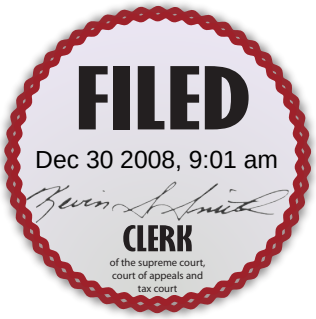

ATTORNEY FOR APPELLANT:

DEBORAH M. AGARD
Law Office of Deborah M. Agard
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

RALPH E. DOWLING
Muncie, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE MARRIAGE OF 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

December 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

John Farrell appeals the modification of his child support. He challenges the court's authority to modify support, the amount of income the court assigned to him, the date from which the court modified payment of college expenses, and the order that he pay a portion of attorney fees for his ex-wife, Nicole. While the court had authority to modify the child support order, the order lacks sufficient clarity for us to determine whether the evidence supports the income assigned to John. Accordingly, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

John and Nicole married on June 7, 1980, and separated on December 4, 2004. Their marriage produced four children, two of whom are emancipated. The two children entitled to support are a daughter, M.F., who was born February 20, 1987, and a son, D.F., who was born May 19, 1990.

On March 3, 2006, John and Nicole entered a settlement agreement regarding numerous issues, including division of property, custody of the minor children, and visitation. The agreement left unresolved how much child support John would pay and who would claim D.F. and M.F. as tax exemptions. Three days later, the court approved the settlement agreement and incorporated it into its Summary Decree of Dissolution.

The court set the two remaining issues for hearing. After that hearing, the court entered on July 10, 2006, an order resolving those issues. Because in this appeal John questions the validity and propriety of changes from this order, we provide the relevant portions of the order:

FINDINGS

* * * * *

3. The original respondent, John M. Farrell, 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.

5. The original Petitioner, Nicole A. Farrell, is not currently employed, except through her graduate assistantship, in which she earns approximately $7000.00 per year, but she is actively pursuing a degree which would enable her to become a fulltime employee of a school corporation later this year. She had postponed her career by agreement of the parties while the children were young, and she has diligently pursued her needed course work to obtain a teaching license since the parties separated.

6. [John] 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 [John]'s income in the amount of $55,000.00 per year, for purposes of child support calculation. The Court should impute to Nicole 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.

9. The youngest child of the parties, [D.F.], is a freshman at Yorktown High School, and is residing with his mother. The Court will calculate child support based upon all of the relevant factors including

overnight credit for visitation for ninety-eight (98) overnights per year.

10. A child support worksheet is attached, and the original Respondent, John Farrell, should pay child support to Nicole A. Farrell, 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 Nicole 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. The Respondent, John M. Farrell, shall pay $156.96 per week to Nicole A. Farrell, 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.

(App. at 31-34.)

When M.F. returned to Ball State for her sophomore year, she did not have the same amount of scholarships and grants she had received during her freshman year. However, neither party filed a new child support worksheet before August 15, 2006. The evidence indicates M.F. took out student loans and received some money from Nicole to cover the expenses of that year.

On December 20, 2006, Nicole moved for modification of child support. Following a hearing, the court on January 4, 2008, found and ordered in pertinent part:

7. The Court now finds that [John] 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, [John] 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 [John]'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 [John]'s income for 2007 to use in the calculation in the child support worksheet.

8. [Nicole] has continued to better herself, has completed her education, and 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 [Nicole]'s income for the calculation of child support.

* * * * *

16. The Court therefore finds based upon the above information that [John] should be paying 92% of [M.F.]'s college education expenses and [Nicole] paying 8% which expenses are not covered by scholarships or grants. Those expenses shall include tuition, room and board, fees, and books.

17. The Court finds that for the 2006-07 school year, there was $4,088.00 not covered by scholarships or grants which is to be reimbursed by the parents. The Court finds and orders that [John]'s share of said expenses are [sic] $3,761.00. [John] shall pay said sum as follows: $1,750.00 to [M.F.], which she shall then apply to the student loan she obtained, the sum of $425.00 to [M.F.] for books, the sum of $450.00 to [M.F.] for her field trip, and the sum of $1,136.00 to [Nicole] as reimbursement for out of pocket expense that she made toward the 2006-07 expenses. The above sums shall be reimbursed to the appropriate parties with one-half due within 30 days and one-half due within 60 days of the entry of this order.

18. For the 2007 school year commencing fall 2007 and thereafter, the parties shall divide [M.F.]'s tuition, room and board, and other school fees billed by the university plus her books and field trips, less scholarships and grants, with [John] paying 92% and [Nicole] paying 8%. The Court finds that a reasonable sum for [M.F.]'s monthly living expenses which includes rent, food, utilities, and miscellaneous expenses to be $565.00 per month, however subject to any increases in her rent and

utilities. The parties are therefore to divide this amount with [John] paying 92% of $520.00 per month directly to [M.F.] commencing August 10, 2007 and every month thereafter. [John] is to reimburse [M.F.] that amount which he is currently behind, or the sum of $2,080.00 through November, 2007, by paying one-half within 30 days and one-half within 60 days. Any sum that [Nicole] owes to [M.F.] that she has not yet paid as her share of [M.F.]'s living expenses shall also be paid one-half within 30 days and one-half within 60 days. Should [M.F.] encounter an increase in her rent or utilities which causes this monthly amount to change, she shall report that to her parents immediately. Both parties shall be responsible for paying Ball State University expenses directly to the university and book expenses shall be paid to whoever purchases the books. Both parties shall make their payments timely to Ball State University. The Court anticipates that there will be fees and tuition due January, 2008, and the parties are to make immediate arrangements to pay their share to the university as soon as the payment becomes due in January, 2008. For those sums expended for fall semester 2007, [John]'s share of 92% shall be reimbursed to [Nicole] or [M.F.] whoever has paid those expenses out of pocket with one-half being due by February 15 and one-half being due by March 15, 2008.

* * * * *

20. The Court finds that because [M.F.] has received substantial scholarship and grants, she is not going to be required to take on any student loans for her education. Neither party shall influence or attempt to influence [M.F.] in securing any further student loans and neither parent will take or use any of [M.F.]'s student loan money. The Court also notes that both parties stipulated at the hearing [John] has agreed and is responsible for the repayment of those student loans taken out prior to the child support order dated July 10, 2006.

21. The Court further finds that [Nicole] submitted, via counsel, a fee affidavit totally [sic] $2,527.05. The Court finds that [John] shall be responsible for paying 92% of those fees based upon his percentage of income from the child support worksheet. [John] 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 [Nicole's counsel]. [Nicole] shall be responsible for the balance of her fees.

(*Id*. at 10-16.)[1]

[1] John filed a motion to strike Nicole's Brief of Appellee. We denied that motion by separate order issued concurrent with this opinion because John's complaints did not justify striking the entirety of Nicole's brief. Our failure to do so, however, does not indicate we approve of the tone and language in Nicole's

DISCUSSION AND DECISION

The trial court entered findings of fact and conclusions of law without a request from either party. In such a situation, the findings control only those issues they cover, while a general judgment standard applies to any issue about which the court made no finding. *Harris v. Harris*, 800 N.E.2d 930, 934 (Ind. Ct. App. 2003), *trans. denied* 812 N.E.2d 798 (Ind. 2004). "A general judgment may be affirmed on any theory supported by the evidence presented at trial." *Scoleri v. Scoleri*, 766 N.E.2d 1211, 1215 (Ind. Ct. App. 2002). Where there are findings, we must insure the evidence supports those findings and the findings support the judgment. *Id.* Findings are clearly erroneous when the record lacks probative evidence, or reasonable inferences therefrom, to support the

---

Brief or in her Response to Appellant's Motion to Strike.

As examples, Nicole's counsel refers to John's Statement of the Issues as a "minefield of problems," (Br. of Appellee at 1); states John's brief "moves on to a pointless tangent," (*id.* at 46); refers to John's self-employment history as "dismal," (*id.* at 18); and calls John "selfish," (*id.* at 34). In defense of that tone, counsel asserts he "cannot discern how a description of an argument can be disrespectful," (Response to Motion to Strike at 3), and attempts to demonstrate how the evidence and dictionary definitions of "dismal" and "selfish" support counsel's characterizations of John and his employment history.

We disagree with Nicole's counsel. In an attempt to help counsel understand how to discern a disrespectful tone, we provide an example. We could state we find no merit in his assertions in defense of the brief's tone, which would indicate our disagreement with his arguments. Alternatively, we could state we find his assertions in defense of the brief's tone are immature, petty, classless, and unbecoming of a lawyer admitted to the bar of Indiana, which would insult not just the assertions, but also the author of the assertions. Such insulting characterizations have no place in appellate advocacy. And regardless whether an opposing party's behavior can be alleged to fit the dictionary definition of an insulting word, there is no place for such insults in appellate brief writing.

As we have explained all too often: "Material of this nature is akin to static on a radio broadcast. It tends to blot out legitimate argument." *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992), *trans. denied*. "On a darker note, if such commentary in appellate briefs is actually directed to opposing counsel for the purpose of sticking hyperbolic barbs into his or her opposing numbers' psyche, the offending practitioner is clearly violating the intent and purpose of the appellate rules." *Id.* Briefs are far more helpful to appellate courts, and they advocate more effectively, when the focus remains on the case, rather than on insulting the opposing party and opposing counsel. *See In re H.M.C.*, 876 N.E.2d 805, 806 n.1 (Ind. Ct. App. 2007), *trans. denied* 891 N.E.2d 42 (Ind. 2008). We "firmly request the elimination of such surplusage from future appellate briefs." *Amax Coal*, 597 N.E.2d at 352.

findings. *Id.* As we conduct our review, we consider only the evidence and inferences favorable to the judgment, and we may not reweigh the evidence or assess the credibility of the witnesses. *Id.*

1. Authority to Modify Support

John asserts the court had no authority to modify his child support obligation because Nicole had not demonstrated a substantial change in circumstances justifying modification. We disagree.[2]

[2] The parties also argue at length in their motions about alleged improper use of the transcript of evidence from the 2006 support hearing. John included that transcript with the transcripts of the hearings to modify support in the single "Transcript" filed on appeal. John claims he provided the prior transcripts "to demonstrate that his employment and business practice circumstances had not changed in the months between the initial support hearing and the filing of Nicole's petition to modify, not to invite Nicole's improper reliance on the original evidence to support her modification request." (Motion to Strike at 3.) We decline to hold John may rely on the earlier transcript to demonstrate the court erred, while Nicole may not rely on the same transcript to demonstrate the court did not err. In addition, we disapprove of John's inclusion of that material in the Record on Appeal if he believed it was not part of the record before the trial court. *See* Ind. Appellate Rule 50 (requiring counsel to verify the documents in the Appendix are accurate parts of the record on appeal).

The controlling law is:

> 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 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).

Ind. Code § 31-16-8-1(b) provides:

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

The party who petitions for modification of child support bears the burden of establishing the right to modification under that statute. *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 840 (Ind. 2005).

On appeal, we give "considerable deference" to a finding of changed circumstances supporting modification under Ind. Code § 31-16-8-1(b). *Id.* Our deference reflects, "first and foremost, that the trial judge is in the best position to judge the facts, to get a feel for the family dynamics, to get a sense of the parents and their relationship with their children—the kind of qualities that appellate courts would be in a difficult position to assess." *Id.* Additionally, our deference reflects our understanding that our reversal of a trial court decision is "especially disruptive in the family law setting." *Id.*

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.

As we review the court's decision, we give "substantial weight" to the court's conclusions about credibility of witnesses and inferences to be drawn. *Id.* at 941. However, if a ruling is based on an error of law, or if it is unsupported by the evidence, we must reverse, because the trial court has no discretion to reach the wrong result. *Id.* In accordance therewith:

> We rely on the trial court's determination of the respective incomes of the parties, for example, but the determination of whether or not the change in circumstances asserted is "so substantial and continuing" as to render the prior child support order's terms "unreasonable" is, at a minimum, a mixed question of law and fact. To the extent it is a question of law, it is the duty of the appellate court to give it de novo review--and doing so promotes the values of consistency, predictability, and enunciation of standards that curb arbitrariness.

Id.

> Nicole requested a modification of support, asserting:
>
> 2. That there has been a substantial and continuing change of circumstance such that the prior order is unreasonable and should be modified, more specifically:
>
> a. Petitioner's income has changed and Respondent's income should be imputed at a higher level.
>
> b. Petitioner would request that Respondent continue to cover the children on his health insurance.
>
> c. Respondent is not exercising parenting time on a regular basis and should therefore not receive the parenting time credit.
>
> 3. That Petitioner requests that this Court set payments as to [M.F.]'s educational expenses as she has lost her scholarship and the parties have not been able to agree to payments.

(App. at 38-39.)

The court's original order on child support did not address payments in the event that M.F. lost her scholarships. Rather, it said: "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." (*Id.* at 32.) While Nicole's petition did not list M.F.'s loss of scholarship as a "substantial and continuing change of circumstance," the petition did inform the court of that change and of the need to provide for payment of M.F.'s college expenses. Because the original support order did not contain a contingency plan for payment of M.F.'s college expenses if her scholarships or grants were terminated, the court did not abuse its discretion in finding a significant change in circumstances that justified re-visiting the support issue even though twelve months had not elapsed since the prior order.[3]

2. Calculation of Father's Income

John asserts "the trial court erred by establishing self-employed father's income upon three isolated financial transactions and, in so doing, changed the methodology for imputing income to father when there was no change in father's self-employment or the way he conducted his business." (Appellant's Br. at 18.) He claims the court erroneously found him voluntarily underemployed or unemployed, erroneously modified the methodology by which it imputed income to him, and erroneously found money from three financial transactions were income.[4]

[3] In the modification order, the court noted its earlier order indicated it would reconsider the support order based on M.F.'s scholarship status. (App. at 11.)

[4] John also suggests the court erred in determining his income because only five months had passed between the court's order and Nicole's petition. (*See* Appellant's Br. at 23.) However, the hearings on the petition to modify took place over a year after the initial support hearing. (*Compare* Tr. at 64 (initial hearing held on March 17, 2006) *with* Tr. at 65 (modification hearing began on May 1, 2007).) As we have explained:

John appears to assert the court imputed income to him for being voluntarily underemployed or unemployed, but at the same time determined his actual income based on three of his financial transactions. Nicole asserts the court imputed potential income to John. We understand their confusion.

The trial court order provides:

> 7. The Court now finds that [John] 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, [John] 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 [John]'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 [John]'s income for 2007 to use in the calculation in the child support worksheet.

(App. at 10.) The court found John could have sought employment, if he had chosen; but did not explicitly find John "voluntarily unemployed" or "voluntarily underemployed." It then cited three specific transactions as if the amounts generated thereby were actual income to John, but then stated the amounts would be combined to "reflect" John's yearly income. Use of the term "reflect" leaves unclear whether the court meant those

---

> In weighing the ability of each parent to contribute to payment of college expenses, it hardly seems an abuse of discretion to examine the parties' current salaries, obligations, etc. To the contrary, it would make little sense to use current income amounts for the apportionment of college expenses, but use [old] income amounts for calculating the remaining child support obligation because it would not paint an accurate picture of the parties' respective incomes and responsibilities.

Carter v. Dayhuff, 829 N.E.2d 560, 567 (Ind. Ct. App. 2005). Because more than a year had passed between the initial support hearing and the time the court was to re-determine support, we find no abuse of discretion in the court's acceptance of new evidence regarding the parties' incomes.

three figures represented John's actual income for the year or would be combined to give a value to impute as potential income.

If the court was finding actual income, we would review the three financial transactions to determine whether they were, in fact, income. If the court was imputing income, then we would need to review the finding of voluntary unemployment and determine whether the amount imputed was within the scope of the evidence before the trial court. Because it is not clear which review is appropriate, we must reverse and remand for clarification of the order.

3. Timing of College Expense Modification

Because this issue likely will arise again on remand, we note the court erred when it ordered John to reimburse Nicole and M.F. for college expenses incurred during fall semester in 2006, before Nicole filed her petition to modify in December of 2006.

Pursuant to Ind. Code § 31-16-16-6(b):

> A court with jurisdiction over a support order may modify an obligor's duty to pay a support payment that becomes due:
> (1) after notice of the petition to modify the support order has been given either directly or through the appropriate agent to:
> (A) the obligee; or
> (B) if the obligee is the petitioner, the obligor; and
> (2) before a final order concerning the petition for modification is entered.

Accordingly, trial courts have discretion to modify child support "'back to the date the petition to modify is filed, or any date thereafter.'" *Carter*, 829 N.E.2d at 568 (quoting *Haley v. Haley*, 771 N.E.2d 743, 752 (Ind. Ct. App. 2002)). If the modification relates back to a date before the petition was filed, the modification is erroneous. *Id.* at 567.

Nicole filed her petition on December 20, 2006. Accordingly, the court could not modify John's obligation to pay fall semester expenses incurred prior to that date.[5] The court found the uncovered college expenses were $4,088 for the entire 2006-2007 school year. It appears at least some of those expenses were for M.F.'s spring semester, and Nicole and M.F. accordingly may be entitled to some reimbursement. Therefore, we reverse this portion of the court's order. On remand the court should recalculate John's arrearage for the 2006-2007 school year to include only spring semester 2007 expenses.

4. Attorney Fees

Finally, John argues the court abused its discretion when it ordered him to pay 92% of Nicole's attorney fees.

An order for payment of attorney fees is discretionary: "The court periodically *may* order a party to pay a reasonable amount for . . . attorney's fees . . . ." Ind. Code § 31-16-11-1 (emphasis added). Determinations whether to award fees under that statute in proceedings to modify child support are "within the sound discretion of the trial court and will be reversed only upon a showing of a clear abuse of that discretion." *Whited v. Whited*, 859 N.E.2d 657, 665 (Ind. 2007) (quoting *Whited v. Whited*, 844 N.E.2d 546, (Ind. Ct. App. 2006), *reh'g denied*, *vacated* 859 N.E.2d 657 (Ind. 2007)). A trial court need not state the reasons for its decision to award fees, but "must consider the parties' resources, their economic condition, their ability to engage in gainful employment, and other factors that bear on the award's reasonableness." *Id.*

[5] John agrees he should be responsible for expenses of M.F.'s spring 2007 semester, even though those expenses were billed prior to the filing of the petition. (Appellant's Br. at 37.)

Because we must remand for clarification of John's income, we cannot accurately assess whether the order that John pay 92% of Nicole's attorney fees was erroneous. We encourage the court to revisit this issue after clarifying John's income.

CONCLUSION

The court had authority to modify the child support order because M.F.'s loss of scholarships was a substantial change in circumstances. We cannot address whether the court erred in determining John's income because it is not clear whether the court was finding John's actual income or imputing potential income. The court abused its discretion when it ordered John to reimburse college expenses incurred for fall semester 2006 prior to Nicole's petition. The court should reconsider, after the court clarifies, or perhaps redetermines, John's income, the order that John pay a portion of Nicole's attorney fees. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We retain jurisdiction of this appeal pending action by the dissolution court.

Affirmed in part, reversed in part, and remanded.

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