MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

John U. Dustin,
Appellant-Petitioner

v.

Michelle C. Dustin,
Appellee-Respondent

March 5, 2024

Court of Appeals Case No.
23A-DC-758

Appeal from the Monroe Circuit Court

The Honorable Catherine B. Stafford, Judge

Trial Court Cause No.
53C04-2012-DC-439

Memorandum Decision by Judge Mathias
Judges Tavitas and Weissmann concur.

Mathias, Judge.

[1] John Dustin ("Father") appeals the Monroe Circuit Court's final decree dissolving his marriage to Michelle Dustin ("Mother"). Father presents two issues for our review:

> 1. Whether the trial court abused its discretion when it awarded primary physical custody of the parties' minor child ("Child") to Mother.
>
> 2. Whether the trial court abused its discretion when it awarded seventy percent of the marital estate to Mother.

[2] We affirm.

Facts and Procedural History

[3] Father and Mother (collectively, "Parents") were married in 2012 and have one child together, Child, who was born in December 2013. In addition, Mother has two children from a prior relationship, L.M. and B.M., and Father has one child from a prior relationship, H.D. Because Mother had primary physical custody of L.M. and B.M., Father was very involved in all of the children's lives during the marriage.

[4] Father has been employed as a physician since before the marriage. During the marriage, Mother worked as a registered nurse before returning to school to become a nurse practitioner. Mother's parents "paid for [her] schooling" during the marriage. Tr. Vol. 3, p. 115. While Mother was in school, Father paid the mortgage and other bills. Both Father and Mother shared child-rearing

responsibilities. With respect to Parents' significant financial assets, Father owned a home prior to the marriage, Parents bought a second home during the marriage, and Mother inherited an interest in a family trust during the marriage.

[5] On December 9, 2020, Mother filed a petition for dissolution of the marriage. Mother also filed a petition for an order of protection alleging that Father had stalked and harassed her and that he was "frequently angry in a scary manner and inappropriately physically rough" with L.M. and B.M. Appellant's App. Vol. 2, p. 75. Following a hearing on February 12, 2021, the trial court issued an order of protection against Father for the protection of Mother, L.M., and B.M. And in March, the trial court awarded provisional sole legal and primary physical custody of Child to Mother, with Father exercising parenting time. The trial court ordered Father to participate in the Abuse Awareness and Accountability Program.

[6] In October, Father and H.D. argued, and Father threatened to throw H.D.'s computer out the window. H.D. chased Father around the house, and Father called law enforcement. Child was present in Father's home at that time. The responding officer talked to Father and H.D. and reported the incident to the Department of Child Services. Mother filed a motion to suspend Father's parenting time with Child and a motion to appoint a Guardian ad Litem ("GAL"). Following a hearing, the trial court ordered that Father's parenting time would continue as ordered in the provisional order.

[7] The court appointed Dr. Jenny Seiss to conduct a custody evaluation. After she conducted interviews and reviews of Parents' medical and psychological records, Dr. Seiss recommended that Father and Mother share joint legal and physical custody of Child.

[8] During the evidentiary hearing on Mother's dissolution petition, Mother described Father's behavior towards herself and the children as "[b]ullying, aggressi[ve], and ang[ry]." Tr. Vol. 3, p. 16. Mother testified that Father was controlling, and she gave as examples his control of their

> [f]inances, the temperature of the home, how much we spent on everything, access to funds, how the kids behaved and what they did and, you know, do things, when we couldn't do things, if I could read to [Child], if I couldn't read to [Child]. Just, everything it seemed to be, [Father']s controlled.

Id. at 17. In addition, Father's ex-girlfriend, Amy Countryman, the mother of H.D., also testified that, during the past fifteen years they had shared custody of H.D., she has felt "railroaded, pushed, disrespected[and] manipulated" by Father. *Id.* at 171. Countryman testified further that Father has exerted "a lot of control" over her and that "a lot . . . has happened that has been scary[.]" *Id.*

[9] Following that hearing, the trial court entered extensive findings and conclusions to support its determination that Parents would have joint legal custody of Child, with Mother having primary physical custody and Father exercising parenting time. The trial court divided the marital estate unequally, awarding 70% to Mother and 30% to Father. This appeal ensued.

Discussion and Decision

Issue One: Custody

[10] Father first contends that the trial court abused its discretion when it awarded Mother primary physical custody of Child. Our standard of review is well settled. Pursuant to Father's Trial Rule 52 request, the trial court entered findings of fact and conclusions of law. Therefore, we apply a two-tiered standard of review: first, whether the evidence supports the findings, and second, whether the findings of fact support the judgment. *Hamilton v. Hamilton*, 103 N.E.3d 690, 694 (Ind. Ct. App. 2018), *trans. denied*. We will set aside findings only if they are clearly erroneous, which occurs if the record contains no facts to support them either directly or by inference. *Id.* To determine that a trial court's findings or conclusions are clearly erroneous, this court's review of the evidence must leave it with the firm conviction that a mistake has been made. *Campbell v. Campbell*, 993 N.E.2d 205, 209 (Ind. Ct. App. 2013), *trans. denied*.

[11] Our review of family law matters is conducted with a preference for granting latitude and deference to our trial judges. *Anselm v. Anselm*, 146 N.E.3d 1042, 1046 (Ind. Ct. App. 2020), *trans. denied*.

> Appellate deference to the determinations of our trial court judges, especially in domestic relations matters, is warranted because of their unique, direct interactions with the parties face-to-face, often over an extended period of time. Thus enabled to assess credibility and character through both factual testimony and intuitive discernment, our trial judges are in a superior

> position to ascertain information and apply common sense, particularly in the determination of the best interests of the involved children.

Best v. Best, 941 N.E.2d 499, 502 (Ind. 2011). "It is not enough on appeal that the evidence might support some other conclusion; rather, the evidence must positively require the result sought by the appellant." *Hamilton*, 103 N.E.3d at 694. "Accordingly, we will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment." *Id.*

[12] Indiana Code section 31-17-2-8 provides as follows:

> The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:
>
> (1) The age and sex of the child.
>
> (2) The wishes of the child's parent or parents.
>
> (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.
>
> (4) The interaction and interrelationship of the child with:
>
> > (A) the child's parent or parents;
> >
> > (B) the child's sibling; and
> >
> > (C) any other person who may significantly affect the child's best interests.

(5) The child's adjustment to the child's:

(A) home;

(B) school; and

(C) community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic or family violence by either parent.

(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

(9) A designation in a power of attorney of:

(A) the child's parent; or

(B) a person found to be a de facto custodian of the child.

Here, the trial court expressly addressed each statutory factor in its findings to support its conclusion that Mother should have primary physical custody of Child.

[13] On appeal, Father challenges several of the trial court's findings and contends that the valid findings do not support anything but an award of joint physical custody of Child. We address each contention in turn.

[14] Father first contends that Finding No. 49 is clearly erroneous. That finding states: "Mother alleges that Father has acted abusively towards the children at various points. Mother cites examples including Father taking the children's bedroom doors off the hinges, Father pulling [B.M.] by his ear, and Father putting his hands on [L.M.'s] neck." Appellant's App. Vol. 2, p. 32. Father argues that there is no evidence that he was abusive towards *Child*. Indeed, as Father correctly states, Child was not a subject of the order of protection. Father also points out that Mother's accounts of abusive behavior towards L.M. and B.M. occurred several years prior to the date of Mother's dissolution petition.[1]

[15] Father's argument on appeal is misplaced. The trial court did not make any finding that Father was abusive towards Child. While the court used the term "children," the specific examples cited by the court referred to L.M. and B.M. And the evidence showed that Child was present for at least one instance of Father's aggression towards Mother and that he was "scared" and wanted to leave the house with Mother. Tr. Vol. 1, pp. 15, 17. Father's allegation that the evidence is stale goes to the weight of the evidence. Father merely asks that we reweigh the evidence, which we will not do on appeal. Father has not shown that Finding 49 is clearly erroneous.

[1] As Mother points out, the trial court took judicial notice of the evidence in support of the order of protection she had obtained in early 2021.

[16] Father next contends that Finding No. 50 is clearly erroneous. That finding states:

> Amy Countryman, the mother of [H.D.], described Father being physically abusive towards her when they were in a relationship. Ms. Countryman has attempted to co-parent with Father for over a decade, and found Father to be inflexible, unwilling to compromise, and difficult to coparent with. The Court gives weight to Ms. Countryman's testimony and was disturbed by it, particularly by her testimony that she felt, "very railroaded, pushed, disrespected, manipulated" by Father. She does not feel safe being around Father. At one point, Father left marks on [H.D.]'s chest during an altercation. Father dropped her husband's computer to punish [H.D.]

Appellant's App. Vol. 2, p. 33. Father argues that there is no evidence showing either that he left marks on H.D.'s chest or that he dropped a computer. And he argues that Countryman's testimony was stale and vague.

[17] But Father ignores the clear testimony that he had thrown Countryman's husband's computer on the floor "and broke it" and that H.D. had "marks on his chest" after a "physical altercation" with Father. Tr. Vol. 3, pp. 188-89. Further, Countryman testified regarding her experiences co-parenting with Father over the past fifteen years, generally, so the testimony was relevant, and Father's argument that it was "stale" is not supported by cogent reasoning. Father has not shown that this finding is clearly erroneous.

[18] Father contends that Finding No. 52 is clearly erroneous. That finding states: "Father has a pattern of controlling behavior, including excluding Mother from

the room, blocking hallways, and being overly physical with the children. Father threw [L.M.]'s clock out of a window w[hen] he felt [L.M.] was not listening to him." Appellant's App. Vol. 2, p. 33. Again, Father ignores Mother's testimony regarding Father's behavior toward her that supports the finding. Father has not shown that this finding is clearly erroneous.

[19] Father contends that Finding No. 53 is clearly erroneous. That finding states:

> In late October 2021, Father had a physical altercation with [H.D.] and threw [H.D.]'s laptop out of a window. Law enforcement was called because of the altercation between Father and [H.D.] Instead of de-escalating the situation with [H.D.], Father escalated the situation. [Child] was in the home during the incident. Father believes that [Child] did not witness the altercation. The Court does not credit Father's testimony on this point.

Id. Father is correct that there is no evidence that he threw H.D.'s laptop out of a window. However, Countryman testified that Father had held it out of a second-story window and "threaten[ed] to drop it[.]" Tr. Vol. 3, p. 189. And, again, she testified that Father threw the laptop on the floor and broke it. The evidence supports the remainder of this finding, and we cannot say that the difference between threatening to throw a laptop out of a window but instead throwing it on the floor and actually throwing it out of the window is significant in the context of this finding. Father has not shown that the finding is clearly erroneous.

[20] Father next contends that Findings No. 79 and 80 are clearly erroneous. Those findings state:

> 79. The Court has concerns about Father's propensity for control and about Mother's defensiveness. However, both parents are stable, able to seek help from family when they need to and have good support systems.
>
> 80. The Court does have a concern about a pattern of control by Father that is indicative of domestic violence, however the Court notes that Mother makes no allegation of physical violence toward her in the marriage.

Appellant's App. Vol. 2, p. 37. On appeal, Father cherry-picks evidence in an attempt to undermine these findings, but he ignores evidence that supports these findings. Again, Father has not shown that they are clearly erroneous.

[21] Finally, Father argues that the trial court's findings "fail to support a conclusion that it is in Minor Child's best interest for Mother to be awarded primary physical custody." Appellant's Br. at 20. In particular, Father states that,

> based upon the trial court's findings, both parents have been equally involved in Minor Child's life, Minor Child has a healthy relationship with both Parents, and the Parents have the ability to coparent as demonstrated by the trial court's award of joint legal custody. Thus, these findings undoubtedly weigh in favor of joint physical custody.

Id. Father also emphasizes the court's four findings that Mother had made "unreasonable" requests that Father not attend certain activities with Child because of potential interactions with L.M. and B.M., who are covered by the

order of protection. *See* Appellant's App. Vol. 2, pp. 33-34. And Father emphasizes the court's findings regarding Mother's "inappropriate" interference with Father's attempts to have phone calls with Child. *Id.* at 34.

[22] Once again, Father's argument amounts to a request that we reweigh the evidence, which we will not do on appeal. The trial court's findings are exceptionally thorough, and the court went to great lengths to explain its rationale for the custody award. We reject Father's argument on this issue and hold that the trial court did not abuse its discretion when it awarded Mother primary physical custody of Child.

Issue Two: Marital Estate

[23] Father also contends that the trial court abused its discretion when it awarded Mother 70% of the marital estate. Indiana Code section 31-15-7-5 provides that 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.

Id. The statutory factors are to be considered together in determining what is just and reasonable; any one factor is not entitled to special weight. *Smith v. Smith*, 136 N.E.3d 275, 282 (Ind. Ct. App. 2019). The party seeking to rebut the presumption of equal division bears the burden of proof of doing so, and a party challenging the trial court's decision on appeal must overcome a strong presumption that the trial court acted correctly in applying the statute. *Id.*

[24] The trial court carefully considered each statutory factor and divided the marital estate as follows:

Division as Ordered					
Institution	**Type**	**Act #**	**Value**	**Petitioner**	**Respondent**
*** Bank	Checking	****	$853.00	$426.50	$426.50
*** Bank	Checking	****	$2,822.70	$2,822.70	
*** Bank	Checking	****	$400.46	$400.46	
Sacred Root, LLC	Business	****	$579.86	$579.86	
*** Bank	Checking	****	$31,750.00		$31,750.00

***	401(k)		$153,151.00		$153,151.00
***	IRA	****	$1,611.71	$1,611.71	
***	IRA	****	$4,949.76	$4,949.76	
***	403(b)		$47,775.07		$47,775.07
***	Stocks	****	$188,400.17		$188,400.17
3296 East Carowinds Ct	Home		$600,000.00		$600,000.00
1135 East Secretariat Ct	Home		$682,752.00	$682,752.00	
3296 East Carowinds Ct	Mortgage	****	(294,367.00)		(294,367.00)
Furniture			$10,000.00	$7,000.00	$3,000.00
Jewelry			$30,000.00	$23,500.00	$6,500.00
Honda Odyssey	2013		$12,075.00	$12,075.00	
Toyota RAV4	2009		$4,980.00		$4,980.00
Helen Margaret Johnson Trust			$1,054,271.55	$1,054,271.55	
Sacred Root, LLC	Nursing Business		$0.00	$0.00	
*** Bank	Card	****	(1,833.00)		(1,833.00)
Custody Evaluator	Other		(6,000.00)		(6,000.00)
Mediation			(900.00)		(900.00)
TOTAL			$ 2,523,272.28	$ 1,790,389.54	$ 732,882.74
PERCENTAGE				70%	30%
PROPERTY EQUALIZATION PAYMENT				($24,098.94)	$24,098.94

Appellant's App. Vol. 2, p. 57. (Notably, the parties do not dispute the court's valuation of any asset or liability.)

[25] On appeal, Father contends that "the findings fail to support a conclusion that a seventy-thirty division is just and reasonable, the trial court ignored evidence of controlling factors, the trial court applied the incorrect legal standard, and the evidence presented fails to support the conclusion that an unequal division is just and reasonable." Appellant's Br. at 28. We do not agree.

[26] With respect to the allegedly ignored controlling factors, Father argues that the trial court ignored the evidence that he bought the marital residence prior to the marriage, that he had invested $85,000 in the home at that time, and that he later invested another $50,000 from an inheritance in the home. The trial court explicitly acknowledged that evidence in its Finding No. 119 but found that it

was outweighed by Mother's significant interest in the family trust.[2] Father's contention on this issue is without merit.

[27] With respect to the trial court's alleged reliance on the "incorrect legal standard," Father's argument is difficult to discern. In the context of this contention on appeal, Father merely argues that the trial court erred when it found that the economic circumstances factor would weigh in Father's favor but for Mother's inheritance. Specifically, the trial court found:

> ECONOMIC CIRCUMSTANCES. Husband has taken on debt for the education of his older child, but considering the parties' overall economic resources, the debt is not significant. Wife has a sizeable interest in the trust. While she does not currently wish to liquidate her asset, she can do so. This factor would point to a larger share of the marital estate to Husband, except that Wife's Trust was acquired prior to the marriage and has been kept separate. This factor does not benefit either spouse.

Appellant's App. Vol. 2, p. 46. Father states that, "Mother's inheritance, or whether it was in her sole name, fails to provide justification that Mother's economic circumstances are not superior to Husband's. Thus, the finding that this factor does not benefit either party because 'Wife's Trust was acquired prior to the marriage' is clearly erroneous." Appellant's Br. at 30. While the trial

[2] We note that the trial court's findings regarding Mother's interest in the family trust are inconsistent in that some of them refer to the inheritance occurring prior to the marriage and others during the marriage. This discrepancy is insignificant because, in the end, the trial court explicitly stated that Mother had inherited the interest "during the marriage" to support its finding that Indiana Code section 31-15-7-5(2)(B) "significantly benefits [Mother] due to the size of her assets in the Trust." Appellant's App. Vol. 2, p. 46.

court's finding may be confusing, the findings and conclusions, taken as a whole, make clear that the trial court placed significant weight on the inheritance factor. In any event, Father has not shown that the trial court used an improper legal standard in dividing the marital estate.

[28] Next, Father asserts that "the evidence and findings reveal that Mother's earning ability dramatically increased during the marriage, and as a direct result of Father's support for same. Thus, the trial court should have considered this evidence in weighing the Parties' respective earnings and earning ability." Appellant's Br. at 30. In support, Father cites *Roberts v. Roberts*, 670 N.E.2d 72, 76 (Ind. Ct. App. 1996), where we observed that "the enhanced earning ability of a degree-earning spouse may certainly be considered in making a division of the marital assets." Father's contention is not well taken. The trial court explicitly considered the impact of Mother's nurse practitioner degree on her earnings and earning ability.

[29] Finally, Father argues that, because he brought more assets into the marriage and significantly contributed financially to the household, including supporting the family when Mother went back to school, the trial court clearly erred when it awarded Mother 70% of the marital estate. But Father's argument is nothing more than a request that we reweigh the evidence. The trial court very carefully and thoroughly analyzed the statutory factors and found that Wife's $1 million interest in her family trust significantly outweighed the other factors to justify the unequal division. With respect to the other statutory factors, the trial court found that an unequal division was further justified due to Husband's superior

future earning ability, which the evidence supports. And the court found that the remaining factors did not favor either party.

[30] In sum, the evidence supports the trial court's findings. Husband has not satisfied his burden on appeal to overcome the strong presumption that the trial court acted correctly in applying the statutory factors. *Smith*, 136 N.E.3d at 282. The trial court did not abuse its discretion, and we affirm the trial court's division of the marital estate. *See, e.g.*, *In re Marriage of Marek*, 47 N.E.3d 1283, 1292 (Ind. Ct. App. 2016) (holding that wife rebutted the presumption of an equal division where she had received an inheritance, she had been out of the workforce for fifteen years to raise children, and husband's income was significantly higher than wife's income), *trans. denied*; *see also Boucher v. Doyle*, ___ N.E.3d ___, 2024 WL 542023 (Ind. Ct. App. Feb. 12, 2024) (affirming trial court's award of 62% of marital estate to husband where marriage lasted less than five years, husband brought majority of assets into the marriage, and wife had a substantial earning ability).

[31] For all these reasons, we affirm the trial court's final decree of dissolution.

[32] Affirmed.

Tavitas, J., and Weissmann, J., concur.

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