relief from the order that he pay less than half of Klingaman's attorney fees. *See Planert v. Planert*, 478 N.E.2d 1251, 1254 (Ind. Ct. App. 1985) (no abuse of discretion in order for husband to pay part of wife's attorney fees even though wife received assets she could have sold to pay attorney fees).

Conclusion

[21] Shelmadine has not demonstrated the trial court abused its discretion when it denied his motions to correct error and for relief from judgment. The trial court

was not required to grant his last-minute continuance, could not consider his evidence submitted post-judgment, and did not err in maintaining the order for Shelmadine to pay a portion of Klingaman's attorney fees. Accordingly, we affirm.

[22] Affirmed.

Kirsch, J., and Vaidik, J., concur.