MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ignacio Espinosa De Los Monteros,

Appellant-Respondent,

v.

Amber N. Espinosa De Los Monteros n/k/a Amber Scott-Raddaatz,

Appellee-Petitioner.

August 23, 2023

Court of Appeals Case No. 23A-DR-439

Appeal from the Hamilton Superior Court

The Honorable Andrew R. Bloch, Special Judge

Trial Court Cause No. 29D06-1503-DR-1750

Memorandum Decision by Judge Tavitas
Judges Bailey and Kenworthy concur.

Tavitas, Judge.

Case Summary

[1] Ignacio Espinosa De Los Monteros ("Father") and Amber Espinosa De Los Monteros ("Mother") are the parents of two children. Their marriage was dissolved in 2016. Nonstop contentious post-dissolution litigation has followed.

[2] In 2019, Father filed a petition for modification of child support; the trial court issued an order addressing child support and parenting time issues. Father argues that the trial court erred by: (1) ordering the children to continue therapy; (2) ordering Father to continue therapy; (3) failing to impute income to Mother in the amount suggested by Father; and (4) determining Father has an arrearage rather than an overpayment of child support. We conclude that Father has failed to establish clear error regarding the trial court's therapy orders and the trial court's imputation of income to Mother. The trial court, however, erred when it characterized Father's overpayment of child support as an arrearage. Accordingly, we affirm in part, reverse in part, and remand for the trial court to apply Father's overpayment of child support to his existing arrearage judgment.

Issues

[3] Father raises four issues, which we restate as:

I. Whether the trial court's order that the children continue therapy is clearly erroneous.

II. Whether the trial court's order that Father continue therapy is clearly erroneous.

III. Whether the trial court clearly erred in determining the amount of weekly gross income to impute to Mother.

IV. Whether the trial court clearly erred in characterizing Father's overpayment of child support as an arrearage.

Facts

[4] Father and Mother were married and had two children, B.M., born in 2007, and I.M., born in 2010. The trial court granted a dissolution of marriage in 2016. Father was ordered to have supervised parenting time with the children. The trial court ordered Father to pay $280 per week in child support, ordered him to pay an arrearage of $8,250, and ordered him to pay Mother's attorney fees of $7,000.

[5] Since that time, the parties have engaged in significant contentious post-dissolution litigation. Only the events relevant to this appeal will be discussed here.

[6] In January 2017, Father was found in contempt for failure to pay: (1) child support; (2) his child support arrearage; (3) childcare expenses; (4) the children's extracurricular activities; and (5) Mother's attorney fees. The trial court entered a judgment against Father in the total amount of $32,905.50.

[7] In February 2019, Father filed a petition for modification of child support due to his loss of employment. The trial court held a hearing on the matter in

October 2019, but Father failed to appear. The trial court vacated the hearing and ordered that, "[i]f [Father] wishes the Court to conduct a hearing he can file a request for same." Appellant's App. Vol. II p. 82. In April 2022, Father filed a request for a hearing on his petition for modification of child support.

[8] In June 2022, after hearings on several other pending motions, not including Father's petition for modification of child support, the trial court issued extensive findings of fact and conclusions thereon. In part, the trial court noted Father's mental health evaluation, which recommended intensive individual psychotherapy. The trial court ordered Father to follow the evaluation's recommendations and engage in weekly psychotherapy. The trial court was concerned that unsupervised parenting time with the children would endanger the children physically and emotionally. Accordingly, the trial court again ordered supervised parenting time. The trial court found that Father was $32,905.50 in arrears, although Father was current on his child support payments accruing between January 21, 2017, and February 22, 2022. The trial court ordered Father to pay an additional $10,000 of Mother's attorney fees for a total of $24,205.16 in Mother's attorney fees that Father owed.

[9] Mother filed a motion to correct error regarding the trial court's calculation of Father's child support arrearage and attorney fees owed. After a hearing, the trial court entered revised findings of fact and conclusions thereon. The trial court found that the $32,905.50 arrearage was previously reduced to a judgment, that Father has not made payments on the judgment, and that Father now also owed an additional $14,162.53 in interest on the judgment. Further,

the trial court found that Father owed a total of $27,370 in attorney fees to Mother.

[10] On September 29, 2022, Father notified the trial court that he had moved to Chicago on September 1, 2022.

[11] The trial court held a hearing regarding parenting time issues and Father's request for a modification of child support on November 21, 2022. The parties stipulated to Father's weekly gross income during the years 2019 through 2022. Father asked the trial court to remove his counseling requirement and the supervised parenting time requirement. Father also asked that the trial court impute $1,402 of weekly gross income to Mother, who was remarried and supported by her husband, was caring for an infant, and not working outside of the home.

[12] Mother requested that the supervised parenting time requirement remain in place, that Father participate in reunification therapy with the children, and that Father continue his individual therapy. Mother also testified that the children had been participating in therapy for two to three years at the recommendation of the guardian ad litem. Mother noted that she had never been employed at more than $10 per hour, and she asked the trial court not to impute income to her or, alternatively, to impute only $300 or $500 weekly gross income. Mother calculated that Father had overpaid child support and asked that the overpayment be applied to Father's judgment arrearage.

[13] In January 2023, the trial court issued sua sponte findings of fact and conclusions thereon to address parenting time and child support modification. Regarding parenting time, the trial court ordered that Father's supervised parenting time would be phased into unsupervised parenting time every other weekend. The trial court also ordered: (1) "Father shall continue in therapy and comply with all treatment recommendations. He shall notify Mother when he is released from Therapy"; and (2) "The children shall continue in therapy and comply with all treatment recommendations." Appellant's App. Vol. II p. 53. With respect to child support, the trial court imputed $500 of weekly gross income to Mother.[1] The trial court then ordered:

> The Court finds that Father's Child support should be:
>
> a. From February 28, 2019, through December 31, 2019: $294.00 per week.
>
> b. From January l, 2020, through December 31, 2020: $384.00 per week.
>
> c. From January 1, 2021, through December 31, 2021: $304.00 per week.

[1] The trial court found it "is in the children's best interest to calculate what Father's support obligation would have been in the intervening years as well as what his current obligation should be." Appellant's App. Vol. II pp. 53-54. This is not the standard for modification of child support. *See* Ind. Code § 31-16-8-1; Ind. Child Support Guideline 4. The parties, however, do not raise this issue.

> d. From January 1, 2022, through August 31, 2022: $264.00 per week
>
> e. From September 1, 2022, through the present: $405.00 per week.
>
> * * * * *
>
> 10. Father's arrearage for the period of February 28, 2019, through November 4, 2022 is $4,875.00.

Id. at 54. The trial court attached several child support worksheets for each period of time showing an imputation of $500 in weekly gross income to Mother. Father now appeals.

Discussion and Decision

[14] The trial court here entered sua sponte findings of fact and its conclusions. "In such a situation, the specific factual findings control only the issues that they cover, while a general judgment standard applies to issues upon which there are no findings." *Fetters v. Fetters*, 26 N.E.3d 1016, 1019 (Ind. Ct. App. 2015), *trans. denied*. When reviewing the accuracy of findings entered sua sponte, we first consider whether the evidence supports them. *Id.* at 1020. We will disregard a finding only if it is clearly erroneous, meaning the record contains no facts to support it either directly or by inference. *Id.* We will not reweigh the evidence or judge witness credibility. *Id.* Next, we consider whether the findings support the judgment. *Id.* "A judgment also is clearly erroneous if it relies on an incorrect legal standard, and we do not defer to a trial court's legal

conclusions." *Id.* We review the trial court's legal conclusions de novo. *Gittings v. Deal*, 109 N.E.3d 963, 970 (Ind. 2018).

[15] "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." *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011). Trial courts are, thus, "enabled to assess credibility and character through both factual testimony and intuitive discernment. . . ." *Id.* "[O]ur trial judges are in a superior position to ascertain information and apply common sense . . . ." *Id.*

I. The Children's Therapy

[16] Father argues that the trial court erred by ordering the children to continue their therapy, which was recommended to Mother by the GAL. Father claims the therapy may interfere with his "recently restored parenting time." Appellant's Br. p. 18. Father, however, did not argue this to the trial court. A party on appeal waives a claim by raising it for the first time on appeal. *In re N.G.*, 51 N.E.3d 1167, 1173 (Ind. 2016). Accordingly, Father's argument is waived.

II. Father's Therapy

[17] Father argues that the trial court's order that Father continue therapy, which was initially ordered in June 2022, was clearly erroneous. According to Father, this Court should order the trial court to clarify the goals of the therapy and when therapy can be terminated.

[18] We first note that Father's brief fails to identify any of the numerous reasons that a mental health evaluation was ordered, fails to discuss the evaluation's recommendations, fails to mention any of the reasons that supervised parenting time has been ordered, and generally ignores Father's conduct that resulted in the order to participate in therapy. We conclude that Father has failed to make a cogent argument; thus, the issue is waived. *See* Ind. Appellate Rule 46(A)(8); *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding that the failure to present a cogent argument waives the issue for appellate review), *trans. denied*.

[19] Waiver notwithstanding, Indiana Code Section 31-17-4-1(a) provides: "[A] parent not granted custody of the child is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development." This Court "has previously held that trial courts have discretion to set reasonable restrictions and conditions upon a parent's parenting time," including the requirement that a parent undergo therapy. *T.R. v. E.R.*, 134 N.E.3d 409, 417 (Ind. Ct. App. 2019) (quoting *Pitcavage v. Pitcavage*, 11 N.E.3d 547, 561 (Ind. Ct. App. 2014)).

[20] In June 2022, the trial court issued findings regarding Father's mental health evaluation, which recommended intensive individual psychotherapy. The trial court ordered Father to follow the evaluation's recommendations and engage in weekly psychotherapy. The trial court was concerned that unsupervised parenting time with the children would endanger the children physically and

emotionally and ordered supervised parenting time. After less than six months of therapy, Father requested that the trial court "remove the necessity of any counseling . . . ." Tr. Vol. II pp. 19-20. Given Father's history, our review of the record reveals support for the trial court's order. Accordingly, we cannot say the trial court's order is clearly erroneous or requires clarification.

III. Mother's Imputed Income

[21] Father argues that, in calculating child support, the trial court failed to impute the correct amount of weekly income to Mother. "A trial court's calculation of child support is presumptively valid." *Young v. Young*, 891 N.E.2d 1045, 1047 (Ind. 2008). A trial court's decision regarding child support will be upheld unless the trial court has abused its discretion. *Martinez v. Deeter*, 968 N.E.2d 799, 805 (Ind. Ct. App. 2012). A trial court abuses its discretion when its decision is clearly against the logic and the effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Id.*

[22] Trial courts may impute income to a parent for purposes of calculating child support upon the determination that he or she is voluntarily unemployed or underemployed. *Barber v. Henry*, 55 N.E.3d 844, 851 (Ind. Ct. App. 2016). Indiana Child Support Guideline 3(A)(3) provides:

> If a court finds a parent is voluntarily unemployed or underemployed without just cause, child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's employment and earnings history, occupational

> qualifications, educational attainment, literacy, age, health, criminal record or other employment barriers, prevailing job opportunities, and earnings levels in the community.

[23] Mother testified that she has never earned more than $10 per hour. Mother is remarried, and her spouse is employed. Mother is caring for an infant and not working outside of the home. Mother requested that the trial court not impute income to her or, alternatively, impute only $300 or $500 in weekly gross income.

[24] Father contends that the trial court should have imputed $1,402 of weekly gross income to Mother. Father based this calculation on Mother's living expenses. Father relies upon the following commentary to the Child Support Guidelines:

> d. In-Kind Benefits. Whether or not the value of in-kind benefits should be included in a parent's weekly gross income is fact-sensitive and requires careful consideration of the evidence in each case. It may be inappropriate to include as gross income occasional gifts received. However, regular and continuing payments made by a family member, subsequent spouse, roommate or live-in friend that reduce the parent's costs for housing, utilities, or groceries, may be included as gross income. If there were specific living expenses being paid by a parent which are now being regularly and continually paid by that parent's current spouse or a third party, the value of those assumed expenses may be considered to be in-kind benefits and included as part of the parent's weekly gross income. The marriage of a parent to a spouse with sufficient affluence to obviate the necessity for the parent to work may give rise to a situation where either potential income or the value of in-kind benefits or both should be considered in arriving at gross income.

Ind. Child Support Guideline 3, Commentary 2(d).

[25] The Guidelines and Commentary, however, explain that the calculation of imputed income is discretionary. There are many factors to consider—living costs that are covered by a subsequent spouse are just one of many factors that the trial court may contemplate. Under the Guidelines, the trial court was entitled to also consider Mother's potential income based upon her work history. Father merely asks that we reweigh the evidence here, which we cannot do. The trial court's imputation of $500 of weekly gross income to Mother is not clearly erroneous.

IV. Father's Arrearage

[26] Finally, Father also challenges the trial court's calculation of his child support arrearage. The trial court found: "Father's arrearage for the period of February 28, 2019, through November 4, 2022 is $4,875.00." Appellant's App. Vol. II p. 54. This amount is based upon Mother's Exhibit 2, which calculated: (1) Father's child support for February 28, 2019, through November 4, 2022; (2) the amount of child support actually paid by Father during this time period; and (3) the difference between the amount owed and the amount paid. Mother's exhibit calculated that $4,875 is the "[a]mount to apply to arrearage." Ex. Vol. III p. 12. Mother also testified that Father had overpaid child support during this time period and asked that the overpayment be applied to Father's arrearage judgment.

[27] The evidence presented, thus, demonstrated that Father overpaid his child support during the time period at issue. Father, however, owes a substantial judgment to Mother for unpaid child support for an earlier time period and unpaid attorney fees. Accordingly, we agree that the trial court mischaracterized the $4,875 as an arrearage rather than an overpayment. We remand for the trial court to order the $4,875 overpayment to be applied to Father's arrearage judgment, as requested by Mother.

Conclusion

[28] Father has failed to establish clear error regarding the trial court's therapy orders and the trial court's order imputing income to Mother. The trial court, however, erred in characterizing Father's actual overpayment of child support as an arrearage. Accordingly, we affirm in part, reverse in part, and remand for the trial court to apply Father's overpayment of child support to his existing arrearage judgment.

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

Bailey, J., and Kenworthy, J., concur.