MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In Re the Marriage of:

Joshua W. Noble,

Appellant-Respondent,

v.

Marni (Headrick) Girardot,

Appellee-Petitioner.

January 29, 2021

Court of Appeals Case No. 20A-DR-1558

Appeal from the Allen Circuit Court

The Honorable Thomas J. Felts, Judge
The Honorable Ashley N. Hand, Magistrate

Trial Court Cause No. 02C01-1606-DR-904

Weissmann, Judge.

[1] Something does not add up in this appeal from a child support modification. Because the trial court significantly overvalued the father's income, we reverse and remand for further calculations.

Facts

[2] When Joshua Noble (Father) and Marni (Headrick) Giardot (Mother) first divorced, they agreed Father's child support obligation for their three children should be $208 per week. Three years later, Mother petitioned to modify this agreement. Because of the COVID-19 pandemic, the trial court conducted a hearing over Zoom on the issue of Father's child support obligation. Mother was represented; Father appeared pro se. Upon the request of Mother's counsel, the trial court conducted the hearing in summary fashion. Father did not object.

[3] Following the hearing, the court issued an order modifying Father's child support obligation to $349 per week. It also found that Father owed Mother $11,418.44 in arrears. App. Vol. II p. 14. Father then hired counsel to file this appeal. .

Discussion and Decision

[4] Father argues that the summary form of proceedings was an abuse of discretion that violated due process and that the calculation of child support was clear error. In reviewing family law matters, we give "considerable deference" to the trial court, as the trial judge is in the best position to judge the facts, including family dynamics. *McLafferty v. McLafferty*, 829 N.E.2d 938, 940 (Ind. 2005). "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 conclusion." *Id.* at 941.

I. Due Process

[5] Father argues that the court abused its discretion when conducting the hearing in summary fashion without his consent, thereby violating his due process rights. Summary proceedings forego formal rules of evidence and procedure in favor of efficiency, allowing the court to "base its findings and conclusions upon the arguments of counsel and limited evidence." *Bogner v. Bogner*, 29 N.E.3d 733, 739 (Ind. 2015). Father did not, in fact, verbally agree to summary proceedings. Tr. Vol. II p. 7. But Father also did not object and, therefore, has waived this argument.

[6] Licensed attorneys cannot "sit idly by and raise issues for the first time on appeal" and neither can pro se litigants. *Reynolds v. Reynolds*, 64 N.E.3d 829, 834 (Ind. 2016) (quoting *Jackson v. State*, 735 N.E.2d 1146, 1152); *Butler v. Symmergy Clinic, PC*, 158 N.E.3d 407 (Ind. Ct. App. 2020) (holding that pro se litigants are held to the same standard as licensed attorneys). Though Father may have felt steamrolled by the court's quick acceptance and implementation of summary proceedings, he was obligated to voice this objection *during* the proceeding. The record contains no indication that Father was muted or otherwise prohibited from doing so.

[7] Father further argues that Mother failed to present any evidence at the hearing, instead relying solely on her counsel's arguments. But to proceed in summary

fashion is to eschew formal rules of evidence. *Bogner*, 29 N.E.3d at 739. In essence, Father is doubling down on his objection to the form of proceedings, an objection that has been waived. *See, e.g.*, *id.* (finding father's contention that evidence was inadequate to support the trial court's findings was "essentially a challenge to the form of the proceedings").

II. Child Support Modification

[8] Next, Father argues that the modification of his child support obligation was clearly erroneous because the trial court miscalculated his income and failed to impute income to Mother. On review, "a trial court's calculation of child support is presumptively valid." *Bogner*, 29 N.E.3d at 738 (quoting *Young v. Young*, 891 N.E.2d 1045, 1047 (Ind. 2008)). Reversal is only merited where the trial court's determination is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.* We may only consider evidence and reasonable inferences favorable to the judgment and will only set the order aside if it is clearly erroneous. *Id.*

A. Father's Income

[9] For the purposes of calculating child support, a parent's weekly gross income is the "actual weekly gross income of the parent if employed to full capacity." Ind. Child Support Guideline 3A(1). It includes "income from any source." *Id.*

[10] The trial court determined Father's weekly income to be $2,475. Father alleges his weekly income is only $2,105.79. Exs. Vol. III p. 63. After examining Father's paystub and a letter from the Department of Veterans Affairs, this

Court has been unable to reproduce either figure. Our guess is that the trial court erroneously treated Father's one-time bonus as though it were paid multiple times throughout the year.[1]

[11] Because we cannot identify a factual basis for the trial court's accounting, it is clearly erroneous, as is every part of the child support modification order based on this number. *See, e.g.*, *Marshall v. Marshall*, 92 N.E.3d 1112, 1116-22 (Ind. Ct. App. 2018) (remanding case to trial court to recalculate mother's and father's weekly gross incomes and child support obligations in accordance with evidence in the record). We remand this issue to the trial court.

B. Mother's Income

[12] Father further argues that Mother's earning potential and her spouse's household contributions should be imputed to her, which would result in a reduction of his child support obligation.

[13] Father points us to the Indiana Child Support Rules and Guidelines, which define "weekly gross income" 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." Ind. Child Support

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[1] There is no indication that Father's $5,372.94 bonus is anything but an annual bonus. *See, e.g.*, Tr. Vol. II p. 25. If the trial court used Father's year-to-date earnings as expressed in Exhibit 3 (Exs. Vol. III, pp. 17-18) to extrapolate Father's expected annual income without separating out the bonus, the court would have inadvertently counted Father's bonus more than three times. Father's weekly income based on this error would be around $2,497.76, or almost $23 higher than the court's estimate. This is the closest we have come to recreating the trial court's number, and it reflects a significant overestimation of Father's weekly income.

Guideline 3A(1). "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." *Id.* at 3A(3). The trial court employs "a great deal of discretion" in determining whether potential income should be included in a parent's weekly income. *Id.* at 3A cmt. c.

[14] Mother's training and work history do indicate that she is currently underemployed. Mother was a certified ophthalmic assistant,[2] but she now works part-time at her husband's lawn care business. At the hearing, Mother's attorney argued that Mother took a lesser-paying job with more flexible hours so she could transport their three sons back and forth to games, practices, and medical appointments. Tr. Vol. II, pp. 13-14. This testimony supports the trial court's decision not to impute a full-time ophthalmic assistant salary to Mother. Child support orders cannot be used to force parents "to make their career decisions based strictly upon the size of potential paychecks." *Abouhalkah v. Sharps*, 795 N.E.2d 488, 491 (Ind. Ct. App. 2003) (citing *In re E.M.P.*, 722 N.E.2d 349, 351 (Ind. Ct. App. 2000). The trial court's refusal to impute potential income to Mother is not clearly erroneous. *See, e.g.*, *id.* at 491-92 (holding that father's choice not to follow a high-paying job several hundred miles away from his children "does not constitute voluntary unemployment").

[2] It appears Mother may have allowed her certification to lapse in 2020. *See* Exs. Vol. III, pp. 36-37.

[15] Likewise, though "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," imputing these contributions as income is not required. Ind. Child Support Guideline 3A cmt. 2(d); *accord Laux v. Ferry*, 34 N.E.3d 690, 693 (Ind. Ct. App. 2015) (holding that the trial court did not abuse its discretion in refusing to impute mother's husband's income to her because imputation is not required). Though Mother is no doubt receiving support from her new husband, Father failed to provide sufficient proof concerning that level of contribution. We therefore cannot find an abuse of discretion in the trial court's refusal to impute income to Mother.

[16] In sum, we find Father's arguments regarding the summary nature of the proceedings and the imputation of Mother's income unavailing. However, because the trial court erroneously calculated Father's income, we reverse the trial court's order and remand for further proceedings consistent with this opinion.[3]

Mathias, J., and Altice, J., concur.

[3] Mother argues that Father's appeal is so frivolous it merits sanctions. We disagree and decline to impose sanctions.