MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Erik H. Carter
Crown Point, Indiana

IN THE COURT OF APPEALS OF INDIANA

Nathan Lummis,
Appellant-Respondent,

v.

Marlena Friel,
Appellee-Petitioner.

August 30, 2021

Court of Appeals Case No. 21A-JP-391

Appeal from the Madison Circuit Court

The Honorable Dennis Carroll, Special Judge

Trial Court Cause No. 48C06-1105-JP-127

Tavitas, Judge.

Case Summary

[1] Nathan Lummis ("Father") appeals from the trial court's modification of a child support order. Father challenges the denial of his request for retroactive application for a parenting time credit relating back to a date preceding the filing of Father's petition to modify child support. Father also challenges the trial court's determination of his gross income for purposes of employing the Indiana Child Support worksheet. As to the former, the trial court did not clearly err in refusing to retroactively modify its child support order to a date preceding the filing of Father's petition to modify; thus, we find no clear error and affirm in part. Regarding the latter, the trial court's determination of Father's gross income for 2020 is unsupported by the evidence and is clearly against the logic and effect of the facts and circumstances before the trial court; accordingly, we reverse in part and remand to the trial court. We affirm in part, reverse in part, and remand with instructions.

Issues

[2] Father raises two issues on appeal, which we restate as follows:

I. Whether the trial court improperly failed to award him parenting time credit retroactive beyond the date of Father's petition to modify child support.

II. Whether the trial court improperly imputed additional income to Father in determining his gross income.

Facts

[3] Father and Marlena Friel ("Mother") are the divorced parents of J.L. ("the Child"). Mother is the legal and physical custodian of the Child. Father was court-ordered to pay weekly child support of $100.00 to Mother since at least[1] September 2014. Father was initially granted visitation pursuant to the Indiana Parenting Time Guidelines ("IPTG"); however, in October 2012, the trial court modified the order to require supervised visitation. In 2014, the trial court entered a $2,500.00 attorney fees judgment in favor of Mother against Father. As of March 2016, Father owed a child support arrearage of over $8,000.00.

[4] On October 3, 2017, Father filed a petition for modification of child visitation to unsupervised parenting time. On October 17, 2017, Mother filed a motion for rule to show cause and to enforce the attorney fees judgment. On November 17, 2017, Father filed an emergency petition for temporary modification of the visitation order. In December 2017, the trial court: (1) found Father in contempt for failure to pay toward the child support arrearage and failure to pay any amount toward the attorney fee judgment; (2) concluded Father was voluntarily underemployed; and (3) ordered Father to pay $150.00 per week, consisting of $100.00 of current child support, $30.00 toward Father's

[1] We gleaned this information from a previously-filed petition in the underlying trial court record.

arrearage, and $20.00 toward the outstanding attorney fees judgment.[2] In March 2018, the trial court granted Father's petition to modify parenting time with overnight visitations scheduled to commence in August 2018, pursuant to the IPTG. Father did not request a modification of child support or a parenting time credit.

[5] On November 18, 2020, Mother filed another motion for rule to show cause regarding Father's noncompliance with the trial court's orders. On December 4, 2020, Father filed a petition to modify child support, wherein he argued, for the first time, that: (1) the trial court failed to award him a parenting time credit to which he was entitled following the 2018 parenting time modification; and (2) as a result of the "denied" credit, his child support obligation was too high and caused him financial strain.

[6] On January 27, 2021, the trial court conducted a hearing on Mother's petition for rule to show cause and contempt citation and Father's petition to modify child support. During the hearing, the trial court heard undisputed testimony that: (1) in 2019, Father earned $32,000.00 and paid $3,600.00 of his $5,200.00 child support obligation for 2019; and (2) in 2020, Father earned $23,620.00 and paid $2,700.00 of his $5,200.00 child support obligation for 2020.

---

[2] The $50.00 overpayment was applied only to Father's arrearage, leaving the attorney fees judgment entirely unpaid.

[7] Mother testified, in pertinent part, as follows: (1) as of January 22, 2021, Father owed $11,770.31 in child support, as well as the entire attorney fees judgment of $2,500.00; and (2) Father was entitled to the parenting time credit for ninety-eight overnights, retroactive to the date when Father filed his petition to modify child support. Tr. Vol. II pp. 9-10.

[8] Father testified that he works as an independent contractor handyman and attributed his reduced 2020 income to the COVID-19 pandemic. On cross-examination, Father affirmed that his income of $23,620.00 was reflected in his 2020 IRS Form 1099 from Aspin.[3] Father testified that he had not yet paid Social Security, state, or federal taxes on his 2019 income and that he intended to pay taxes on his 2019 and 2020 income in the future. During the hearing, the trial court asked Father: "So that entire sum of thirty-two thousand dollars ($32,000.00) from 2019 would have been available to pay your own expenses, your living expenses, plus the obligations you had for your daughter, right?" *Id.* at 40. Father responded in the affirmative. Father testified further that his parenting time expenses, including "food and extracurricular activities," electricity, utilities, [and] gas[ ] for transportation[,]" constitute in-kind child support payments that correlate to the parenting time credit he was denied. *Id.* at 25.

[3] Father's 1099 Form, reflecting income Father earned as an independent contractor, is not included in the record on appeal or in the trial court's record on Odyssey.

[9] On February 2, 2021, the trial court entered its order, wherein it: (1) found Father's explanation for his reduced earnings was "plausible[,]" Father's App. Vol. II p. 13; (2) treated Father's reported 2020 income as net income, recalculated Father's gross income therefrom and employed the resulting figure in the parties' child support worksheet; (3) acknowledged Father was, by agreement, entitled to a parenting time credit for ninety-eight to 100 overnight visits dating back to the filing of Father's petition to modify child support; (4) temporarily reduced Father's support obligation to $65.00 per week, with the modification ordered to be "retroactive to the date Father filed his petition, December 4, 2020"; and (5) ordered Father to pay additional attorney fees to Mother. *Id*. at 14. Father now appeals.

Analysis

[10] We initially note that Mother has not filed an appellee's brief. "[W]here, as here, the appellee does not submit a brief on appeal, the appellate court need not develop an argument for the appellee but, instead, will 'reverse the trial court's judgment if the appellant's brief presents a case of prima facie error.'" *Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020) (quoting *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 758 (Ind. 2014). "Prima facie error in this context means 'at first sight, on first appearance, or on the face of it.'" *Id*. This less stringent standard of review relieves us of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee. *See, e.g., Jenkins v. Jenkins*, 17 N.E.3d

350, 352 (Ind. Ct. App. 2014). We are obligated, however, to correctly apply the law to the facts in the record to determine whether reversal is required. *Id.*

[11] Father challenges the trial court's modification of his child support obligation. A trial court's calculation of child support is presumptively valid, and we will reverse a support order only for clear error. *Bogner v. Bogner*, 29 N.E.3d 733, 738 (Ind. 2015); *Young v. Young*, 891 N.E.2d 1045, 1047 (Ind. 2008). That is, reversal is proper only where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the trial court or is contrary to law. *See Bogner*, 29 N.E.3d at 738.

[12] > We recognize of course that trial courts must exercise judgment, particularly as to credibility of witnesses, and we defer to that judgment because the trial court views the evidence firsthand and we review a cold documentary record. Thus, to the extent credibility or inferences are to be drawn, we give the trial court's conclusions substantial weight. But to the extent a ruling is based on an error of law or is not supported by the evidence, it is reversible, and the trial court has no discretion to reach the wrong result.

MacLafferty v. MacLafferty, 829 N.E.2d 938, 941 (Ind. 2005).

[13] Indiana Code Section 31-16-8-1 provides, in part, as follows:

> (a) Provisions of an order with respect to child support or an order for maintenance . . . may be modified or revoked.

(b) Except as provided in section 2 of this chapter, and subject to subsection (d), modification may be made only:

> (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
>
> (2) upon a showing that:
>
> > (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
> >
> > (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed. . . .

Ind. Code § 31-16-8-1; *see also* Ind. Child Support Guideline 4 ("The provisions of a child support order may be modified only if there is a substantial and continuing change of circumstances which makes the present order unreasonable or the amount of support ordered at least twelve [ ] months earlier differs from the Guideline amount [ ] by more than twenty percent (20%).").

I. Retroactivity

[14] First, Father argues that the trial court improperly failed to award him a sufficient retroactive parenting time credit for "support and shared expenses" that he incurred during his exercise of parenting time. Father's Br. p. 13.

Father contends that, instead of granting him a parenting time credit dating back to August 2018, when Father began to exercise overnight parenting time visits pursuant to the IPTG, the trial court only gave him credit for ninety-eight to 100 days of overnight visits dating back to December 4, 2020, when Father filed his petition to modify child support.

[15] A trial court has discretion to make its modification of child support relate back to the date the petition to modify was filed or any date thereafter, but retroactive modification that relates back to a date earlier than that of the petition to modify is improper. *Taylor v. Taylor*, 42 N.E.3d 981, 986 (Ind. Ct. App. 2015), *trans. denied*. This rule against retroactive modification of a child support order protects the welfare of children, provides predictability and certainty, and prevents extended and expensive litigation about alleged informal agreements between parents." *Id*. In 2018, Father did not request a parenting time credit.

[16] The Indiana Child Support Guidelines are designed to help trial courts fashion child support awards that provide children, as closely as possible, with the same standard of living they would have enjoyed had the marriage not been dissolved. *R.B. v. K.S.*, 25 N.E.3d 232, 235 (Ind. Ct. App. 2015). Guideline 6 provides: "[a] credit should be awarded for the number of overnights each year that the child(ren) spend with the noncustodial parent." *See Harris v. Harris*, 56 N.E.3d 1152, 1156 (Ind. Ct. App. 2016) ("Under Indiana Child Support

Guideline 6, a non-custodial parent is to be afforded credit to his or her child support obligation 'for hosting his or her children overnight.'").

[17] Additionally, under the heading, "Application of Parenting Time Credit[,]" the commentary to Guideline 6 provides:

> **Application of Parenting Time Credit**. Parenting Time Credit is not automatic. The court should determine if application of the credit will jeopardize a parent's ability to support the child(ren). If such is the case, the court should consider a deviation from the credit.
>
> The Parenting Time Credit is earned by performing parental obligations as scheduled and is an advancement of weekly credit. The granting of the credit is based on the expectation the parties will comply with a parenting time order.
>
> * * * * *
>
> Contents of Agreements/Decrees. Orders establishing custody and child support shall set forth the specifics of the parties' parenting time plan in all cases. A reference to the Indiana Parenting Time Guidelines will suffice if the parties intend to follow the Guidelines. All such entries shall be accompanied by a copy of the Child Support Obligation Worksheet and the Parenting Time Credit Worksheet.[4]

[4] The trial court's failure to include a child support obligation worksheet and a parenting time worksheet with its February 2, 2021 order on Father's petition to modify child support is contrary to the explicit directive of the Guidelines and has both hindered and frustrated our review. *See Payton v. Payton*, 847 N.E.2d 251, 253-54 (Ind. Ct. App. 2006) (finding error and remanding to the trial court where "[n]either parent offered a signed Guidelines worksheet" and "[t]he trial court did not enter findings or complete its own child support worksheet to justify its order and permit our review.").

* * * * *

If the court determines it is necessary to deviate from the parenting time credit, it shall state its reasons in the order.

[18] Based upon the parties' stipulation that Father was entitled to parenting time credit for ninety-eight to 100 overnight visits, the trial court awarded Father a parenting time credit dating back to December 2020, the filing date of Father's petition for modification of child support. Accordingly, the appealed order includes the trial court's written finding that, "[b]y agreement, Father is entitled to 98-100 days of overnight credit. Child support is therefore reduced to $65.00 per week. This modification is retroactive to the date Father filed his petition, December 4, 2020." *See* Father's App. Vol. II p. 14.

[19] As we have already noted above, parenting time credit is not automatic. *See* Child Supp. G. 6, cmt. Although Father began to exercise overnight visits in August 2018, he did not seek a parenting time credit until he filed his petition to modify child support in December 2020. Upon Father's request for parenting time credit in his petition to modify child support, the trial court awarded credit, retroactive to the filing date of Father's petition to modify. *See Taylor*, 42 N.E.3d at 986 ("A trial court has discretion to make its modification of child support relate back to the date the petition to modify was filed or any date thereafter, but retroactive modification that relates back to a date earlier than that of the petition to modify is improper."). Father's claim that he was eligible

for, but failed to seek, parenting time credit in years past does not give rise to a finding of clear error.

[20] We find that the trial court's denial of Father's request for retroactive modification of the child support order to a date preceding Father's filing of his petition to modify child support is neither "clearly against the logic and effect of the facts and circumstances before the trial court [nor] contrary to law." In fact, a retroactive date earlier than the date of Father's petition to modify child support would be improper. The trial court did not clearly err in denying Father's petition for retroactive parenting time credit dating back to August 2018.

II. Gross Income Determination

[21] Next, Father argues that the trial court improperly imputed $6,616.00 of additional income to him in calculating his child support obligation. Specifically, he maintains that the trial court improperly: (1) "imputed to [him] the amount of income that he would have to earn [for] his stated income [to be] his net income"; and (2) treated his income as "'untaxed' . . . as opposed to . . . 'not yet taxed.'" Father's Br. pp. 17, 18.

[22] "The Indiana Child Support Guidelines are based on the Income Shares Model[,]" which is "predicated on the concept that the child should receive the same proportion of parental income that he or she would have received if the

parents lived together." Child Supp. G. 1 (Preface). The commentary to this guideline provides, in part, under the heading "Gross Versus Net Income":

> One of the policy decisions made by the Judicial Administration Committee in the early stages of developing the Guidelines was to use a gross income approach as opposed to a net income approach. Under a net income approach, extensive discovery is often required to determine the validity of deductions claimed in arriving at net income. It is believed that the use of gross income reduces discovery. (See Commentary to Guideline 3A). While the use of gross income has proven controversial, this approach is used by the majority of jurisdictions and, after a thorough review, is considered the best reasoned.
>
> * * * * *
>
> In a gross income methodology, the tax factor is reflected in the support amount column, while in a net income guideline, the tax factor is applied to the income column. In devising the Indiana Guidelines, an average tax factor of 21.88 percent was used to adjust the support column.
>
> Of course, taxes vary for different individuals. . . . Under the Indiana Guideline, where taxes vary significantly from the assumed rate of 21.88 percent, a trial court may choose to deviate from the guideline amount where the variance is *substantiated by evidence at the support hearing*.
>
> Flexibility Versus the Rebuttable Presumption.
>
> * * * * *

> If a judge believes that in a particular case application of the Guideline amount would be unreasonable, unjust, or inappropriate, a finding must be made that sets forth the reason for deviating from the Guideline amount. The finding need not be as formal as Findings of Fact and Conclusions of Law; the finding need only articulate the judge's reasoning.

Id. (emphasis added). Under the heading, "Income Shares Model," the commentary to Guideline 1 further provides, in part, that in applying the Guidelines: "*The gross income of both parents is added together* after certain adjustments are made. A percentage share of income for each parent is then determined." *Id*. (original emphasis).

[23] Indiana Child Support Guideline 3(A), pertaining to the "Definition of Weekly Gross Income," provides in part as follows:

> [ ] For purposes of these Guidelines, "weekly gross income" is defined as actual weekly gross income of the parent if employed to full capacity, potential income if unemployed or underemployed, and the value of in-kind benefits received by the parent. Weekly gross income of each parent includes income from any source, except as excluded below, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, overtime, partnership distributions, dividends, severance pay, pensions, interest, trust income, annuities, structured settlements, capital gains, social security benefits, worker's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, prizes, and alimony or maintenance received.

[24] Here, in its order, the trial court explained that it determined Father's gross income as follows and, thereby, deviated from the Child Support Guidelines:

FATHER'S 2020 income is $23,621. The only way to properly apply the Indiana Child Support Calculator is to calculate gross income on a net amount of $23,621. That is done through the following equation:

$$\frac{\$23,621}{X} = \frac{.7812}{1}$$ (1 - 0.2188, the assumed tax rate above)

$23,621 divided by .7812 = gross income of $30,237. This is the correct figure to use as FATHER'S income, and has been applied in the attached child support worksheet. This is a deviation from the Indiana Child Support Guidelines.[5]

Father's App. Vol. II p. 14.

[25] The uncontroverted testimony is that Father's gross income was $23,621.00 in 2020, yet the trial court determined in its order that Father's 2020 income was net income. The record includes Father's straightforward testimony that he: (1) worked as an independent contractor handyman; (2) earned $32,000.00 in IRS

---

[5] The appellate record does not include a child support worksheet. The sparsity of the record before us prompted our review of the trial court record in the Odyssey case management system. Although the trial court purported to attach the parties' child support worksheet to its order, no worksheet is attached to the copy of the order in Father's appendix or to the order as it appears in the trial court's record in Odyssey. We are unable to determine whether the omission is actually owing to the parties or to the trial court.

Since 1989, the Indiana Child Support Guidelines have required, in all cases in which the court is requested to order support, that both parents complete and sign, under penalty of perjury, a child support worksheet to be filed with the court verifying the parents' incomes. *Glover v. Torrence*, 723 N.E.2d 924, 931 n.2 (Ind. Ct. App. 2000). Despite this mandate, in some cases, parties still fail to submit worksheets. *See, e.g., Payton,* 847 N.E.2d 251. Here, although the trial court's order references an attached worksheet, none appears in the materials submitted on appeal. We caution counsel and the trial court to tender and compile appellate records that comply with the guidelines and facilitate, not frustrate, appellate review.

Form 1099[6] income in 2019; (3) earned $23,621.00 in IRS Form 1099 income in 2020; (4) paid no social security, state, or federal taxes in 2019 and retained the entirety of his 2019 income to use as he wished; and (5) planned[7] to pay taxes on his 2019 and 2020 income in the future. We are perplexed by the trial court's treatment of Father's stated gross income as net income, as well as the trial court's finding that it was required to do so as a precondition to employing the child support worksheet. The trial court failed to explain why it treated Father's gross income as net income. This deviation upward of Father's stated gross income is not supported by the record.

[26] Based on the facts before the trial court, the amount of Father's gross income in 2020 was known, documented, and undisputed. When Father pays his taxes is not relevant to determining Father's gross income. Thus, we conclude that: (1) the trial court's approach to recalculating Father's gross income is not supported by the evidence; and (2) the trial court clearly erred in finding "Father's reported 2020 income should be 'grossed up' for purposes of completing the Indiana Child Support Worksheet."[8] *See* Father's App. Vol. II

---

[6] *See* https://www.irs.gov/faqs/small-business-self-employed-other-business/form-1099-nec-independent-contractors/form-1099-nec-independent-contractors (last visited August 19, 2021).

[7] *See* Tr. Vol. II p. 40 (Father's testimony that "[he] usually wait[s] every couple years and then file[s] [his tax returns]"); *see id.* at 43 (Q: "So do you just pocket the money you earn and you don't pay taxes, is that how you operate?" A" "Some years yes.").

[8] It appears that the notion to treat Father's stated gross income as net income originated in Mother's proposed findings, but was not mentioned during the trial. Our review of the trial court record in Odyssey

p. 14. We reverse and remand to the trial court with instructions to recalculate Father's child support obligation using the gross income data that was presented to the trial court and to attach a child support worksheet to its corrected order.

Conclusion

[27] The trial court did not clearly err in denying Father's request for retroactive modification of the child support order relating back to a date that preceded the filing of the petition to modify child support. Accordingly, we affirm the trial court in part. The trial court's determination of Father's gross income is unsupported by the evidence and constitutes clear error; accordingly, we reverse and remand to the trial court with instructions to recalculate Father's child support obligation in accordance with the evidence presented below and to attach a child support worksheet to its corrected order. We affirm in part, reverse in part, and remand with instructions.

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

Mathias, J., and Weissmann, J. concur.

---

revealed that the trial court's order adopted verbatim, from Mother's proposed order, the rationale for recalculating Father's gross income.