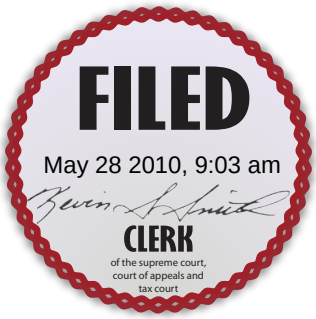

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IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE MARRIAGE OF FARRELL,	)	
	)	
JOHN M. FARRELL,	)	
	)	
Appellant-Respondent,	)	
	)	
and	)	No. 18A02-0803-CV-266
	)	
NICOLE T. FARRELL,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18C02-0412-DR-47

May 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

John M. Farrell ("Father") challenges the support modification order that he pay 92% of his daughter's "uncovered" college expenses[1] and 92% of attorney fees for Nicole T. Farrell ("Mother"). Father asserts clear error in the court's finding Father is voluntarily underemployed and that his potential income is $403,369 per year. We affirm.

FACTS AND PROCEDURAL HISTORY

Father and Mother married in 1980 and separated in 2004. Their marriage produced four children, but support of only one child, M.F., a daughter born in 1987, is at issue. In July of 2006, the trial court entered a child support order that provided in pertinent part:

> **FINDINGS**
> * * * * *
> 3. [Father] was formerly employed as a high level corporate executive, and left that employment in late 1999. He obtained substantial assets and had earned substantial wages as a corporate executive, in some years earning in excess of $500,000.00.
> 4. He has not earned any regular wages since 2000, by his own choice, but does have assets, which earn income, and he could have sought employment had he chosen to do so. Instead, he has attempted to earn income by trading stocks and by starting a residential real estate construction business. He has constructed homes, which are for sale.
> * * * * *
> 6. [Father] has notes payable to him, which will provide interest income to him of at least Fifty-five Thousand Dollars ($55,000.00) per year, in addition to his earnings in the real estate business. He built a residence, which is for sale at this time. He also is an able-bodied person who could seek employment as a corporate executive, as he has done before.
> 7. It is therefore appropriate that the Court establish [Father]'s income in the amount of $55,000.00 per year, for purposes of child support

[1] "Uncovered" college expenses are those "not covered by scholarships or grants," including "tuition, room and board, fees, and books." (Amended App. at 10-16.)

calculation. The Court should impute to [Mother] minimum wages at this time.

8. The two older children are receiving higher education, but are emancipated. The third child, [M.F.], is a Ball State freshman, with substantial scholarships during her freshman year, although those scholarships may not be available to her next school year. [M.F.] resides with her mother in the summer for at least eighteen (18) weeks, and that should be considered in the calculation with respect to the time she lives with her mother. In the event that [M.F.]'s scholarship status changes for school year 2006-07 and subsequent years, the Court may reconsider this Order based upon that status.

* * * * *

10. A child support worksheet is attached, and [Father] should pay child support to [Mother] effective as of the hearing date of March 17, 2006, in the sum of $156.96 per week. He should also be required to keep the children of the parties covered with health insurance so long as such is available at a reasonable cost. The six percent (6%) rule shall apply to uninsured medical and related bills, and therefore [Mother] will be responsible to pay the first $666.12 per year in uninsured medical bills for the children.

* * * * *

CONCLUSIONS

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. [Father] shall pay $156.96 per week to [Mother] effective as of March 17, 2006, through the Clerk of Delaware County, for the support of [M.F.] and [D.F.]. John Farrell shall provide health insurance for the minor children so long as such is available at a reasonable cost, and Nicole shall be responsible for the first $666.12 per year of uninsured medical expenses for the children.

* * * * *

3. In the event that [M.F.]'s scholarship status changes, the parties shall submit for the Court's consideration, a child support worksheet to the Court on or before August 15 of each year reflecting her scholarship status.

(Amended App. at 31-34.)[2]

Two months later, when M.F. returned to college for her sophomore year, she did

[2] "Amended App." denotes the Appendix Father filed after we required him in 2009 to resubmit his original Appendix, filed in 2008, in a format that complied with Trial Rule 5(G) and Appellate Rule 9(J). "Supp. App." denotes the Appendix Father filed to provide materials produced by our remand.

not have the same scholarships and grants she had received during her freshman year. However, neither party filed a new child support worksheet before August 15, 2006. On December 20, 2006, Mother moved for modification of child support. On January 4, 2008, the court found and ordered in pertinent part:

> 7. The Court now finds that [Father] has yet failed to obtain employment, he continues to draw on investment funds to support himself. The Court continues to find that he is an able bodied person who could seek employment as he has done before and that he has not earned regular wages since 2000, again by his own choice. The Court further finds that in calendar year 2007, [Father] sold a property located at 301 S. Greenland in Muncie, IN, and that as a result of that sale he took a home in trade which he has valued at $126,800.00 and that he further received net cash in the sum of $131,751.00. The Court further finds that [Father]'s bank records of June/July 2007 indicate a deposit of $144,838.00. The Court finds that these three figures; $144,838, $131,751, and $126,800, should be combined to reflect [Father]'s income for 2007 to use in the calculation in the child support worksheet.
>
> 8. [Mother] is now employed full time as a teacher earning a weekly gross income of $719.00. The Court finds that this is a reasonable sum to use as [Mother]'s income for the calculation of child support.
>
> * * * * *
>
> 16. The Court therefore finds based upon the above information that [Father] should be paying 92% of [M.F.]'s college education expenses and [Mother] paying 8% which expenses are not covered by scholarships or grants. Those expenses shall include tuition, room and board, fees, and books.
>
> * * * * *
>
> 21. The Court further finds that [Mother] submitted, via counsel, a fee affidavit totally [sic] $2,527.05. The Court finds that [Father] shall be responsible for paying 92% of those fees based upon his percentage of income from the child support worksheet. [Father] shall therefore pay the sum of $2,322.98 by paying one-half within 30 days and one-half within 60 days of the entry of this order to the office of [Mother's counsel]. [Mother] shall be responsible for the balance of her fees.

(*Id*. at 10-16.)

Father appealed that order. We held that a change in M.F.'s scholarships and

grants was a change in circumstances that permitted the court to modify the child support calculation. *Farrell v. Farrell*, No. 18A02-0803-CV-266, Slip op. at 11 (Ind. Ct. App. Dec. 30, 2008). We reversed and remanded for clarification of the findings regarding Father's income because neither the parties nor we were certain whether the trial court calculated Father's actual income or imputed income due to voluntary underemployment. *Id.* at 12-13. In addition, we asked the court, after it clarified Father's income, to revisit the order that Father pay 92% of Mother's attorney fees.[3] *Id.* at 15.

The trial court then ordered, in pertinent part:

> **CLARIFICATION #1: THE COURT IMPUTED FATHER'S POTENTIAL INCOME.**
>
> 1. This Court's Order Book Entry of January 4, 2008 ("the OBE"), was intended to express that the Court had ***imputed potential*** income, ***not calculated actual*** income, for [Father] for child support purposes.
>
> 2. This Court intended to convey that it was imputing potential income for [Father] both by references in the OBE intended to communicate this Court's finding that Father was voluntarily underemployed (see Clarification #2, *infra*) and the language in paragraph 7 of the OBE (quoted in Slip Opinion, p. 12) referring to the $403,369 figure as one that the Court thought would "***reflect*** [Father's] income for 2007 to use in the calculation in the child support worksheet." (emphasis added).
>
> 3. Even if Father were not voluntarily underemployed, the Court still could not have calculated Father's actual income because Father's own demeanor prevented such actual calculation in that:
>
> (a) The Court found much of Father's testimony to be not credible due both to his testimonial demeanor and to the inherent lack of believability of many of his factual assertions; and
>
> (b) Father failed to provide the Court with the mandatory sworn Child Support Worksheet.
>
> 4. The OBE included some of the testimony and prior findings of this Court that supported the imputed potential income amount,

[3] We also retained jurisdiction over the case so that we could address the parties' remaining arguments after we received clarification from the trial court.

including:

(a) OBE paragraph 3, which incorporated findings made July 10, 2006, and reported in paragraphs 3-4 of that 2006 order.

(b) OBE paragraph 7, which refers to substantial financial transactions made by Father in 2007 that appeared to be income to him and to which he offered no credible testimony or other evidence that these transactions were not income to him or at least a reliable indicator of his potential income if he would cease to be voluntarily underemployed and offer truthful disclosure of his income.

(c) Father's efforts to show that the transactions he claimed were not income were not credible because they were supported primarily by his own incredible testimony and his submission of unitemized and unsworn documents.

5. In addition to the evidence cited in the OBE, there was other undisputed evidence of Father's potential income at the hearings on this case, including evidence that he could and did earn nearly $1 million in one year, and averaged $850,000 the last two years he was employed before he chose to become voluntarily underemployed.

6. This Court did ***not*** make a finding of Father's actual income for child support purposes.

CLARIFICATION #2: THE COURT FOUND FATHER WAS VOLUNTARILY UNDEREMPLOYED.

1. On January 4, 208, this Court did find that Father was voluntarily underemployed.

2. Although the Court of Appeals properly noted that this Court did not "explicitly find [Father] "voluntarily 'unemployed' or 'voluntarily underemployed,'"[sic] this Court intended to communicate this finding in the OBE as follows:

(a) OBE paragraph 3's reference to Father's former employment as a high level corporate executive often earning over half a million dollars per year;

(b) OBE paragraph 3's reference to Father not having earned any regular wages since the year 2000 by his own choice;

(c) OBE paragraph 3's reference to the fact that Father could have sought employment if he had chosen to do so;

(d) OBE paragraph 7's reference to Father having "yet failed to obtain employment" long after the Court

noted his substantial earning power and voluntary failure to seek and find employment at the time of the March 2007 hearing; and

(e) OBE paragraph 7's reference to the Court continuing to find that Father is able bodied and could seek employment but has chosen not to do so.

3. There was substantial other evidence from the hearing in the case from which the Court concluded Father was voluntarily underemployed, including:

(a) Although Father claimed he was having trouble finding other sources of income because he was too busy winding down the affairs of Vista Homes, this testimony was incredible because his company Vista's home building projects were all completed and listed for sale with a realtor;

(b) Although Father testified that he had been seeking a job since 1999, substantial evidence made this claim incredible, including his own testimony that he had not been looking for a job for wages because his self-employment precluded it, testimony from Nicole Farrell ("Mother") that Father was not looking for work between 1999 and 2006, and testimony from Mother that Father did not want a regular job because he did not like working for others and thus was looking for a company to run; and

(c) Father's testimony that he had been unable to find gainful employment despite an alleged search for such work also was not credible given the many years that had passed and the evidence that he was a healthy able-bodied man who had an M.B.A. decree, and had high level corporate executive experience in positions paying several hundred thousand dollars per year. Father had no credible explanation other than voluntary underemployment for his inability to find work under these circumstances if he had actually been seeking it as he claimed.

(Supp. App. at 12-15.) The trial court renewed its order that Father pay 92% of Mother's attorney fees.[4]

[4] The Court also recalculated Father's arrearage for the 2006-2007 school year and ordered Father to pay

DISCUSSION AND DECISION

We presume a trial court's calculation of child support is valid. *Young v. Young*, 891 N.E.2d 1045, 1047 (Ind. 2008). We may reverse only if its decision is clearly erroneous or contrary to law. *Id.* "A decision is clearly erroneous if it is clearly against the logic and effect of the facts and circumstances that were before the trial court." *Id.* We review first whether the evidence supports the specific findings and then whether the findings and conclusions support the judgment. *Id.* As we conduct our review, we consider only the evidence most favorable to the judgment and all reasonable inferences therefrom. *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 944 (Ind. Ct. App. 2006). We may neither reweigh evidence nor assess credibility of witnesses. *Id.*

A. Contents of the Record on Appeal

Before evaluating whether the evidence supports the findings, we must address Father's argument that we held the evidence presented at a hearing in 2006 could not be considered. When this case was first before us, we stated:

> A trial court may take judicial notice of law, a fact, or of the contents of the pleadings and filings in the case before it. *Sanders v. State*, 782 N.E.2d 1036 (Ind. Ct. App. 2003); *see also* Rule 201 of the Indiana Rules of Evidence. More generally, a trial court may take judicial notice of proceedings

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$2,240. (Supp. App. at 18.) Neither party challenges that calculation.

After we received the trial court's clarifications, Father asked us to schedule additional briefing and strike portions of the trial court's clarification order, and Mother filed responses to those motions. We granted Father's request for additional briefing and provided a schedule therefor, but we denied Father's motion to strike, indicating Father could include his arguments regarding the trial court's order in his supplemental brief.

Father filed a supplemental brief, supplemental appendix, and an addendum to his supplemental brief, and Mother filed a supplemental brief. Thereafter, we returned Father's supplemental appendix and addendum to him and ordered him to bring them into compliance with Trial Rule 5(G) and Appellate Rule 9(J). For the same reason, we ordered the trial court reporter to correct the Exhibits volume.

> that have taken place in that court, and in that cause of action. *Vance v. State*, 640 N.E.2d 51 (Ind. 1994); *Gerrick v. State*, 451 N.E.2d 327. The cases cited above--as well as other, similar cases--have permitted incorporating by reference evidence presented in an earlier hearing when doing so would prevent redundancy. That is, courts allow it when it will minimize needless and time-consuming duplication of effort that results in nothing more than the presentation of evidence that is identical to or cumulative of evidence previously placed before the court in the same case. *See*, *e.g.*, *Vance v. State*, 640 N.E.2d 51 and *Gerrick v. State*, 451 N.E.2d 327 (permitting incorporation by reference, in a later proceeding, of evidence presented at an earlier waiver hearing); *Smith v. State*, 713 N.E.2d 338 (Ind. Ct. App. 1999) (allowing incorporation by reference, at a bench trial, statements made at an earlier suppression hearing), *trans. denied*; *Miller v. State*, 702 N.E.2d 1053 (Ind. 1998), *cert. denied*, 528 U.S. 1083, 120 S. Ct. 806, 145 L.Ed.2d 679 (2000) and *Wisehart v. State*, 693 N.E.2d 23 (Ind. 1998), *cert. denied*, 526 U.S. 1040, 119 S. Ct. 1338, 143 L.Ed.2d 502 (1999) (permitting incorporation by reference, at the penalty phase, of evidence adduced at the earlier guilt phase).
>
> *Arms v. Arms*, 803 N.E.2d 1201, 1209-10 (Ind. Ct. App. 2004). Accordingly, the trial court could have taken judicial notice of the transcript of the earlier hearing on the motion of one of the parties or on its own motion. It is not clear that happened in this case. Our review of the trial court's order leads us to believe the court's findings relied on its prior order for all the facts that it needed. Therefore, we will disregard the transcript and evidence from the original support hearing and review the court's new order based on the evidence presented at the modification hearings and the findings in the original order.

Farrell, Slip op. at 8-9 n.2. To summarize, the trial court herein would have been well within its discretion to take judicial notice of the evidence presented at the 2006 hearing. Nevertheless, it was not "clear" to us that the trial court had taken judicial notice of that evidence. *Id.*

The "Record on Appeal" consists "of the Clerk's Record and all proceedings before the trial court." Ind. Appellate Rule 2(L). "It is well settled that matters outside

the record cannot be considered by this court on appeal." *Schaefer v. Kumar*, 804 N.E.2d 184, 187 n.3 (Ind. Ct. App. 2004), *trans. denied*. Thus, without clear indication from the trial court that it had taken notice of the evidence presented at the 2006 hearing, we could not consider it. *See id.* (striking materials that had not been presented to the trial court).

However, on remand, the trial court entered a new order that contains a number of findings explicitly based on that 2006 evidence, which indicates the court did, in fact, take notice of the evidence presented in the earlier proceedings. Because we now know the court took notice of that evidence, it is part of the Record on Appeal and we may consider it as we review the validity of the court's findings of fact. Accordingly, to the extent Father asserts the trial court's findings on remand are erroneous simply because they are supported only by evidence from the 2006 hearing, his arguments fail.[5]

B. Father's Credibility

Father notes the trial "court made no implicit or explicit finding concerning [Father's] credibility either during the court proceeding or in the Modification Order," (Appellant's Supplemental Br. at 15), and then asserts: "The trial court cannot cure the fatal defect of the missing legal bases for the voluntary underemployment status and potential income by filling the order with language about [Father]'s credibility." (*Id.* at

[5] These findings include Paragraphs 4 and 5 of Clarification #1 and Paragraph 3 of Clarification #2. Because we reproduced those paragraphs above, we do not do so again here.

Father also challenges the court's finding he "failed to provide the Court with the mandatory sworn Child Support Worksheet," Paragraph 3(b) of Clarification #1, because he submitted proposed child support worksheets. However, as Father acknowledges, he did not sign those worksheets. Therefore, despite any testimony Father may have provided in support of the worksheets, they were not the worksheets required by Ind. Child Support Guideline 3(B)(1) ("In all cases, a copy of the worksheet which accompanies these Guidelines shall be completed and filed with the court when the court is asked to order support. . . . Worksheets shall be signed by both parties, not their counsel, under penalties for perjury.").

16.)

The trial court's determinations regarding Father's credibility explain the court's decision not to credit the evidence Father presented regarding his economic and employment situation. That Father was not cross-examined regarding much of his testimony does not require the trial court to believe Father's version of events. We have explained:

> The trier of fact may not arbitrarily disregard evidence, but the evidence as a whole and the circumstances of trial may justify rejection of evidence not directly controverted:
>
> > Among the factors that may be considered in determining the credit to be given to the testimony of a witness are: The interest of the witness, if any, in the outcome of trial; his bias and prejudice, if any is shown; his opportunity for knowing and recollecting the facts about which he testified; the probability or improbability of his testimony; and his demeanor while on the witness stand.
>
> It has long been recognized that a jury may disbelieve uncontradicted oral evidence, on the basis of credibility.

Terry v. West, 524 N.E.2d 343, 348-49 (Ind. Ct. App. 1988) (quoting *Gemmer v. Anthony Wayne Bank*, 181 Ind. App. 379, 386-87, 391 N.E.2d 1185, 1189 (1979), *reh'g denied*), *reh'g denied*. Thus, the court was not required to give weight to any of Father's evidence.[6]

Father also claims the trial court should not have disregarded all of his testimony

[6] Neither was the court required to make an explicit or implicit finding regarding Father's lack of credibility prior to our request for clarification in order for those new findings to be valid.

Father also challenges one of the trial court's findings that supports its determination he was not credible: "his submission of un-itemized and unsworn documents." (Supp. App. at 13 (Clarification #1, Paragraph 4).) Father asserts error in that finding because it was Mother, not he, who submitted those documents to the trial court. Assuming *arguendo* Father is correct, we need not reverse, as an absence of documents supplied by Father could not provide more support for his position than unsworn and unitemized documents. Moreover, the court made numerous other findings that are sufficient to support its determination that Father was not credible.

because his testimony was not "inherently improbable" or "wholly uncorroborated." (Appellant's Supp. Br. at 15.) The standard Father cites is for "incredible dubiosity" – a rule whereby we may "impinge upon a [fact finder]'s function to judge the credibility of a witness . . . [i]f a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence." *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). The rule permits us to ignore testimony if "no reasonable person could believe it." *Id.* However, Father has turned this rule on its head – he urges us to find him credible when the trier of fact explicitly found he was not. We decline to do so.

C. Father's Underemployment

Father asserts the court committed clear error when it found him voluntarily underemployed. Child support orders "cannot be used to 'force parents to work to their full economic potential or make their career decisions based strictly upon the size of potential paychecks.'" *Miller v. Sugden*, 849 N.E.2d 758, 761 (Ind. Ct. App. 2006) (quoting *In re E.M.P.*, 722 N.E.2d 349, 350-51 (Ind. Ct. App. 2000)), *reh'g denied*, *trans. denied sub nom Miller v. Miller*, 860 N.E.2d 596 (Ind. 2006). Nevertheless, our Guidelines advise:

> When a parent has some history of working and is capable of entering the work force, but voluntarily fails or refuses to be employed in a capacity in keeping with his or her capabilities, such a parent's potential income should be determined to be a part of the gross income of that parent. The amount to be attributed as potential income in such a case would be the amount that the evidence demonstrates he or she was capable of earning in the past.

Child Supp. G. 3, cmt. 2(c)(2).

Before 2000, Father was a high level corporate executive making more than

$500,000.00 some years. After 2000, Father could have chosen to seek similar employment. Instead he traded stocks and started a real estate business. By the time of the modification hearing, the stock market was doing poorly and Father had wound down the real estate business, but he had not obtained employment. The trial court simply did not believe Father had applied for the number of positions that Father claimed or that Father actively had sought employment. Because these determinations rest on the trial court's authority to weigh the evidence and assess credibility, we may not disturb them.

Those findings differentiate Father's situation from those in which courts have held unemployment or underemployment was not voluntary. *See*, *e.g.*, *Lambert v. Lambert*, 861 N.E.2d 1176, 1181-182 (Ind. 2007) (being imprisoned for crime is not voluntary unemployment or underemployment justifying imputation of income at pre-incarceration levels); *In re Kraft*, 868 N.E.2d 1181, 1189 (Ind. Ct. App. 2007) (father entitled to modification where yearly income had been $90,000 plus multiple six-figure bonuses, but after that company folded, father found job paying $90,000 per year); *Abouhalkah v. Sharps*, 795 N.E.2d 488, 491 (Ind. Ct. App. 2003) (father not voluntarily underemployed when company moved his job to Minnesota, but he refused to move with job because he wanted to stay near his children in Indiana, and he had been searching for comparable employment); *E.M.P.*, 722 N.E.2d at 352 (father was not voluntarily underemployed for child support purposes after he took lower paying job because had had been seeking a job change for three years due to rigorous physical nature of original job, which had caused injury to his body, and because the new job had better benefits and would, over time, produce more income).

Thus, we cannot hold the trial court abused its discretion in finding Father voluntarily underemployed. *See, e.g.*, *Bojrab v. Bojrab*, 810 N.E.2d 1008, 1015 (Ind. 2004) ("While legitimate reasons may exist for a parent to leave one position and take a lower paying position other than to avoid child support obligations, this is a matter entrusted to the trial court and will be reversed only for an abuse of discretion."); *Meredith v. Meredith*, 854 N.E.2d 942, 948 (Ind. Ct. App. 2006) (court properly imputed income for voluntary unemployment where father voluntarily took early retirement and was not seeking employment); *Williamson v. Williamson*, 825 N.E.2d 33, 44 (Ind. Ct. App. 2005) ("Given Father's failure to submit a calculation of his gross receipts minus ordinary and necessary expenses resulting from his self-employment and his argument that he has no income, we cannot say that the trial court's imputation of income to Father is clearly erroneous.").

D. Father's Income

Father argues the court erred by changing the way it calculated his income from one proceeding to the next. (Appellant's Br. at 24-30.) In the 2006 support order, the court assigned income to Father based on his interest income:

> 6. [Father] has notes payable to him, which will provide interest income to him of at least Fifty-five Thousand Dollars ($55,000.00) per year, in addition to his earnings in the real estate business. He built a residence, which is for sale at this time. He also is an able-bodied person who could seek employment as a corporate executive, as he has done before.
>
> 7. It is therefore appropriate that the Court establish the Respondent's income in the amount of $55,000.00 per year, for purposes of the child support calculation.

(Amended App. at 32.) Thus, the court determined Father's *actual* income based on the

amount of interest his investments would earn. *See* Child Supp. G. 3(A) ("Weekly gross income of each parent includes income from any source . . . and includes, but is not limited to, income from . . . interest . . . ."). [7] The court did not, as Father asserts, change the methodology by which it imputed income to him. [8] Rather, the court changed from determining Father's actual income to imputing income because Father was voluntarily underemployed. As we have already found the court did not abuse its discretion in finding Father voluntarily underemployed, we find no error in the court's decision to impute income rather than to determine Father's actual income.

The Indiana Child Support Guidelines provide that if a parent is voluntarily underemployed, child support shall be determined based on potential income. Ind. Child Support Guideline 3(A)(3). "A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, and earning levels in the community." *Id.* The purposes behind determining potential income are to "discourage a parent from taking a lower paying job to avoid the payment of significant support" and to "fairly allocate the support obligation when one parent remarries and,

[7] We note the court's order on modification included the following finding: "The Court further found in the July 10, 2006 order that Respondent should be imputed with income of $55,000.00 per year and Petitioner was to be imputed with minimum wage for the purpose of child support calculations." (App. at 11.) The first half of that finding is clearly erroneous because it does not accurately reflect the original order.

[8] Therefore, we find misplaced Father's reliance on *Apter v. Ross*, 781 N.E.2d 744 (Ind. Ct. App. 2003), *trans. denied sub nom Apter v. Apter*, 792 N.E.2d 46 (Ind. 2003). In *Apter*, we held it was "improper for the trial court to use inconsistent formulas in calculating an obligor's [actual] income [from self-employment] to determine whether there has been a substantial change in circumstances warranting support modification . . . ." *Id.* at 763. *Apter* does not control. Father's income calculation was changed from actual income to imputed income, because the court had begun to believe Father's underemployment was voluntary.

because of the income of the new spouse, chooses not to be employed." Child Supp. G. 3 cmt. 2(c). Trial courts have broad discretion when imputing income "to ensure the child support obligor does not evade his or her support obligation." *Miller*, 849 N.E.2d at 761.

Father does not allege the amount of potential income imputed to him is inconsistent with "the amount that the evidence demonstrates he . . . was capable of earning in the past." Child Supp. G. 3, cmt. 2(c)(2). Father's history included earnings in excess of $500,000.00 per year; the income imputed by the court, $403,389.00, was not outside the scope of the evidence.[9] Father's remaining argument about the amount of imputed income would require us to assess his credibility and reweigh the evidence, which we may not do. Accordingly, we find no abuse of discretion.[10]

CONCLUSION

Because the evidence supports the trial court's findings regarding Father's underemployment and income, we affirm the order that he pay 92% of his daughter's "uncovered" college expenses and 92% of Mother's attorney fees.

Affirmed.

NAJAM, J., and ROBB, J., concur.

[9] Father asserts the court erred when it relied on three specific bank deposits to set his income for 2007. We agree the court's methodology would have been erroneous if the court had been calculating Father's actual income. However, it was determining potential income.

[10] Father's challenge to the order that he pay Mother's attorney fees is based on his assertion that the trial court erroneously established his income. As the record supports that finding, Father has given us no reason to disturb the order.