MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael L. Wright,
Appellant-Petitioner,

v.

Kerry L. Wright,
Appellee-Respondent

August 17, 2022

Court of Appeals Case No. 21A-DR-2369

Appeal from the Putnam Circuit Court

The Honorable Charles D. Bridges, Special Judge

Trial Court Cause No. 67C01-0303-DR-77

May, Judge.

[1] Michael L. Wright ("Father") appeals the trial court's order that he pay a portion of the post-secondary educational expenses for his son, Tyler. Father presents multiple issues for our review, which we consolidate and restate as:

> 1. Whether the trial court's order is clearly erroneous because the trial court did not administer an oath to any witness during the July 30, 2020, hearing and thus did not receive testimony or evidence on the matter;
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> 2. Whether there is evidence to support some of the trial court's findings;
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> 3. Whether the trial court's order is erroneous because the trial court did balance the burden of out of state tuition against the hardship on Father and Kerry L. Wright ("Mother"); and
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> 4. Whether the trial court's order is clearly erroneous because the trial court did not consider the factors set forth in Indiana Child Support Guideline 8(b).

We affirm.

Facts and Procedural History

[2] Mother and Father were divorced in 2003. Two children, Austin and Tyler, had been born of the marriage. The initial dissolution order did not address post-secondary educational expenses. Over the years, Mother and Father have been embroiled in ongoing and contentious litigation regarding custody, parenting time, and multiple other related issues.

[3] On July 25, 2019, Mother filed a petition to modify the child support order to include Tyler's post-secondary educational expenses. Following multiple continuances, the trial court held a hearing on Mother's petition on July 30, 2020. Mother and Father appeared at that hearing and both presented testimony, evidence, and argument. At the end of the hearing, Mother offered to prepare an order, which would be submitted to Father for approval, after both parties complied with the pending discovery requests regarding financial holdings that were not included in the parties' respective income stipulations.

[4] For reasons unclear from the record, Mother did not submit her proposed order until June 6, 2021. On June 8, 2021, Father filed an objection to Mother's proposed order. On June 10, 2021, the trial court issued an order purportedly denying Mother's request for post-secondary expenses. The order included all of the findings that ultimately would appear in the appealed order on August 6, 2021, except the word "GRANTING" was marked out and replaced with the word "DENYING[.]" (App. Vol. II at 183) (formatting in the original). Additionally, the word "Denying" was handwritten above the judge's signature. (*Id.* at 184.) The order does not appear in the Chronological Case Summary, but there is a file stamp on the order indicating it was filed in the case on June 10, 2021.

[5] Then, on June 19, 2021, the trial court set a hearing for August 5, 2021, to consider Father's objection to Mother's proposed order. On July 27, 2021, Father filed a "Verified Motion to Establish No Post-Secondary Educational Expense Obligation Due to Repudiation[.]" (*Id.* at 194) (original formatting

omitted). On July 28, 2021, the trial court issued an order adding Father's July 27, 2021, motion to the items to be considered during the August 5, 2021, hearing. On July 30, 2021, Mother filed a motion to continue the August 5, 2021, hearing as to the issue of Father's motion arguing repudiation. On the same day, Mother filed a motion to dismiss Father's motion arguing repudiation. On August 2, 2021, the trial court granted Mother's motion to continue as to the issue of Father's motion arguing repudiation.

[6] On August 5, 2021, the trial court held a hearing on Father's opposition to Mother's proposed order during which the trial court received only the argument of counsel. On August 6, 2021, the trial court issued an order that contained the same language as Mother's proposed order, granted Mother's request for post-secondary costs, and found, in relevant part:

> 1. The child of the marriage, Tyler Wright[,] was enrolled as a full time student at Kansas State University for the 2019-2020 academic year.
>
> 2. Mother filed her petition timely, prior to the date the child reached the age of 19 years and prior to his enrollment.
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> * * * * *
>
> 7. [Tyler] has the aptitude and ability for post-secondary education.
>
> 8. Both parents have the ability to contribute to [Tyler's] higher education expenses.

(*Id.* at 34-5.) Based thereon, the trial court concluded:

> 9. The parents and [Tyler] should contribute to his post-secondary education, retroactive to the 2019-2020 school year.
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> 10. Each of them should be responsible for one-third (1/3) of the total cost of attendance for an out of state student at Kansas State University. Any gifts, aid, grants, or other assistance that does not have to be repaid should be applied to [Tyler's] one-third (1/3) portion first.
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> 11. The parties shall make an agreement on the amount of child support arrears owed, if the parties cannot agree, either party shall request a hearing.

(*Id.* at 35.) On September 3, 2021, Father filed a motion to correct error and argued there was no evidentiary basis for the factual findings in the trial court's order and the trial court "'pre-judged' the issues without hearing evidence necessary for the court to enter an Order relating to post-secondary educational expenses." (*Id.* at 208.) On September 20, 2021, Mother filed her opposition to Father's motion to correct error. On September 29, 2021, the trial court denied Father's motion to correct error.

Discussion and Decision

[7] Father appeals the order that he pay one-third of Tyler's post-secondary educational expenses.

> Under Indiana law, there is no absolute legal duty on the part of parents to provide a college education for their children.

> However, the statutory authorization for the divorce court to order either or both parents to pay sums toward their child's college education constitutes a reasonable manner in which to enforce the expectation that most families would encourage their qualified children to pursue a college education consistent with individual family values. In determining whether to order either or both parents to pay sums toward their child's college education, the court must consider whether and to what extent the parents, if still married, would have contributed to the child's college expenses.

McKay v. McKay, 644 N.E.2d 164, 166 (Ind. Ct. App. 1994) (internal citations omitted).

[8] We review a trial court's order regarding post-secondary expenses contribution for an abuse of discretion. *Hirsch v. Oliver*, 970 N.E.2d 651, 662 (Ind. 2012). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts before it. *Id.* In determining the amount, if any, of post-secondary educational expenses to be paid by a parent, the trial court is to consider:

> (A) the child's aptitude and ability;
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> (B) the child's reasonable ability to contribute to education expenses through:
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> (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[.]

Ind. Code § 31-16-6-2(a)(1).

1. Omission of Oath

[9] Father argues "without an oath, there is no testimonial evidence, and during the July 30, 2020 hearing, the trial court did not administer an oath to any witness." (Father's Br. at 25.) Pursuant to Indiana Code section 34-45-1-2, "[b]efore testifying, every witness shall be sworn to testify the truth, the whole truth, and nothing but the truth." Father did not object to the manner in which testimony and evidence were presented at the July 30, 2020, hearing until a year later, during the August 5, 2021, hearing during which he stated:

> So there was a hearing that occurred on July 30, 2020. Both parties were here. Mr. Boggess [Mother's counsel] was here and Mr. Arrington [Father's former counsel] was here. Um, you did not swear any witnesses during that hearing. You did not hear any testimony during that hearing. Um, you do make statements form [sic] the bench about how it [sic] going to be a third, a third and a third. Um, and you make other statements of [sic] the hearing of which I listened to the tape of which [sic] early last week and I appreciate your Court's staff setting that up for me. The hearing was about 24 minutes long. There were a lot of statements made by Mr. Boggess that were not evidence. There were a lot of statements made by his client unsworn. That were not evidence. [sic] Um, and Mr. Arrington on behalf of [Father] was not permitted to put on any evidence. There were I think

> two or three stipulated exhibits that apparently Counsel had agreed you should see.

(Tr. Vol. II at 28-9.)

[10] However, over seventy years ago, this court held the oath requirement "can be waived by the parties and if no objection is made to a witness testifying without being sworn such waiver will be presumed." *Pooley v. State*, 116 Ind. App. 199, 202-3, 62 N.E.2d 484, 485 (1945), *reh'g denied*. Thus, as Father did not make a contemporaneous objection to the trial court's failure to administer oaths prior to receiving testimony and evidence, his argument on appeal is waived.[1] *See Cook v. Beeman*, 150 N.E.3d 643, 646 (Ind. Ct. App. 2020) ("The failure to contemporaneously object results in waiver of the issue on appeal."), *reh'g denied*.

2. Challenged Findings

[11] Father challenges several of the trial court's findings. When, as here, a trial court issues findings of fact and conclusions thereon,

> [w]e apply a two-tier standard of review to sua sponte findings and conclusions: whether the evidence supports the findings, and whether the findings support the judgment. Findings and conclusions will be set aside only if they are clearly erroneous,

[1] Further, even if the trial court did commit error in its more casual approach to receiving evidence about the matters before it, Father invited that error because he acquiesced to the trial court's method of conducting the July 30, 2020, hearing. *See Batterman v. Bender*, 809 N.E.2d 410, 412 (Ind. Ct. App. 2004) (under the legal doctrine of invited error, a party may not take advantage of an error she commits, invites, or allows to happen as a natural consequence of her own neglect or misconduct).

> that is, when the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. We consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will neither reweigh the evidence nor assess witness credibility.

Trust No. 6011, Lake Cnty. Trust Co. v. Heil's Haven Condominiums Homeowners Ass'n, 967 N.E.2d 6, 14 (Ind. Ct. App. 2012). We accept all unchallenged findings as true. *See Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) ("Because Madlem does not challenge the findings of the trial court, they must be accepted as correct.").

2.1 Finding 1

[12] Father challenges Finding 1 in the trial court's order, which states, "[t]he child of the marriage, Tyler Wright[,] was enrolled as a full time student at Kansas State University for the 2019-2020 academic year." (App. Vol. II at 34.) Father contends "the trial court did not hear any testimony or admit any documentary evidence during the July 30, 2020 Hearing to support this factual finding." (Father's Br. at 26.)

[13] During the July 30, 2020 hearing, Mother testified Tyler was a student at "Kansas State" and he "chose Kansas State because he's going in Grain Science[.]" (Tr. Vol. II at 6.) Mother testified the fall semester bill for Tyler's education was $46,000.00 and that he was living on campus. From that information, it would be reasonable for the trial court to infer Tyler was a full-

time student at Kansas State. Therefore, Father's argument is an invitation for us to judge the credibility of witnesses and reweigh the evidence, which we cannot do. *See Trust No. 6011*, 967 N.E.2d at 14 (appellate court will not judge the credibility of witness or reweigh the evidence).

2.2 Finding 2

[14] Father challenges Finding 2 of the trial court's order, which states: "Mother filed her petition timely, prior to the date the child reached the age of 19 years and prior to his enrollment." (App. Vol. II at 34.) Father contends "the trial court did not hear any testimony or admit any documentary evidence during the July 30, 2020 Hearing to support this factual finding." (Father's Br. at 26.)

[15] At the July 30, 2020, hearing, the trial court noted Tyler was seventeen years old when the trial court issued its last order regarding Father's request for a change in custody in February 2018. (Tr. Vol. II at 5.) Mother filed her petition to modify child support to include post-secondary educational expenses on July 25, 2019. The parties' original dissolution order indicates Tyler was born on August 3, 2000. Therefore, he would have been eighteen years old when Mother filed the petition. Further, at the July 30, 2020, hearing, Mother's counsel told the trial court that Tyler has "been through a whole year of higher education so there is money that needs to be paid." (*Id.* at 12.) Considering the date of the trial, the trial court could reasonably infer Tyler's first year at Kansas State University was the 2019-2020 school year, which was after Mother filed her petition to modify child support to include post-secondary educational expenses. Therefore, Father's argument is an invitation for us to judge the

credibility of witnesses and reweigh the evidence, which we cannot do. *See Trust No. 6011*, 967 N.E.2d at 14 (appellate court will not judge the credibility of witness or reweigh the evidence).

2.3 Finding 8

[16] Father challenges Finding 8 of the trial court's order, which states: "Both parents have the ability to contribute to child's higher education expenses." (App. Vol. II at 35.) Father contends "the trial court did not hear any testimony or admit any documentary evidence during the July 30, 2020 Hearing to support this factual finding." (Father's Br. at 27.)

[17] At the July 30, 2020, hearing, the trial court received evidence of each parties' earnings. Based on that evidence, it would seem the trial court concluded both parties had the ability to contribute to Tyler's post-secondary expenses. Therefore, Father's argument is an invitation for us to judge the credibility of witnesses and reweigh the evidence, which we cannot do. *See Trust No. 6011*, 967 N.E.2d at 14 (appellate court will not judge the credibility of witness or reweigh the evidence).

2.4 Paragraph 10

[18] Father challenges Paragraph 10 of the trial court's order, which states:

> Each of them [Mother, Father, and Tyler] should be responsible for one-third (1/3) of the total cost of attendance for an out of state student at Kansas State University. Any gifts, aid, grants, or other assistance that does not have to be repaid should be applied to [Tyler's] one-third (1/3) portion first.

(App. Vol. II at 34.) Father contends "the trial court did not hear any testimony or admit any documentary evidence during the July 30, 2020 Hearing to support this factual finding." (Father's Br. at 27.)

[19] However, Paragraph 10 of the trial court's order is not a finding, it is a conclusion – it provides a portion of the trial court's order regarding how the cost of Tyler's post-secondary education will be divided. Father does not argue this conclusion is not supported by the findings in the trial court's order and, thus, his argument is waived for failure to make a cogent argument. *See* Ind. Appellate Rule 46(A)(8) (an appellant's argument must be supported by cogent reasoning and citation to relevant case law); *and see Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding the failure to present a cogent argument waives the issue for appellate review), *trans. denied*.

2.5 Finding 7

[20] Father challenges Finding 7 of the trial court's order, which states: "The child has the aptitude and ability for post-secondary education." (App. Vol. II at 35.) Father contends "the trial court did not hear any testimony or admit any documentary evidence during the July 30, 2020 Hearing to support this factual finding." (Father's Br. at 27.) At the hearing, the trial court heard evidence that Tyler was enrolled in Kansas State University and wanted to re-enroll but "he cannot pay the bill from last year." (Tr. Vol. II at 34.) This suggests Tyler successfully completed high school with the ability to gain entry into Kansas State University and had a level of academic success at Kansas State University to advance to the next year of his studies. Such evidence is sufficient to prove a

child has the aptitude and ability for post-secondary education. *See Neudecker v. Neudecker*, 566 N.E.2d 557, 560 (Ind. Ct. App. 1991) (that child possessed aptitude and ability for post-secondary education was demonstrated by evidence that "the eldest daughter had applied to, been accepted by and enrolled at the University of Kansas"), *aff'd by Neudecker v. Neudecker*, 577 N.E.2d 960 (Ind. 1991). Therefore, Father's argument is an invitation for us to judge the credibility of witnesses and reweigh the evidence, which we cannot do. *See Trust No. 6011*, 967 N.E.2d at 14 (appellate court will not judge the credibility of witness or reweigh the evidence).

2.6 Introductory Paragraph

[21] In the introductory paragraph of the trial court's order, the trial court stated:

> Comes now [Mother], in person and by counsel, having filed her Petition to Modify Child Support to Include Post-Secondary Education Expenses and Motion for Discovery Sanctions, comes now [Father], in person and by counsel having filed a Motion for Discovery Sanctions and the court having sworn witnesses and hearing the evidence . . .

(App. Vol. II at 34.) Father argues the portion of the introductory paragraph indicating "the court having sworn witnesses and hearing the evidence" is not supported by the evidence. As discussed *supra*, Father's argument regarding the trial court's failure to swear in witnesses is waived. However, we agree the trial court's statement about swearing in witnesses is incorrect. Nevertheless, the statement has no bearing on the trial court's ultimate conclusion – that Father is responsible for a portion of Tyler's post-secondary education expenses and,

thus, it is surplusage and not a basis for reversal. *See In re B.J.*, 879 N.E.2d at 20 ("Because there is evidence sufficient to support the trial court's ultimate findings on the elements necessary to sustain the judgment" the erroneous finding was "merely harmless surplusage that did not prejudice [m]other and, consequently, is not grounds for reversal.").

3. Balance of Out-of-State Tuition v. Hardship to Parents

[22] Father argues the trial court did not consider "the advantages of the more expensive college in relation to the needs and abilities of the child" as compared to the "increased hardship on the parents." (Father's Br. at 29.) It is well-established that post-secondary support is not limited to "educational support commensurate with in-state, state-supported colleges." *Hinesley-Petry v. Petry*, 894 N.E.2d 277, 281 (Ind. Ct. App. 2008), *reh'g denied*, *trans. denied*. Instead, "these cases are more properly determined on a case-by-case basis, with the trial court balancing the advantages of the more expensive college in relation to the needs and abilities of the child with the increased hardship on the parent." *Id.*

[23] Contrary to Father's assertion, the trial court completed the case-by-case balance test. Mother testified Tyler attended Kansas State University because it was one of the only schools to offer Grain Science, which was the field of study Tyler wished to pursue. The trial court received evidence of Tyler's aptitude and ability for post-secondary education. The trial court received evidence that Mother, Father, and Tyler had the ability to contribute to Tyler's college education. Father has not indicated where in the record he argued out-of-state

tuition would be burdensome or a hardship on him. The trial court balanced these factors because it had evidence regarding those factors and decided to order Mother, Father, and Tyler to contribute to Tyler's college expenses in thirds.

4. Consideration of Factors in Guideline 8 of the Indiana Child Support Guidelines

[24] Father argues the trial court did not consider the factors set forth in Guideline 8 of the Indiana Child Support Guidelines. Guideline 8 states:

> b. Post-Secondary Education. The authority of the court to award post-secondary educational expenses is derived from IC 31-16-6-2. It is discretionary with the court to award post-secondary educational expenses and in what amount. In making such a decision, the court should consider post-secondary education to be a group effort, and weigh the ability of each parent to contribute to payment of the expense, as well as the ability of the student to pay a portion of the expense.
>
> When determining whether or not to award post-secondary educational expenses, the court should consider each parent's income, earning ability, financial assets and liabilities. If the expected parental contribution is zero under Free Application for Federal Student Aid (FAFSA), the court should not award post-secondary educational expenses. If the court determines an award of post-secondary educational expenses would impose a substantial financial burden, an award should not be ordered.
>
> If the court determines that an award of post-secondary educational expenses is appropriate, it should apportion the expenses between the parents and the child, taking into consideration the incomes and overall financial condition of the

parents and the child, education gifts, education trust funds, and any other education savings program. The court should also take into consideration scholarships, grants, student loans, summer and school year employment and other cost-reducing programs available to the student. These latter sources of assistance should be credited to the child's share of the educational expense unless the court determines that it should credit a portion of any scholarships, grants and loans to either or both parents' share(s) of the education expense.

* * * * *

A determination of what constitutes educational expenses will be necessary and will generally include tuition, books, lab fees, course related supplies, and student activity fees. Room and board may be included when the child does not reside with either parent.

* * * * *

The court should require that a student maintain a certain minimum level of academic performance to remain eligible for parental assistance and should include such a provision in its order. The court should also consider requiring the student or the custodial parent to provide the noncustodial parent with a copy of the child's high school transcript and each semester or trimester post-secondary education grade report.

The court may limit consideration of college expenses to the cost of state supported colleges and universities or otherwise may require that the income level of the family and the achievement level of the child be sufficient to justify the expense of private school.

[25] Father argues

> [t]he trial court did not evaluate:
>
> (1) the particular educational needs of the child;
>
> (2) each parent's earning ability, financial assets and liabilities; and
>
> (3) a certain minimum level of academic performance, as a condition for the parental obligations;[2]

(Father's Br. at 29) (formatting in original). As stated *supra*, the trial court received evidence that Tyler chose to attend Kansas State University because it was one of the only schools that offered a degree in Grain Science, the career field he wished to pursue. The trial court also received evidence regarding Tyler's aptitude and ability for post-secondary education, specifically that his academic achievement was sufficient to be accepted to Kansas State University and that he performed well enough to return the following year. Additionally, the trial court received evidence regarding Mother and Father's earning ability through evidence of their income and the existence of a 529 Educational

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[2] Father also argues the trial court did not follow Guideline 8 because it did not consider "whether the income level of the family and the achievement level of the child are sufficient to justify the expenses of out-of-state tuition." (Father's Br. at 29.) Father misquotes the Guideline here. Guideline 8(B) states, in relevant part, "The court may limit consideration of college expenses to the cost of state supported colleges and universities or otherwise may require that the income level of the family and the achievement level of the child be sufficient to justify the expense of *private school*." (emphasis added). There is no evidence in the record that Kansas State University is a private school.

Savings Plan for Tyler's benefit. Based thereon, we conclude the trial court considered Tyler's educational needs and the parties' ability to pay post-secondary expenses.

[26] Regarding the maintenance of a minimum level of academic performance as a condition for parental obligations, our court has held:

> Support Guideline 8(b) states that a trial court "should require that a student maintain a certain minimum level of academic performance," but there is no requirement that trial courts do so: "We encourage trial courts to set a minimum level of academic performance when appropriate.... [W]hether a minimum grade point average is appropriate and, if so, the precise level … should be determined on a case-by-case basis." *Deckard v. Deckard*, 841 N.E.2d 194, 203 n.6 (Ind. Ct. App. 2006).

In re Marriage of Blanford, 937 N.E.2d 356, 365 (Ind. Ct. App. 2010). Therefore, the trial court did not err when it did not set a minimum grade point average Tyler was required to achieve as a condition of Mother and Father's obligations to contribute to his post-secondary educational expenses. *See Myers v. Myers (Phifer)*, 80 N.E.3d 932, 936 (Ind. Ct. App. 2017) ("Although the order did not include an obligation for [child] to maintain a certain minimum level of academic performance, there is no requirement for a trial court to incorporate one in each case.").

Conclusion

[27] Father waived his argument that the trial court erred when it did not require witnesses to swear an oath during the July 30, 2020, hearing because he did not make a contemporaneous objection. Additionally, the evidence supported the trial court's Findings 1, 2, 7, and 8. Father waived his challenge to Paragraph 10 because he did not make a cogent argument. Furthermore, Father's argument regarding the trial court's consideration of the cost of out-of-state college expenses balanced with the hardship to the parents and Father's arguments regarding Guideline 8 both fail. Accordingly, we conclude the trial court's order is not clearly erroneous and affirm the trial court's decision.

[28] Affirmed.

Riley, J., and Tavitas, J., concur.