MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Richard C. Hersberger
Judy G. Hester
Lavonna L.T. Derringer
Brazill Hester, P.C.
Indianapolis, Indiana

Kaleel M. Ellis, III
Ellis Law Offices
Terre Haute, Indiana

ATTORNEY FOR APPELLEE

Katherine S. Brown
Brown Law Firm, Inc.
Brazil, Indiana

IN THE COURT OF APPEALS OF INDIANA

James Joseph Zentko,
Appellant-Respondent,

v.

Cassandra Lynn Zentko,
Appellee-Petitioner.

January 16, 2024

Court of Appeals Case No. 23A-DR-1455

Appeal from the Clay Superior Court

The Honorable Robert A. Pell, Judge

Trial Court Cause No. 11D01-1601-DR-50

Memorandum Decision by Judge Mathias
Judges Riley and Crone concur.

Mathias, Judge.

[1] James Zentko ("Father") appeals the Clay Superior Court's order modifying his obligation to pay college expenses for his child J.D.Z. ("Child"). Father presents three issues for our review, which we consolidate and restate as two issues:

> I. Whether the trial court erred when it modified Father's obligation to pay some of Child's college expenses.
>
> II. Whether the trial court abused its discretion when it found him in contempt and ordered Father to pay some of Cassandra Zentko's ("Mother's") attorney's fees.

[2] We affirm.

Facts and Procedural History

[3] Father and Mother (collectively, "Parents") were married and had one child together, Child, born July 2, 2003. Following the dissolution of their marriage in 2016, the trial court approved the parties' agreement to share custody of Child equally, with neither parent paying child support to the other. Parents also agreed that they would "equally share in the agreed[-]upon expenses" for Child, including clothing, educational expenses, and extra-curricular activities. Appellant's App. Vol. 2, p. 16.

[4] During Child's senior year in high school, Father fell behind in his obligation to pay one-half of Child's expenses as Parents had agreed. Mother filed a petition to find Father in contempt for an arrearage of $7,301.95, and she asked the trial

court to order Father to contribute to Child's college expenses beginning in the Fall of 2021. On April 30, 2021, Parents entered into an agreement to resolve those issues without court intervention ("April 2021 agreement"). Parents agreed in relevant part that, beginning January 15, 2021, Father would pay Mother $118 per week in child support, as well as $32 per week towards his arrearage. Father also agreed to pay $1,650 in Mother's attorney's fees. Finally, Parents agreed that Father's support obligation "shall continue through [Child's] undergraduate years while attending Anderson University full time (9 [months] per year) *or as otherwise may be determined by the Court*." *Id.* at 25 (emphasis added). Father's child support payments were made through an income withholding order.

[5] Child attended Anderson University from August 30, 2021, until his withdrawal on September 9. Child then enrolled in classes at Ivy Tech, which he attended from October 2021 until May 2022. Child's grade point average ("GPA") at Ivy Tech was .92. In April 2022, Child was accepted to Illinois Eastern Community Colleges at Olney ("Olney"), and he began classes in the Fall of 2022. Child's GPA there was 3.4. Child's attendance at both Anderson and Olney were tied to baseball scholarships, and his out-of-pocket expenses at both schools were comparable.

[6] In the meantime, after February 9, 2022, Mother did not receive any more child support from Father, and she filed an information for contempt. When Mother contacted Father, he explained that the money was still being withheld from his paychecks but he did not know why the payments were not being sent to her.

Father reached out to his attorney for assistance. At some point, Father received reimbursement checks for the amounts that had been taken out of his paychecks after February 9. Father's attorney advised him not to pay those amounts to Mother until the issue was resolved. Father and his attorney were ultimately able to determine that the income withholding order erroneously stated that Child's nineteenth birthday was January 2, 2022, instead of July 2, 2022. On October 3, Father's attorney instructed him to give the missing checks to Mother's attorney and to request that Mother not cash them until they could take the matter to the trial court. A few weeks later, on Mother's motion, the trial court ordered her to cash the checks.

[7] Following a hearing on Mother's information for contempt against Father in February 2023, the trial court found and concluded as follows:

> The language of the parties' agreement regarding post-secondary education expenses contained language [that] allows the court to vary the terms of the agreement.
>
> Indiana Code [section] 31-16-6-6 states that child support usually terminates upon the child reaching the age of 19.
>
> [Father's] regular duty for child support existed until July 2, 2022.
>
> Due to the language of the parties' agreement the Court retains jurisdiction regarding post-secondary education expenses despite the fact that no petition for post-secondary expenses was filed.
>
> [Father] willfully failed to pay child support until [Child's] nineteenth birthday.

> [Father's] child support obligation of $118.00 per week continues for higher education purposes from July 3, 2022 through [Child's] undergraduate years while attending [Olney] full time (approximately nine months per year).
>
> Once [Child's] undergraduate course of study at that school and campus is complete, the child support obligation terminates.
>
> [Father's] child support arrearage as of February 10, 2023 is $3,776.00.
>
> Because the issue of post-secondary education payments was a close one, with each side having reasonable arguments for their positions, the Court awards attorney's fees to [Mother] in the amount of $1,028.91 for support not paid up to [Child's] 19th birthday.

Id. at 13-14. Father filed a motion to correct error alleging in relevant part that

> 27. Since [Child] is no longer attending Anderson University in any capacity, let alone full time, the condition-precedent triggering [Father's support] obligation [for college expenses] post-emancipation has failed; [and]
>
> 28. Since [Child] is not, in fact, attending Anderson University full time as required by the Parties' agreement and the Court's Order, and the Court does NOT have jurisdiction to modify the [college expense obligation] since neither Party requested a modification, [Father's support] obligations [for college expenses] should cease.

Id. at 53. The trial court denied that motion. This appeal ensued.

Discussion and Decision

Standard of Review

[8] When a trial court issues findings, as the court did here, we will "not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A). We apply "a two-tiered standard of review by first determining whether the evidence supports the findings and then whether the findings support the judgment." *Masters v. Masters*, 43 N.E.3d 570, 575 (Ind. 2015).

> In evaluating whether the findings support the judgment, we will reverse "only upon a showing of 'clear error'—that which leaves us with a definite and firm conviction that a mistake has been made." *Egly v. Blackford Cnty. Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992). "[T]he reviewing court may affirm the judgment on any legal theory supported by the findings." *Mitchell v. Mitchell*, 695 N.E.2d 920, 923 (Ind. 1998).

Id.

Overview

[9] Initially, we note that the crux of Father's argument on appeal is that his April 2021 agreement with Mother did *not* include a provision for post-secondary educational expenses ("PSEE"). Rather, Father contends that he and Mother only agreed to *child support* until Child turned nineteen. Father argued to the trial court that, in order "to obtain educational support, you must file a petition" before a child turns nineteen. Tr. p. 124. And he maintains that,

because neither party filed a petition seeking PSEE before Child turned nineteen, the trial court exceeded its authority when it ordered Father to pay $118 per week for Child's expenses at Olney. However, as we explain below, the trial court did not err when it interpreted the April 2021 agreement as including a provision for PSEE subject to the court's discretion to "vary" its terms. Appellant's App. Vol. 2, p. 13. Therefore, no additional petition for PSEE was necessary.

[10] Further, for the sake of clarity, we note that the only modification of the April 2021 agreement alleged by Father is that, while Father agreed to pay $118 per week for nine months of the year while Child was enrolled at Anderson University, the trial court modified that order such that Father had to pay that same amount of support while Child is enrolled at Olney. Father makes no contention that the amount of support is too high, for instance, in light of the factors set out in Indiana Code section 31-16-6-2.[1]

---

[1] Indiana Code section 31-16-6-2 provides in relevant part:

> (a) [A] child support order or an educational support order may also include, where appropriate:
>
> > (1) amounts for the child's education in elementary and secondary schools and at postsecondary educational institutions, taking into account:
> >
> > > (A) the child's aptitude and ability;
> > >
> > > (B) the child's reasonable ability to contribute to educational expenses through:

Issue One: PSEE Obligation

[11] Father contends that the trial court erred when it modified his PSEE obligation. Decisions to order the payment of post-secondary educational expenses are reviewed under an abuse of discretion standard, while apportionment of the expenses is reviewed under a clearly erroneous standard. *Smith v. Weedman (In re Paternity of C.H.W.)*, 892 N.E.2d 166, 171 (Ind. Ct. App. 2008), *trans. denied*. Additionally, the trial court has discretion to determine what is included in educational expenses. *Id.*

[12] Father alleges two errors with respect to the trial court's order that he pay PSEE while Child attends Olney. First, Father contends that the trial court sua sponte modified his PSEE obligation, which, he argues, the court did not have authority to do. Second, Father contends that the trial court erroneously modified his PSEE obligation after Child turned nineteen, which is contrary to statute. We address each contention in turn.

> (i) work;
>
> (ii) obtaining loans; and
>
> (iii) obtaining other sources of financial aid reasonably available to the child and each parent; and
>
> (C) the ability of each parent to meet these expenses[.]

A. Sua Sponte Modification

[13] Father maintains that neither party moved the trial court for a modification of his PSEE obligation and that the trial court had no authority to enter the order sua sponte. In support, Father cites *Himes v. Himes*, 57 N.E.3d 820, 828 (Ind. Ct. App. 2016), *trans. denied*, where we explained as follows:

> Educational expenses are in the nature of child support. *Schacht v. Schacht*, 892 N.E.2d 1271, 1275 (Ind. Ct. App. 2008). An agreement between parents regarding child support may subsequently be modified. *In re Marriage of Kraft*, 868 N.E.2d 1181, 1188 (Ind. Ct. App. 2007). A modification of child support in such cases is governed by INDIANA CODE § 31-16-8-1, which provides that a child support order may be modified or revoked upon a showing of changed circumstances so substantial and continuing as to make the terms of the order unreasonable. *See id.* When confronted with a petition to modify a support order, the trial court must consider the totality of the circumstances involved in order to ascertain whether the modification was warranted. *Carter v. Dayhuff*, 829 N.E.2d 560 (Ind. Ct. App. 2005). [The] party seeking modification . . . ha[s] the burden of establishing that he [i]s entitled to have the educational expenses order modified. *See Cross v. Cross*, 891 N.E.2d 635, 641 (Ind. Ct. App. 2008).

Here, Father asserts that neither party sought modification of his PSEE obligation and that, in any event, Mother did not prove a substantial change in circumstances.

[14] Mother disagrees and argues that the trial court did not sua sponte modify Father's PSEE obligation. She asserts that, during the evidentiary hearing on her information for contempt, the parties raised the issue of whether Father's

PSEE obligation applied to Child's enrollment at Olney and that both she and Father presented evidence relevant to his ongoing obligation while Child is enrolled at Olney. As Mother points out,

> Trial Rule 15(B) provides in pertinent part that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The Indiana Supreme Court explained that the policy behind Trial Rule 15(B) is "to promote relief for a party based upon the evidence actually forthcoming at trial, notwithstanding the initial direction set by the pleadings." *Ayr–Way Stores, Inc. v. Chitwood*, 261 Ind. 86, 300 N.E.2d 335, 338 (1973).

Columbia Club, Inc. v. Am. Fletcher Realty Corp., 720 N.E.2d 411, 423 (Ind. Ct. App. 1999), *trans. denied*.

[15] We agree with Mother. During the early stages of the evidentiary hearing, Mother's attorney engaged in the following colloquy with the trial court without objection by Father:

> [Mother's counsel]: It's our contention, and I know [Father's counsel] differs, but it's our contention that there is a higher education order that kicks in when the child goes to college that continues beyond age 19 for higher education expenses.
>
> THE COURT: And [Father] doesn't think so.
>
> [Mother's counsel]: Correct.

Tr. p. 39. Later, on redirect examination of Mother, Father's counsel objected to a question and engaged in a short colloquy with the trial court:

Q: I think we've covered this, but . . . [w]hat does the order for higher education state as far as your understanding?

[Father's counsel]: Objection, Your Honor. The . . .

THE COURT: I know. I get it. *It's up to me as to whether or not it's an order for higher education.*

[Father's counsel]: *Yeah, right*.

THE COURT: But he can characterize it the way he wants. You can characterize it the way you want. But I'm -- I get it. Okay.

[Father's counsel]: Right. I thought you said the four corners of the document *you were going to interpret*.

THE COURT: I am.

[Father's counsel]: Well --

BY [Mother's counsel]:

Q: What's [Father's] obligation toward higher education?

A: To pay $118 a week.

Q: Okay. And the rest is up to you and/or [Child]. Is that correct?

A: I guess so.

[Mother's counsel]: Okay. Nothing further.

THE WITNESS: Yes.

THE COURT: Redirect -- or recross?

[Father's counsel]: Nothing, Your Honor. Nothing, Your Honor.

Id. at 59 (emphases added). Later, Father testified that, while he would "continue to help" Child with expenses, he did not believe that he was "obligated to pay any college expenses at Olney or anywhere else." *Id.* at 92. Father testified further:

> Q: And . . . it's your belief that *the child support stopped after Anderson University, and you continued to pay for another ten months*. Isn't that correct?
>
> A: Yes.
>
> Q: But clearly it stopped at his 19th birthday. Isn't that correct?
>
> A: Yes.
>
> * * *
>
> Q: Okay. All right. And you want to be under -- you want to be released from any of the orders of the Court. I mean you want to be -- you don't want to have to come back to court-for any purposes of litigating. Isn't that correct?
>
> A: That's correct.
>
> * * *
>
> Q: Okay. And you believe, sadly, that [Child] violated the terms of not attending Anderson and your duty to support is terminated, *even though you went ahead and paid in excess of that until he was 19*?
>
> A: Yes.

> Q: Okay. And a postsecondary education petition was never filed by you or Mother in this case. Is that correct?
>
> A: That's correct, yes.

Id. at 111, 113-14 (emphases added). In his closing argument, again without objection from Father, Mother's counsel stated:

> Mother[has] testified that she has housing [expenses for Child] of $4,400 per year. She's providing him with roughly anyplace from $150 to $200 a week in food and miscellaneous expenses. And that would indicate that based on the child support order here, [Father] is paying substantially less than half of those expenses. For that reason it's obvious that . . . this is a higher education order. It continues as long as [Child] is in college. . . .

Id. at 124. And in his closing argument, Father's counsel argued that the parties' April 2021 agreement only "addressed child support, not educational support" and that neither party had "ever filed a petition to modify anything or ask for a PSEE." *Id.* Father's counsel then argued that the April 2021 agreement was not an educational order because "it doesn't comply with any of the requirements of a PSEE." *Id.* at 126. Father's counsel concluded by arguing that Father had not violated any court order because his child support obligation ended when Child turned nineteen.

[16] We agree with Mother that the issue of Father's ongoing PSEE obligation while Child is enrolled at Olney was tried with the consent of both parties. Indeed, Father acknowledged that the parties were asking the trial court to interpret the provision in the April 2021 agreement regarding his PSEE obligation. Father

neither objected to the court's explicit consideration of that issue nor requested a continuance. *See, e.g.*, *Mercantile Nat'l Bank of Ind. v. First Builders of Ind., Inc.*, 774 N.E.2d 488, 492-93 (Ind. 2002) (holding that party consents to trial of non-pleaded issue if he has notice that issue is being tried and fails to object). Thus, Father's contention that the trial court sua sponte modified his PSEE obligation is without merit.

B. Indiana Code section 31-16-6-6

[17] Next, Father contends that the trial court violated Indiana Code section 31-16-6-6 when it modified his PSEE obligation *after* Child's nineteenth birthday, when Child was emancipated as a matter of law. That statute provides in relevant part:

> a) The duty to support a child under this chapter, which does not include support for educational needs, ceases when the child becomes nineteen (19) years of age [barring certain conditions enumerated in the statute] . . . .
>
> * * *
>
> (f) If a court has established a duty to support a child in a court order issued after June 30, 2012, the:
>
> (1) parent or guardian of the child; or
>
> (2) child;
>
> may file a petition for educational needs until the child becomes nineteen (19) years of age.

Id.

[18] Father maintains that, because neither the parties nor Child filed a petition for educational needs before Child turned nineteen, the trial court erred as a matter of law when it ordered Father to contribute to Child's expenses while he is enrolled at Olney. We do not agree.

[19] Father's argument is based on an alleged violation of Indiana Code section 31-16-6-6. Father ignores the trial court's conclusion that, under the terms of the April 2021 agreement, Father *agreed* to the PSEE obligation subject to the trial court's discretion to modify that obligation. On appeal, Father makes no contention supported by cogent argument that the trial court's interpretation of that agreement is erroneous. Given Father's agreement to the PSEE obligation, there was no reason for Mother or Child to file a petition for educational needs. Accordingly, Father's contention that the trial court's order violates Indiana Code section 31-16-6-6 is without merit.

Issue Two: Contempt

[20] Finally, Father contends that the trial court abused its discretion when it found him in contempt and ordered him to pay $1,028.91 of Mother's attorney's fees. To find a party in contempt for failure to pay child support or child-support obligations, the trial court must find that the party had the ability to pay child support and that the refusal to do so was willful. *Woodward v. Norton*, 939 N.E.2d 657, 662 (Ind. Ct. App. 2010). Father bears the burden to demonstrate that his violation of the court's order was not willful. *See Norris v. Pethe*, 833

N.E.2d 1024, 1029 (Ind. Ct. App. 2005). "Regardless of consideration of economic resources, once a party is found in contempt, the trial court has the inherent authority to compensate the aggrieved party for losses and damages resulting from another's contemptuous actions, including an award of attorney's fees." *Madden v. Phelps*, 152 N.E.3d 602, 615 (Ind. Ct. App. 2020). The determination of damages in a contempt proceeding is within the trial court's discretion, and we will reverse an award of damages only if there is no evidence to support the award. *Id.*

[21] Father maintains that, because he was not responsible for the typo that caused the income withholding order problem, he should not have been found in contempt for the lack of payments from February until October 2022. Father asserts that he should not be faulted for "follow[ing] his counsel's advice" to hold the checks that he had received "while [his] counsel continued to investigate." Appellant's Br. at 23. Father argues that "[t]he testimony at trial was unequivocal that Father and his counsel acted promptly and with due diligence to ascertain where Father's funds were and why they were being returned to him instead of being sent to Mother, and Father voluntarily provided the funds to Mother." *Id.* at 24-25. (Father makes no contention that the trial court abused its discretion when it calculated the attorney's fee award.)

[22] Father's argument amounts to a request that we reweigh the evidence, which we cannot do on appeal. While Father is correct that a clerical error was the cause of the initial problem with the income withholding order, the trial court found that his delay of several months to rectify the situation was willful, and

we cannot say that conclusion was an abuse of the trial court's discretion. Mother also presented evidence showing that, in response to her inquiries about why the payments stopped in February 2022, Father sent her nasty text messages. In the end, Mother did not receive child support payments from February 2022 until October, when, on Mother's motion, the trial court ordered that Mother could cash the checks she had finally received from Father.

[23] We cannot say that the trial court abused its discretion when it found Father in contempt and ordered him to pay $1,028.91 of Mother's attorney's fees.

Conclusion

[24] The trial court did not err when it modified Father's PSEE obligation to cover Child's enrollment at Olney. And the trial court did not abuse its discretion when it found Father in contempt and ordered him to pay a portion of Mother's attorney's fees.

[25] Affirmed.

Riley, J., and Crone, J., concur.