DA 21-0233

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 110

IN RE THE MARRIAGE OF:

JASON C. MILLER,

Petitioner and Appellee,

v.

ERIN O. MILLER,

Respondent and Appellant,

and

CHRISTIAN FOLGER MILLER,

Intervenor and Appellee.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DR-15-647
Honorable Leslie Halligan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Klaus D. Sitte, T. Geoff Mahar, ASUM Legal Services, Missoula, Montana

For Appellees:

Molly Howard, Adrienne M. Tranel, Datsopoulos, MacDonald & Line, P.C., Missoula, Montana (for Christian Folger Miller)

Jason C. Miller, Self-represented, Missoula, Montana

Submitted on Briefs: April 6, 2022

Decided: June 7, 2022

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Appellant Erin Miller (Erin) appeals the Findings of Fact, Conclusions of Law and Final Decree of Dissolution (Final Decree) entered April 1, 2021, in the Fourth Judicial District Court, Missoula County. Erin's alleged error concerns the amount of child support Appellee Jason Miller (Jason) was ordered to pay and whether it should be retroactive. Jason's father, Christian Miller (Chris), is an Intervenor in this matter. We rephrase the issues on appeal as follows:

1. *Did the District Court err when it categorized Jason's income from Chris as "gift income," resulting in the exclusion of that income from the District Court's child support calculation?*

2. *Did the District Court abuse its discretion when it refused to award Erin retroactive child support dating back to November 2016?*

¶2 We affirm.

FACTUAL AND PROCEDURAL BACKGRUOND

¶3 Erin and Jason were married in August 2013 and resided together in Missoula for most of the next three years. In late 2013, Erin gave birth to the first of the parties' two children, A.T.M. During their marital relationship, neither Erin nor Jason earned an annual income. Instead, the parties lived on approximately $140,000 to $160,000 in annual payments provided directly to Jason by Jason's father, Chris—the Intervenor in this matter. During their marriage, Erin and Jason also lived rent-free in their marital home in Missoula—one of multiple homes owned by Chis.

¶4 Jason filed a Petition for Dissolution on September 2, 2015. Although the parties briefly reconciled, Erin and Jason permanently separated on June 16, 2016, at which time Erin was pregnant with the parties' second child, M.K.M. Following their separation, Jason remained in the Missoula home owned by Chris while Erin moved to Hamilton with A.T.M. Erin later gave birth to M.K.M. in Hamilton towards the end of 2016.

¶5 As of this appeal, neither Erin nor Jason earns an income from working. Erin is in her early forties and is the full-time caregiver to the parties' children. Prior to her marriage with Jason, Erin held three different minimum wage jobs. Erin has not worked since December 2012, but she is currently a part-time student working towards a degree in sonography. Erin has stated she intends to return to full-time work once her youngest child, M.K.M., reaches school age in Fall 2022. Currently, Erin lives in a home in Hamilton owned by her parents; however, Erin pays her parents monthly rent of approximately $866 and $220 in monthly utilities.

¶6 Jason continues to live rent-free in the Missoula home owned by his father. Jason is in his early forties, is not currently employed, and has no significant work history. Despite Jason's self-reported occupation as a "filmmaker," the record indicates that Jason's work "has not produced significant or sustained income." Although Jason has no physical or mental impairments that would prevent him from working, he currently has seven different children—including A.T.M. and M.K.M—with five different mothers and testified that his obligations to his children make it difficult for him to find full-time employment. For his entire adult life, Jason has relied on monthly cash payments from

Chris of approximately $5,000 on which Jason pays no income tax. In addition to this monthly $5,000 gift, Chris makes payments towards Jason's monthly credit card bill and frequently transfers to Jason "a couple extra thousand dollars per month" upon Jason's request. At the parties' dissolution trial, Chris estimated that, as of 2019, his monthly payments to Jason totaled between $9,000 and $11,000 per month. Jason also testified that, as of 2019, he was receiving $90,000 in total annual payments from Chris, constituting a reduction from the $140,000 to $160,000 Jason received during his three years of marital cohabitation with Erin. The District Court further summarized Chris's testimony regarding his gifts to Jason as follows:

> [Chris] has told his two sons that he intends to leave half of his estate to each of them, after providing for certain other people. And, he has explained that he intends for the money that he gives them while he is alive to be credited against what he will eventually leave them. [Chris] has indicated that there will not be any sort of strict accounting to this end. [Chris] considers what he has given to Jason to be gifts, with no expectation of repayment or other benefit in return, and that though he intends to continue his generosity and ensure that Jason is not homeless, he does not consider himself obliged to do so. [Chris's] estate plan may change.[1]

Chris also testified it was his intention to eventually reduce his $5,000 monthly cash payments to Jason because "[he] cannot afford" to continue them for Jason's entire adult life. Two years later, Chris's brief before this Court reiterated this intention; however, it did not indicate that Chris has any definitive plans to reduce his payments to Jason soon.

[1] Chris's brief before this Court reasserts that he considers his monthly payments to Jason to be "gifts" and that he has "no expectation of repayment or other benefit in return" from Jason.

¶7 As of September 2016, Jason was already paying child support to three separate children from prior marriages—one of whom is named K.H.—in the amount of $280 per child per month. The District Court ordered Jason to pay Erin temporary child support of $280 per month for A.T.M., with the total amount to increase to $560 per month upon the birth of the couple's second child, M.K.M., in late 2016. The Court arrived at this amount by taking judicial notice of the $280 permanent monthly child support award that was established for K.H. in 2013; in arriving at that award, an administrative law judge imputed $30,000 of annual income to Jason based on several specific transfers from Chris that had occurred during 2013.[2] The court further noted that this temporary award of $560 per month could be adjusted following the submission of Jason and Erin's child support affidavits and the eventual resolution of the parties' dissolution matter.

¶8 On October 5, 2016, Erin filed a Motion for Temporary Family Support requesting an increased temporary support award of $2,300 per month, asserting that she was unable to meet her monthly child care expenses. In its February 23, 2017 Order, the Court denied Erin's request and reaffirmed that Jason would pay Erin $560 in temporary child support

[2] In its April 2021 Final Decree, the District Court noted that the administrative law judge in the K.H. matter was correct to deviate from traditional calculations under the Montana Child Support Guidelines due to Jason's lack of personal income. Nevertheless, the District Court's Final Decree acknowledges that, upon further reflection, the administrative law judge in K.H.'s case had incorrectly attributed "gift income" from Chris to Jason for the purposes of calculating Jason's income under the Child Support Guidelines, which would have violated this Court's holding two years later in *Paschen v. Paschen*, 2015 MT 350, 382 Mont. 34, 363 P.3d 444. Despite the District Court's acknowledgement of this error, neither Jason nor Chris challenge the District Court's use of this calculation to award $280—followed by $560—in temporary monthly child support to Erin, nor is this specific error raised by Erin on appeal.

pending the Final Decree. Following this, Erin filed several additional challenges regarding the amount of this award; however, the $560 monthly temporary child support award ultimately remained in effect for over four years until the court's Final Decree.

¶9 Erin and Jason's dissolution trial was held on October 24 through 25, 2019. At trial, Erin requested a permanent child support award of $2,286 per month, in total, for each of her two children, which she calculated using the Montana Child Support Guidelines. Erin's calculation imputed $7,000 of monthly income to Jason in the form of gifts from Chris; it also imputed minimum wage employment income for Jason. Erin's request for $2,286 per month in permanent child support was accompanied by a request for retroactive child support dating back to November 2016—i.e., the month following her October 2016 motion for increased temporary support. Erin asserted that both of her requests were necessary to help her cover her total monthly child care expenses of $3,624.[3]

¶10 On April 1, 2021, the District Court issued its Final Decree. The District Court rejected Erin's proposal for $2,286 in monthly child support based on the court's conclusion that the income provided to Jason by Chris was best categorized as "gift income" and thus could not be imputed to Jason as income for the purposes of calculating his child support obligation under the Montana Child Support Guidelines. In support of this conclusion, the court cited *Paschen v. Paschen*, 2015 MT 350, ¶ 37, 382 Mont. 34, 363

[3] The District Court accepted Erin's calculation of $3,624 in monthly child care expenses as fact, and Erin's appeal once again asserts this figure as her present amount in monthly child care expenses.

P.3d 444, and further noted that Chris's monthly support to Jason meets the definition of "gift" provided in § 70-3-101, MCA (defining "gift" as a "transfer of personal property made voluntarily and without consideration"). Although the court acknowledged that child support of $2,286 per month may have "more accurately reflect[ed] the standard of living enjoyed by the children during the marriage," the court ultimately concluded "Erin's proposed calculation included gift income [which] is . . . exempted from consideration under the [G]uidelines."

¶11 Instead, the District Court awarded Erin permanent child support of $1,800 per month ($900 per month per child) from Jason. Because Jason earned no income himself and the court was unable to impute Jason's gift income from Chris, the court held that strict adherence to the Child Support Guidelines would not result in an "adequate and reasonable" child support award under § 40-4-204(3)(a), MCA, necessitating an upward departure from the Guidelines. In arriving at its $1,800 figure, the District Court considered the prospective annual rental income of the home that Jason lives in—which the court estimated at $57,600—coupled with Jason's prospective earnings from minimum wage employment—which the court estimated to be $18,200 per year. Furthermore, in support of its determination that this $1,800 monthly child support award was "reasonable, adequate, and appropriate," the court noted this figure was almost exactly 50% of the $3,624 in monthly expenses currently paid by Erin to support A.T.M. and M.K.M.

¶12 The District Court also declined Erin's request for retroactive child support dating back to November 2016. In so doing, the court noted that Erin had received additional

support from Chris throughout the course of these proceedings. Following Jason and Erin's separation, Chris found Erin a free place to stay in Hamilton with one of Chris's friends. Next, when Chris's friend moved in April 2018, Chris gifted Erin's parents $175,000 for a down payment on a new home in Hamilton—the same home where Erin currently resides. Moreover, in addition to the $560 per month in temporary child support that Erin received from September 2016 through April 2021, Chris made additional monthly gift payments to Erin to support Erin and her children. From June 2016 through April 2018, Chris provided Erin with tax-free payments of $700 per month; in April 2018, following Erin's move into her new home, Chris reduced these payments to $500 per month, but he continued to make these payments until the court's entry of its Final Decree. Considering these facts, the court denied Erin's request for retroactive child support, holding that "[p]roviding an award of retroactive child support would result in another financial windfall to Erin, the source of which would be [Chris], and [would] ignore the substantial financial contributions provided by [Chris] for the benefit of Erin and the children."

¶13 Erin raises two main issues on appeal. First, Erin contends that the court misapprehended the effect of the evidence—and misapplied the law by relying on *Paschen*—when it categorized Jason's income from Chris as "gift income," which prevented this income from being incorporated into the court's child support calculation under the Montana Child Support Guidelines. Based on this, Erin seeks the reversal of the court's permanent monthly child support award of $1,800 and a remand with instructions allowing for Chris's payments to Jason to be attributed to Jason as "income" under the

Guidelines. Second, Erin asserts the lower court abused its discretion when it failed to award Erin retroactive child support dating back to November 2016.[4]

STANDARDS OF REVIEW

¶14 We review a district court's factual findings in a dissolution proceeding, including factual findings pertaining to an award of child support, to determine if they are clearly erroneous. *In re Marriage of Tipton*, 2010 MT 144, ¶ 12, 357 Mont. 1, 239 P.3d 116 (citation omitted). "A finding is clearly erroneous if it is not supported by substantial evidence, the district court misapprehended the effect of the evidence, or our review of the record convinces us that the district court made a mistake." *Tipton*, ¶ 12 (citing *In re Marriage of Crilly*, 2005 MT 311, ¶ 10, 329 Mont. 479, 124 P.3d 1151 (additional citations omitted)). A trial court's conclusions of law are reviewed de novo to determine whether the court's interpretation of the law was correct. *In re Marriage of O'Moore*, 2002 MT 31, ¶ 8, 308 Mont. 258, 42 P.3d 767 (citation omitted). We review child support awards, including retroactive child supports awards, for an abuse of discretion. *In re Marriage of Brinley*, 2010 MT 260, ¶¶ 6-8, 358 Mont. 314, 244 P.3d 339 (citations omitted). *See also In re Marriage of Lewton*, 2012 MT 114, ¶ 35, 365 Mont. 152, 281 P.3d 181 (citing *Brinley*, ¶ 8). "A district court abuses its discretion where it acts arbitrarily, without employment

[4] In her reply brief, Erin also asks this Court to strike pages 5 through 9 of Jason's brief on the ground that these pages primarily consist of vindictive, unsubstantiated factual accusations about Erin and her family which are irrelevant to Erin's appeal. Although this Court is sympathetic to Erin's argument, we note that a reply brief is not the procedurally proper mechanism for Erin to raise her request to strike this information. *See* M. R. App. P. 16.

of conscientious judgment, or exceeds the bounds of reason resulting in a substantial injustice." *Anderson v. Anderson*, 2014 MT 111, ¶ 11, 374 Mont. 526, 323 P.3d 895 (citing *In re Marriage of Tummarello*, 2012 MT 18, ¶ 21, 363 Mont. 387, 270 P.3d 28).

DISCUSSION

¶15 *1. Did the District Court err when it categorized Jason's income from Chris as "gift income," resulting in the exclusion of that income from the District Court's child support calculation?*

¶16 Under Montana law, a court may order a party to a dissolution proceeding to pay maintenance and/or child support. Section 40-4-203, -204, MCA. With respect to child support, § 40-4-204(2), MCA, obligates the court to consider, among other things, the financial resources of the child and the parents, as well as the child's standard of living had the parents remained married. Section 40-4-204(3)(a), MCA, further states that whenever a court issues a child support order, "the court shall determine the child support obligation by applying the standards in this section and the uniform [C]hild [S]upport [G]uidelines adopted by the [D]epartment of [P]ublic [H]ealth and [H]uman [S]ervices" (DPHHS). Indeed, these Guidelines further instruct what type of "income" can be considered for the purposes of determining child support. In particular, Admin. R. M. 37.62.105(1) states that "[i]ncome for child support" includes "actual income" as well as "imputed income . . . or any combination thereof which fairly reflects a parent's resources available for child support." "Actual income," under Admin. R. M. 37.62.105(2)(a), expressly includes a parent's "economic benefit from whatever source derived [including, subject to exceptions] . . . income from salaries, wages, tips, commissions, bonuses, earnings, profits,

dividends, severance pay, pensions, draws or advances against wages or salaries, interest, trust income, annuities, [and] royalties," along with several other categories of income. "Imputed income" is defined, under Admin. R. M. 37.62.106(1) and (3)(a)-(c) as "income not actually earned by a parent, but which is attributed to the parent" based on the parent's "recent work and earnings history . . . occupational, educational, and professional qualifications . . . [and] existing job opportunities and associated earning levels in the community[,]" amongst several other factors. Admin. R. M. 37.62.106(2)(a)–(d) further states "it is appropriate to impute income to a parent . . . when the parent" is: (a) unemployed, (b) underemployed, (c) fails to produce sufficient proof of income, (d) has an unknown employment status, or (e) is a student. Notably, the term "gift" does not appear anywhere in the Guideline's definitions for "actual income" or "imputed income." In recognition of this fact, this Court held in *Paschen* that gifts of cash do not constitute income for purposes of calculating child support. *Paschen*, ¶ 37.

¶17 In *Paschen*, a district court had imputed $175,000 of income to a husband for the purposes of calculating his child support obligation; $100,000 of this reflected the husband's earning capacity while the other $75,000 reflected the amount in regular, annual cash payments that the husband's mother had gifted him for each of the four years during the parties' marriage.[5] *Paschen*, ¶¶ 3, 37-39. We ultimately reversed the lower court's

[5] In *Paschen*, following the separation of the husband and wife, the husband's mother decreased her annual gift payments to the husband from $75,000 to $30,000. *Paschen*, ¶¶ 3-6.

attribution of this $75,000 in gift income to the husband on the ground that the incorporation of future gift income was not valid "income"—actual or imputed—under the Guidelines. First, we examined the history of changes to Admin. R. M. 37.62.105 and 37.62.106 and noted that the term "gifts and prizes" was previously expressly included in the Rules' definition of "[actual] income"—which, at the time, was referred to as "gross income." *Paschen*, ¶¶ 28-30. This definition remained until 1992, when the Department of Social and Rehabilitation Services (DSRS)—which oversaw the Child Support Guidelines until DPHHS assumed its present-day authority in 1995—made the express decision to amend the Guidelines to eliminate the term "gifts and prizes" from the list of *all* sources of income—both actual and imputed. Next, *Paschen* noted that DPHHS, upon revising Admin. R. M. 37.62.105 and 37.62.106 twice—once in 1998 and again in 2012—failed to reintroduce the term "gifts and prizes" back into these Rules on either occasion. We further noted that the Montana Legislature had also failed to expressly act to reintroduce the term "gifts" into the Guidelines, despite revising the governing child support statute—§ 40-4-204, MCA—"more than a dozen times" since the statute's enactment. *Paschen*, ¶¶ 29-32. Thus, due to DSRS's 1992 decision to amend the Child Support Guidelines by eliminating the terms "gifts and prizes"—and the decades of inaction following this decision—the *Paschen* Court held that the text of Admin. R. M. 37.62.105 and 37.62.106 reflected a purposeful intent to exclude "gifts" from the Guidelines' definitions of actual and imputed income. *Paschen*, ¶¶ 28-33. We reasoned

"[t]he unpredictable largesse or generosity of a third person should not be a basis for determining a parent's ability to provide child support." *Paschen*, ¶ 37.

¶18 Erin claims that the district court committed legal error by applying *Paschen* in lieu of other precedent, and that the court misapprehended the effect of the evidence by factually classifying Chris's payments to Jason as "gifts" lacking in consideration. This latter contention is easily dismissed. Although not referred to in *Paschen*, the Montana Code defines "gift" as "a transfer of personal property made voluntarily and without consideration." Section 70-3-101, MCA ("Gift defined"). Here, Chris testified that, upon his death, he intends for Jason's inheritance to be reduced based on the amount of cash he has given Jason during his lifetime; however, Chris also noted that he would conduct no "strict accounting" in this regard. As a result, Erin claims that this reduction of Jason's future inheritance based on Chris's present-day gifts to Jason should be deemed "consideration" for these present-day payments. However, the reduction of a future gift by a specific amount, coupled with a present-day gift of that same amount, does not constitute bargained-for consideration—especially when, under the terms of Chris's current will, Jason's future inheritance remains freely revocable by Chris. Moreover, Erin's alternate argument that Chris's gifts to Jason should have been factually considered a "loan"—rather than a "gift"—from Chris has no merit, as Chris's testimony was clear that he had "no expectation of repayment or other benefit [from Jason] in return" for his payments. Thus, the District Court did not misapprehend the effect of the evidence by

finding that Chris's payments to Jason are not loans, but rather, "gifts" with no bargained-for consideration.

¶19 Erin next argues that *Paschen*'s facts are distinguishable. She argues that the lower court should have applied *In Marriage of Hoffmaster*, 239 Mont. 84, 90-91, 780 P.2d 177, 181 (1989), where this Court ruled that a father's receipt of "inheritance installment" payments from a deceased family member should have been included as a portion of that father's income in calculating his child support obligation. However, Jason's monthly checks and additional cash payments from Chris are not the result of any formal, legally irrevocable document; rather, Chris's gift payments remain freely revocable and are entirely subject to Chris's future discretion. Erin's assertion that the lower court should have applied *Hoffmaster* rather than *Paschen* also asks this Court to apply precedent which arose *before* the DSRS's 1992 revision of the Child Support Guidelines—that is, the revision which removed the term "gifts and prizes" from the definitions of actual and imputed income. Thus, *Hoffmaster* is not controlling on this issue.

¶20 Next, Erin's assertion that the facts of *Paschen* are "glaringly different" lacks merit. Erin asserts that Chris's monthly payments to Jason over the span of the past ten years constitute "regular, sustained, and predictable payments." In contrast, Erin argues that the four $75,000 one-time annual payments given to the father in *Paschen*—which were then reduced by more than half to $30,000 in the years following the father's separation from his wife—do not constitute the same type of "regular, sustained, and predictable" monthly payments of $5,000 that Chris gives Jason. First, Erin's argument ignores the broader truth

that both cases involve the need to classify—for child support calculation purposes—regular, freely revocable gifts to the parent of a child. Second, *Paschen*'s holding expressly referenced and discussed a California Appeals Court holding involving facts *substantially* like Jason's case. In *In re Marriage of Alter*, 171 Cal. App. 4th 718, 89 Cal. Rptr. 3d 849 (2009), monthly cash gifts of $6,000 had been made to a father from his mother "for . . . over a decade"—nearly identical to Chris's ten plus years of providing monthly $5,000 cash payments to Jason. *Alter*, 171 Cal. App. 4th at 736-37, 89 Cal. Rptr. 3d at 863-64. Although the California court in *Alter* ultimately ruled in favor of including gift income in child support calculations, the *Paschen* Court held that it was not "persuaded by the rationale[]" of California's courts on this issue. *Paschen*, ¶ 37. Thus, *Paschen*'s discussion of the *Alter* decision indicates that the Court contemplated a case involving highly "regular, sustained, and predictable" gift income, but rejected including it as income for child support purposes. The District Court correctly applied *Paschen* to the facts of this case and did not commit legal error.

¶21 We do, however, acknowledge the facts in *Paschen*¸¶ 19, are different from here. *Paschen* involved calculating child support for a father who was earning, or capable of earning, $100,000 in annual income through his own employment, alongside an additional $75,000 in annual gifts he received from his relative. However, *Paschen* remains controlling where a party's receipt of recurrent, revocable gift payments constitutes that party's primary and sole source of income. Here, *Paschen's* central holding that "it would

be fundamentally unfair to base a parent's future monthly child support obligation on gifts not yet received and which may never be given" remains dispositive. *Paschen*, ¶ 37.

¶22 Finally, Erin contends that, by categorizing Jason's income from Chris as "gift income" and awarding only $1,800 in total monthly child support, the District Court failed to maintain "the standard of living that [her] child[ren] would have enjoyed had the marriage not been dissolved," in violation of § 40-4-204(2)(c), MCA. In particular, Erin contends that this failure to follow the statute is a "substantial injustice" constituting an "abuse of discretion." However, § 40-4-204(2)(c)'s "standard of living" consideration need not be determinative in child support rulings; rather, (2)(c) is merely one of eight separate, "relevant factors" listed in subsections (2)(a) through (2)(h) which a court "shall consider" when awarding child support under § 40-4-204(2)(a)-(h), MCA. Additionally, the court's decision to factor Jason's prospective "rental income" into its child support calculation demonstrated it was aware an adjustment was needed to reflect the children's pre-dissolution standard of living. Given these considerations, and because the District Court correctly determined *Paschen* was controlling, we reject Erin's contention that the District Court "abused its discretion" in this regard.

¶23 The District Court did not err or abuse its discretion in holding that Chris's future payments to Jason must be considered gifts.

¶24 *2. Did the District Court abuse its discretion when it refused to award Erin retroactive child support dating back to November 2016?*

¶25 Erin asks that she receive retroactive child support dating back to November 2016, the first month after Erin filed her October 2016 motion for increased temporary support. *See* § 40-4-208(1), MCA (permitting modification of child support or maintenance "only as to installments accruing subsequent to actual notice to the parties of the motion for modification"). On appeal, Erin argues the District Court's temporary child support award of $560 per month was inequitably low and insufficient to cover her expenses. Erin asserts this temporary support award harmed her ability to pursue her degree, caused her to seek public assistance by signing up for food stamps and Medicaid coverage for her two children, and forced her to rely on direct gift payments from Chris for additional income. Thus, although following the entry of the Final Decree, Erin received a larger, permanent award of $ 1,800 per month, Erin argues that the court's rejection of her request to have any permanent increase applied retroactively constituted an abuse of discretion.

¶26 Section 40-4-121(1), MCA permits a lower court to award temporary child support in a pending dissolution matter, and, in doing so, instructs the court to adhere to § 40-4-204, MCA—the same statute that is used to calculate and determine final child support awards. When ruling on a party's request for modification, retroactive or otherwise, § 40-4-121(8)(a), MCA, instructs a lower court to adhere to the standards provided in § 40-4-208, MCA—the same standard that lower courts use to rule on requests to modify final, non-temporary, child support awards. Section 40-4-208(2)(b)(i), MCA, states that a court's previously issued child support award may only be modified "upon a showing of changed circumstances so substantial and continuing so as to make the existing terms

unconscionable." (Emphasis added.) Moreover, as this Court has previously noted, determinations under § 40–4–208(2)(b)(i), MCA, are discretionary, meaning that a district court's ultimate decision on whether to retroactively modify child support ordinarily receives deference and is reversed only for an abuse of discretion. *See Brinley*, ¶¶ 7-8; *O'Moore*, ¶ 11. Our review of these decisions is fact-intensive, and we have previously held that "[d]eterminations of unconscionability of a child support award as grounds for modification are made on a case-by-case assessment." *O'Moore*, ¶ 8 (citing *In re Marriage of Brown*, 283 Mont. 269, 272, 940 P.2d 122, 123 (1997)).

¶27 Here, the District Court acknowledged that "Erin and/or the children may benefit from a retroactive child support award and an award of temporary maintenance";[6] nevertheless, it denied Erin's request for retroactive support, stating as follows:

> [T]he Court does not find retroactive child support or family support to be necessary or appropriate due to the payments made to Erin by [Chris], including the $175,000 for housing and the monthly awards of at least $500 paid by [Chris] for the benefit of Erin and the children. These amounts exceed any proposed amounts sought for retroactive child support, or temporary family support. Providing an award of retroactive child support would result

[6] The District Court denied a separate request from Erin for an additional temporary maintenance payment for Erin's stated purpose of "establish[ing] a home and car[ing] for [her] children while [Erin] finishes school." The court's Final Decree denied this request for the same reason that it denied Erin's request for retroactive child support—that is, because of Chris's "significant financial support" to Erin and her family in the time between the parties' separation and dissolution. On appeal, Erin also challenges the District Court's denial of this specific temporary maintenance payment, merging this argument with her broader argument to receive retroactive child support. Nevertheless, we conclude the District Court did not abuse its discretion in denying this maintenance payment for Erin's housing and education because Chris helped find free housing for Erin until April 2018 and gifted Erin's parents the $175,000 down payment on Erin's current home. Chris also indirectly assisted with Erin's education via his $700 and $500 monthly gift payments to her between June 2016 and April 2021.

> in another financial windfall to Erin, the source of which would be [Chris], and ignore the substantial financial contributions provided by [Chris] for the benefit of Erin and the children.

The District Court's logic is sound. Section 40-4-208(2)(b)(i), MCA, in part, requires a temporary child support award to be "unconscionable" under the circumstances for it to be retroactively modified by a court. In addition to Erin's $560 per month in temporary child support, Chris provided Erin with additional monthly payments of $700 per month until April 2018, and $500 per month following his April 2018 gift of the $175,000 down payment on Erin's current residence. These gifts resulted in an actual monthly income to Erin of over $1,000 per month, an amount which came *entirely* from Chris. We conclude the District Court did not abuse its discretion in denying Erin's request for retroactive child support.

¶28 Erin further argues that in the event we conclude the District Court was correct to apply *Paschen,* then gifts should similarly not be considered when deciding whether to award retroactive child support under § 40-4-208, MCA. According to Erin, this results in an unfair contradiction. We reject this argument because not including future gifts as income is different from considerations involving the retroactive application of child support. Unlike consideration of future income and future, revocable gifts, a retroactive award of child support considers past gifts which may not be revoked. Moreover, the court's decision is discretionary and considers all the circumstances of the parents. Here, the District Court considered *past* gifts to Erin from Chris which could no longer be revoked. *Paschen* held *future* gifts could not be factored into a parent's income for the

purposes of calculating *future* child support obligations. As we noted in *Paschen*, ¶ 38, there is indeed "no guarantee that [a parent faced with paying child support] will continue to receive substantial gift[] [income]" in the future, as future promises of gifts are not legally enforceable. Accordingly, the District Court did not abuse its discretion when it considered Chris's past gifts to Erin in denying retroactive child support, and it did not contradict *Paschen* by doing so.

CONCLUSION

¶29 We affirm the District Court's $1,800 monthly child support award and its denial of retroactive child support to Erin.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON