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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF	)	
	)	
BERT MARCUS JONES,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 14A01-0601-CV-35
	)	
GINA LYNN JONES,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE DAVIESS CIRCUIT COURT
The Honorable Robert L. Arthur, Judge
Cause No. 14C01-9904-DR-108

October 25, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Bert Jones ("Father") appeals the trial court's grant of a petition to modify support filed by Gina Jones ("Mother"). Father raises three issues, which we restate as:

I. Whether the trial court's calculation of weekly gross income for child support purposes was clearly erroneous;

II. Whether the trial court erred by ordering him to pay for college education expenses because S.J. and J.J. had repudiated the parent-child relationship; and

III. Whether the trial court erred by modifying the marital settlement agreement to require Father to pay for private school tuition.

On cross appeal, Mother raises the issue of whether the trial court abused its discretion by failing to order Father to pay Mother's attorney fees. We affirm in part, reverse in part, and remand.

The relevant facts follow. Father and Mother were married in 1983, and three children ("Children") were born to the marriage, J.J., born July 2, 1984, S.J., born March 20, 1987, and M.J., born December 29, 1988. Father is self employed at Jones & Sons.

Father left the house in 1996 or 1997. Father called Mother and told her that he was moving out and that he was in Florida. Neither Mother nor the Children knew where Father lived for periods of time. Before the divorce, Father did not come to the house to see the Children. Father filed a petition for dissolution of marriage in April 1999. In 2002, the parties entered into a marital settlement agreement, and the trial court issued a dissolution decree, which approved of and incorporated by reference the parties' settlement agreement.

J.J. is in his third year of college in Bloomington and lives in an apartment. S.J. lives in a dorm at Butler University because S.J. wanted a smaller school than the state schools. Mother did not think S.J. consulted Father for education plans. Mother did not have a conversation with Father about where the Children would attend college. Father called S.J. very rarely and wrote "[v]ery seldom." Transcript at 80. J.J.'s tuition at IU is "almost Four Thousand a semester" and S.J.'s tuition at Butler is "about Eight Thousand a semester." Id. at 53-54. M.J. is in high school and lives with Mother. Father has recently corresponded with S.J. and J.J.

On July 26, 2005, Father filed a motion to modify support and secondary expenses.[1] On August 24, 2005, Mother filed a petition to modify support and post-secondary educational expense.[2] After a hearing, the trial court entered the following order:

FINDINGS OF FACT

1. The parties' oldest son, [J.J.] (age 21), completed two (2) years of college at Vincennes University and now attends Indiana University, where he is a junior academically.

2. Pursuant to paragraph 1.8 of the February 28, 2002 Marital Settlement Agreement ("Settlement Agreement"), [Mother] properly applied [J.J.]'s stock certificates to [J.J.]'s post-secondary educational expense. The stock certificates are nearly depleted.

[1] The Father's motion to modify is not included in the Appellant's Appendix.

[2] The Mother's petition to modify is not included in the Appellant's Appendix.

3. In paragraph 1.8 of the Settlement Agreement, the parties agreed that the children's post-secondary education would be split on a semester basis, thirty percent (30%) to Mother and seventy percent (70%) to Father, after all grants, loans and other monies are sought by the children. The obligation of the parents was limited to specified expenses for a state supported college in Indiana not to exceed a bachelor's degree or four and one-half (4 1/2) years, whichever occurs first.

4. At the time the parties entered their Settlement Agreement in 2002, their child support worksheet attached to the Settlement Agreement showed the Father's weekly income of Four Thousand Two Hundred Sixty-Nine Dollars and Twenty-Three Cents ($4,269.23) per week ($220,000.00/yr.) and the Mother's weekly income of One Thousand One Hundred Twenty-Nine Dollars ($1,129.00) per week ($58,708.00/yr.) based on her taxable alimony.

5. Mother's Exhibit 2 (copy attached) showed for years 2003 and 2004 that the Father had average weekly income of Six Thousand Eight Hundred Ninety-Seven Dollars ($6,897.00), after deduction for alimony paid to the Mother. The Mother's current weekly income is One Thousand Three Hundred Sixty-Nine Dollars ($1,369.00) per week and wages of Two Hundred Forty Dollars ($240.00) per week.

6. At the October 3, 2005 hearing, the Father claimed his 2005 income will only be Two Thousand Three Hundred Sixty Dollars ($2,360.00) per week, or approximately One Hundred Twenty-Three Thousand Dollars ($123,000.00) per year (Father's Exhibits F, G and H). The Court finds this is dramatically less than the Father earned in either 2002 ($222,000/yr.), 2003 ($486,045.00/yr.) or 2004 ($231,236.00/yr.). Moreover, Mother's Exhibits 7-10 showed the **Father actually deposited One Hundred Twenty-Seven Thousand Five Hundred Sixty-Two Dollars ($127,562.00) into his bank accounts during a three (3) month period in 2005**.

7. The Father requested that his agreed obligation to pay for the children's post-secondary educational expense, set forth in paragraph 1.8 of the Settlement Agreement, be terminated as a result of an alleged repudiation by both [J.J.] and [S.J.] of the Father.

8. The Father recently visited [J.J.] at Indiana University. Both [J.J.] and the Father testified they desire to have a meaningful relationship. [J.J.] is sincere in his desire to build a relationship with his Father.

9. [S.J.] is now a freshman attending Butler University. [S.J.] will reside with the Mother for approximately four (4) months while on breaks from school. While the Father's relationship with [S.J.] has been strained, both [S.J.] and the Father testified they desire to have a meaningful relationship. [S.J.] is sincere in her desire to build a relationship with her Father. Court finds that the parties have an extremely strained relationship, especially between [J.J.] and [S.J.] and [Father]. Despite the strained relationship, the Court finds that the children have not, in fact, repudiated [Father] and that all parties, including both parents, are somewhat to blame for this state of affairs. The actions and/or inactions of [Father] have contributed to the strained relationship with the children.

10. The parties' youngest child, [M.J.] (age 16), continues to reside at the Mother's residence in Vincennes and is expected to attend college after graduation from high school.

11. The Mother requested that paragraph 1.8 be modified to reflect the parties' contribution to [S.J.]'s educational expense at Butler University, which is expected to be more than Eight Thousand Dollars ($8,000.00) per year higher than a state supported university. [S.J.] had a 3.9/4.0 average in high school and is a business major at Butler. [S.J.] chose Butler because she was far more comfortable in a smaller university setting, than at I.U. or Purdue. [S.J.] is very happy at Butler and it is in her best interest that she continues her studies at Butler.

12. The parties have the economic ability to pay for [S.J.]'s post-secondary educational expense at Butler without causing financial hardship.

CONCLUSIONS OF LAW

13. The Father's post-secondary educational expense obligations continue past age twenty-one (21) pursuant to Ind. Code § 31-16-6-6(A)(1). Therefore, the Father remains obligated to pay for [J.J.]'s

post-secondary educational expenses, but the Father is not required to pay the Mother any child support for [J.J.].

14. [J.J.] and [S.J.]'s sincere desire to have a relationship with the Father evidences that they have not repudiated the Father. The Father bears considerable responsibility for his relationship with his children. The Father is not relieved of his agreed responsibility to pay for the children's college expenses.

15. Mother's Exhibit 4 sets forth the "modified" child support obligation now that the Father is not required to pay support for [J.J.], who is twenty-one (21) years of age. The "modified" obligation set forth in Mother's Exhibit 4 is based on the support guidelines, yet differs from the current support of Four Hundred Dollars ($400.00) per week by only eleven percent (11%), which is less than the twenty percent (20%) required by Ind. Code § 31-16-8-1(2)(A) for modification. The current support of Four Hundred Dollars ($400.00) per week should remain in full force and effect.

16. The parties' agreement to pay for post-secondary educational expenses is unquestionably modifiable as the Father petitioned this Court to be relieved of that obligation. The Mother's request that paragraph 1.8 of the Settlement Agreement be modified to provide for payment of [S.J.]'s post-secondary educational expenses at Butler University, is likewise modifiable and should be granted as it is in [S.J.]'s best interests.

17. Each party shall be responsible for their respective attorney fees and costs.

ORDERS

18. The Father shall continue to pay child support at the rate of Four Hundred Dollars ($400.00) per week for the support of [M.J.] who resides with the Mother and for [S.J.], who is expected to reside with the Mother for approximately four (4) months while she is not attending Butler University. No child support is due and payable to the Mother for [J.J.], who is more than twenty-one (21) years of age.

19. Paragraph 1.8 of the Decree is modified to provide that the parties shall pay on a semester basis the cost for [S.J.] to attend Butler

University under the formula in paragraph 1.8. The remainder of paragraph 1.8 is reaffirmed and shall remain in full force and effect.

20. The parties are ordered to promptly comply with this Order so that [J.J.] and [S.J.]'s college expenses are paid without any detriment to their studies.

21. The parties, and their children, shall always provide each other with their current addresses, e-mail addresses and all telephone numbers.

22. All prior Orders of the Court not inconsistent herewith shall remain in full force and effect.

Appellant's Appendix at 7-12.

I.

The first issue is whether trial court's calculation of weekly gross income for child support purposes was clearly erroneous. The Indiana Supreme Court has placed a "strong emphasis on trial court discretion in determining child support obligations" and has acknowledged "the principle that child support modifications will not be set aside unless they are clearly erroneous." Lea v. Lea, 691 N.E.2d 1214, 1217 (Ind. 1998). A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Clark v. Crowe, 778 N.E.2d 835, 840 (Ind. Ct. App. 2002). We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. Id.

Father argues that the trial court erroneously calculated his weekly gross income for child support purposes because the trial court attributed all of his Subchapter S Corporation pass-through income to him. The Indiana Child Support Guidelines aid in

the determination of the amount of child support that should be awarded and provide a measure for calculating each parent's share of the child support. Lea, 691 N.E.2d at 1217. "There is a rebuttable presumption that the amount of the award which would result from the application of the Indiana Child Support Guidelines is the correct amount of child support to be awarded." Id.

When fashioning a child support order, the trial court's first task is to determine the weekly gross income of each parent. Scott v. Scott, 668 N.E.2d 691, 695-696 (Ind. Ct. App. 1996). "Weekly gross income" is broadly defined to include not only actual income from employment but also potential income and imputed income from "in-kind" benefits. Glover v. Torrence, 723 N.E.2d 924, 936 (Ind. Ct. App. 2000). Indiana Child Support Guideline 3(A) provides, in pertinent part:

> Weekly gross income of each parent includes income from any source, except as excluded below, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, overtime, partnership distributions, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workmen's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, prizes, and alimony or maintenance received from other marriages.

While the guidelines advocate a total income approach to calculating weekly gross income, the Guidelines recognize that determining income is fact-sensitive when irregular income, such as bonuses, overtime, and commissions, is involved. In re A.J.R., 702 N.E.2d 355, 359 (Ind. Ct. App. 1998). The commentary to Ind. Child Support Guideline 3(A) provides:

> There are numerous forms of income that are irregular or nonguaranteed, which cause difficulty in accurately determining the gross income of a party. Overtime, commissions, bonuses, periodic partnership distributions, voluntary extra work and extra hours worked by a professional are all illustrations, but far from an all-inclusive list, of such items. Each is includable in the total income approach taken by the Guidelines, but each is also very fact-sensitive.

The Guidelines suggest that one method of treating irregular income is to require the obligor to pay a fixed percentage of the irregular income "in child support on a periodic but predetermined basis (weekly, bi-weekly, monthly, quarterly) rather than by the process of determining the average of the irregular income by past history and including it in the obligor's gross income calculation." Ind. Child Support Guideline 3(A) (Commentary 2(b)).

Father argues that his income consists of his payroll check, his director's fees, and corporate dividends and that his total weekly gross income is $3,489.23. Father also argues that after his maintenance expense is subtracted, his weekly income is $2,360.23.

Mother argues that Father ignores the fact that he actually deposited funds, and Mother relies on the following finding from the trial court:

> At the October 3, 2005 hearing, the Father claimed his 2005 income will only be Two Thousand Three Hundred Sixty Dollars ($2,360.00) per week, or approximately One Hundred Twenty-Three Thousand Dollars ($123,000.00) per year (Father's Exhibits F, G and H). The Court finds this is dramatically less than the Father earned in either 2002 ($222,000/yr.), 2003 ($486,045.00/yr.) or 2004 ($231,236.00/yr.). Moreover, Mother's Exhibits 7-10 showed the **Father actually deposited One Hundred Twenty-Seven Thousand Five Hundred Sixty-Two Dollars ($127,562.00) into his bank accounts during a three (3) month period in 2005**.

Appellant's Appendix at 8-9.

On appeal, Father does not direct our attention to the record to support his argument that "[a]ttributing 100% of [his] Subchapter S Corporation, pass-through income to [him] is an error." Appellant's Brief at 13. Our review of the record reveals that the following exchange occurred between Father and Mother's attorney:

> Q. Now, mother's Exhibit "1" showed that your taxable income in 2003, after alimony, was over Four Hundred Eighty-six Thousand Dollars.
> A. That's part, in fact, because of the corporation, sir.
> Q. Did you tell [Mother] that your income had gone up about Two Hundred Fifty Thousand Dollars since the divorce?
> A. I wasn't obligated to tell [Mother] that.
> Q. You didn't offer to pay any more child support then, did you?
> A. No, I did not, I filled my obligations.
> Q. No, you've told Judge Arthur under oath today that you believe your income for this year is going to be a Hundred Twenty-two Thousand Dollars?
> A. My take home, what I get from payroll.
> Q. Now, is take home what goes into your bank account?
> A. Yes, it is, other than our taxes – what's given to me to pay my taxes.
>
> * * * * *
>
> Q. Would you be surprised to know that the total of those accounts for the quarter of March through June totals a Hundred and Twenty-seven Thousand Dollars deposited into your own accounts?
> A. No, it wouldn't surprise me at all.
> Q. And, you're telling us here under oath that you're going to earn a Hundred and Twenty-two Thousand Dollars this year?
> A. I said at my best recollection, sir.
> Q. Well, if the Judge were to multiply by four just the deposits into these accounts, he would get an estimated income figure in excess of Five Hundred Ten Thousand Dollars per year. Can you explain how you deposited more money in your account in a three month period than you tell the Court you're going to earn for the entire year?

A. Because what you're – what you're trying to taint is the fact that there is taxes being paid out of this, sir, that's been given to me by the corporation for my quarterly.

Transcript at 124-125, 128-129.

Father relies on his 2003 income tax return for his argument that "[t]ax returns, which were introduced into evidence, properly reflect pass-through income attributable to [Father] as a co-owner." Appellant's Reply Brief at 3. Father's 2003 tax return contains a line that states, "Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E." Appellant's Appendix at 67. The corresponding line states $419,116.73, however we cannot discern how much income was due to income from the S Corporation. Moreover, Father appears to rely on his 2003 income tax return to explain the deposit of $127,562 in 2005. Father does not provide citations to the record that facilitate our discernment of clear error. Based upon our review of the record, we cannot determine what portion, if any, of the $127,562 deposited in the Father's account constitutes taxes to be paid on pass through income.[3] See Nowels v. Nowels, 836 N.E.2d 481, 489-490 (Ind. Ct. App. 2005) (holding that father did not demonstrate that the trial court's order was clearly erroneous when father did not provide calculations and citations to portions of the record and does not offer any alternative calculation specifying the amount of pass-through income). Therefore, we cannot say that the trial court's

[3] Because we find that Father cannot demonstrate the amount of pass through income, we need not address Father's argument that Tebbe v. Tebbe, 815 N.E.2d 180 (Ind. Ct. App. 2004), reh'g denied, trans. denied, is applicable.

calculation of Father's weekly gross income was clearly erroneous. See, e.g., Thomas v. Smith, 794 N.E.2d 500, 506 (Ind. Ct. App. 2003) (holding that trial court's calculation of weekly gross income was not clearly erroneous), trans. denied. Accordingly, we affirm the trial court's calculation of weekly gross income for child support purposes.

II.

The next issue is whether the trial court erred by ordering him to pay for college education expenses because S.J. and J.J. had repudiated the parent-child relationship. "Indiana law recognizes that a child's repudiation of a parent, that is a complete refusal to participate in a relationship with his or her parent, under certain circumstances will obviate a parent's obligation to pay certain expenses, including college expenses." Bales v. Bales, 801 N.E.2d 196, 199 (Ind. Ct. App. 2004), reh'g denied, trans. denied. Where a child, as an adult over eighteen years of age, repudiates a parent, that parent must be allowed to dictate what effect this will have on his or her contribution to college expenses for that child. McKay v. McKay, 644 N.E.2d 164, 166-168 (Ind. Ct. App. 1994) (citing Milne v. Milne, 383 Pa.Super. 177, 556 A.2d 854, 856 (1989), appeal denied).

Specifically, father argues that S.J. and J.J. "have not written, called, or visited with [him] with the exception of [J.J.] having lunch with [him] recently." Appellant's Brief at 18. Father also argues that S.J. and J.J. "admit they did not invite him to their respective high school graduations, omitted him from all college discussions, avoided

telephone contact, did not visit, and refused numerous invitations from [Father], [Father] and his wife, and [Father]'s family." Id. at 19. Father also suggests that S.J. and J.J. are not willing to have a relationship with him.

Father relies on Norris v. Pethe, 833 N.E.2d 1024 (Ind. Ct. App. 2005). In Norris, the trial court found that the daughter had repudiated her relationship with her father. Norris, 833 N.E.2d at 1032. Therefore, on appeal, we were reviewing whether the trial court's findings and conclusion that the daughter had repudiated her relationship with her father was clearly erroneous. Id. We held that the record clearly showed that even though the daughter's repudiation of her relationship with her father commenced when she was a minor, it continued uninterrupted after she reached majority. Id. at 1033. The record revealed that when the father sent the daughter flowers and a check for her birthday, the daughter tore up the check and informed him:

> You're wasting your time and money. The flowers are in a trash can at school, just like our relationship. The fact that you had to manipulate around the real issues was enough to trash our relationship, and this asinine lawsuit accomplished nothing more than to seal that fact. No matter what the judge orders, he can't order my heart.

Id. The daughter returned the father's cards without opening them. Id. The daughter also told her father to "essentially get lost." Id. We also noted the following testimony of a doctor appointed to work with the family:

> [The daughter] announced to me at the last meeting that her attorney told her not to schedule any more appointments. So, I, I said well the [c]ourt Order, as far as I know, is that we are to continue, and she just referred me

> to her attorney. Uh, and she made it very clear that she wants nothing more to do with her [F]ather.[4] It was difficult to even know where she was going to be living at IU because she was very hesitant, and I said are you afraid? She said, I don't know, implying that perhaps she was. I asked about tuition, you know, is your dad, she said that would be hypocritical of me to ask my dad to pay tuition. I said, well, all right, but you don't want any contact. Your dad is more than willing to pay tuition, he's more than willing to be part of your life, and I would keep coming to that, and she would say, I don't want anything to do with him, and then she would often fault me for making it worse, but a situation that bleak, I don't know how it could've been worse.

Id. at 1034. We held that the "record reflects that since June of 2001, [the father] has stood with open arms attempting to reestablish a father-daughter relationship with [the daughter]. [The daughter], on the other hand, has rejected all of [father]'s invitations but now insists that we require [father] to stand with outstretched open wallet." Id. at 1035. We concluded that "the evidence supports the trial court's finding that [the daughter] has repudiated her relationship with her [father], which in turn supports the trial court's conclusion that [the father]'s obligation to pay her college expenses is obviated." Id.

Here, the record reveals the following exchange occurred between J.J. and Mother's attorney:

> Q. Did you enjoy the time your dad came up and visited you at Bloomington?
> A. Yes, it was okay, yeah.
> Q. Do you like spending time with your father one on one?
> A. Excuse me?
> Q. Do you like spending time with your father one on one?
> A. Yes, sir.

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[4] Bracketed text appears in original.

Q. Does he have your cell phone number?
A. Yes.
Q. How often does he call you?
A. Not too often, I mean, he's called a few times in the past.
Q. Has your dad ever asked you to spend an overnight with him that you've declined?
A. Not that I can remember, no.
Q. Do you recall him ever asking you to spend an overnight with him?
A. No, not that I can remember.
Q. You've not given up on your relationship with your dad, have you?
A. No, not at all.

Transcript at 94-95.

S.J. indicated that Father called "very rarely" and never asked for her. Id. at 80.

The following exchange occurred between S.J. and Father's attorney:

Q. Since the divorce, how often have you visited with [Father]?
A. Never.
Q. Is that your choice?
A. I don't necessarily think it's my choice, I think it was partly my father's doing and mine as well.
Q. Do you screen his calls when he calls your house, when you lived in Vincennes?
A. No.
Q. Did you invite [Father] to your graduation from Lincoln?
A. No, I did not.
Q. Why not?
A. I didn't feel like he was someone that I wanted there, he didn't ever show any interest in my previous year or my school, or my life, so I didn't really feel like that it was necessary for me to cordially invite him to my graduation.
Q. Did he attend any of your swim meets or other functions?
A. Not that I know of.
Q. Did you tell him about those events?
A. When I was a freshman in high school, I think I sent him a schedule, but he was never – never there.
Q. Ever talk to him about your school?
A. No, he never asked.

Id. at 80-81. Considering the evidence most favorable to the judgment, we cannot say that Father has stood with open arms attempting to reestablish a relationship with J.J. and S.J.

The record reveals the following exchange occurred between J.J. and Father's attorney:

> Q. What kind of relationship do you expect to have with [Father] now?
> A. Well, I expect to have somewhat of a normal father/son relationship. I guess just like anybody else, you know, as far as that goes.
> Q. So, seeing him one time in three or four years is a normal father/son relationship?
> A. No, not in the least.
> Q. And, making career decisions for school and not talking to him about it is a normal father/son relationship?
> A. Well, it's not most normal, no.

Id. at 94. Thus, the record reveals that J.J. wanted a relationship with Father.

Father relies on a letter from S.J., in which she stated:

> I do appreciate and thank you for my insurance card and letter. Although I must say that the timing and sincerity of your letter is a bit strange because it completely contradicts the current situation of taking us to court.
>
> Just as a reminder, [J.J.] and I have never alienated you. I believe that you alienated us when you left home and became an invisible father for years. We never knew where you were, where you lived or whom you were with. We also were never shown any concern for [sic] while you were absent. I do not think, no, I know that we were never a priority in your life.
>
> It is hard for me to believe that you love me when you will pay for your part of [M.J.]'s medical bills but not mine. It is hard to believe that you love me but will not contribute to my education. It is hard to believe that you love me when I do not receive a phone call or card on my birthday. It is hard to believe that you love me but DID NOT feel obligated to attend my high school graduation.

* * * * *

> One more thing I would like you to understand is that [Mother] has NEVER once kept us from you or affect [sic] our opinions about you. I think you and I both know how and why our relationship is the way it is. I am not saying that I am an innocent person but seriously, how could blame [sic] me for feelings I have about this situation. Also, I do not understand why you have left the responsibility of the outcome of our relationship solely up to me.

Father's Exhibit C. However, S.J. also wrote Father a letter in which she wrote, "We are trying to get through this change in our lives. Maybe if you could try to understand our feelings maybe we would try harder with you." Father's Exhibit B. We cannot say that S.J.'s letters constitute a complete refusal to participate in a relationship with Father. Considering only the evidence most favorable to the judgment, we cannot say that the trial court's findings are clearly erroneous. See, e.g., Staresnick v. Staresnick, 830 N.E.2d 127, 133-134 (Ind. Ct. App. 2005) (holding that trial court's finding that son had not repudiated his father was not clearly erroneous where the son testified that he would like to rebuild his relationship with his father), reh'g denied; Cf. McKay, 644 N.E.2d at 168 (holding that a twenty-year-old son had repudiated his father where the son consulted with his mother and stepfather on all of his college-related decisions, rejected all of his father's efforts to reconcile their relationship, and testified that he had no interest in reestablishing a relationship with his father and nothing could be done to change his mind).

III.

The next issue is whether the trial court erred by modifying the marital settlement agreement to require Father to pay for private school tuition. The parties' marital settlement agreement stated, in part:

> 1.8 COLLEGE EDUCATION. Post-secondary education will be split on a semester basis 30% to [Mother] and 70% to [Father] after all grants, loans and other monies are sought by the children. The obligation of the parents will be limited to the amount of tuition, room and board and books and related college expenses for a state supported college in Indiana. This obligation will be paid on a semester basis by each parent. The children's stock certificates, except for Jones & Sons, Inc [sic] stock, shall be used to defray college expenses of the children. The obligation for the parents to pay for the post-secondary education shall not extend past a bachelor's degree of four and one-half (4-1/2) years, whichever occurs first.

Appellant's Appendix at 17.

In reviewing a determination of whether child support should be modified, we will reverse the decision only for an abuse of discretion. In re E.M.P., 722 N.E.2d 349, 351 (Ind. Ct. App. 2000). We review the evidence most favorable to the judgment without reweighing the evidence or reassessing the credibility of the witnesses. Id. An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the court, including any reasonable inferences therefrom. Id.

Ind. Code § 31-16-8-1 (2004) provides that a child support order may be modified 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.

We note that the order was arrived at by the mutual agreement of the parties, but the modification of an order based on such an agreement as to child support is still subject to the "statutory standard" that a showing of changed circumstances of a substantial and continuing nature be made before that order is modified. Meehan v. Meehan, 425 N.E.2d 157, 160 (Ind. 1981).[5] The party seeking modification bears the

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[5] In Pond v. Pond, 700 N.E.2d 1130, 1132 n.4 (Ind. 1998), the Indiana Supreme Court noted:

> We observe that dicta in Marriage of Boren, 475 N.E.2d 690, 695 (Ind. 1985), Meehan, 425 N.E.2d at 159, and Flansburg[v. Flansburg, 581 N.E.2d 430, 433 (Ind. Ct. App. 1991), trans. denied], recites that a trial judge has the discretion not only to accept or reject but also to modify dissolution settlement agreements. In Meehan, this Court wrote that it is "well-settled" that a trial court may "accept, modify, or reject in whole or part a settlement agreement." 425 N.E.2d at 159. However, we note that none of the cases cited in Meehan support this proposition.

In Beaman v. Beaman, 844 N.E.2d 525, 530 n.2 (Ind. Ct. App. 2006), we noted:

> The Pond Court distanced itself from its earlier decision in Meehan v. Meehan, 425 N.E.2d 157, 159 (Ind.1981), where it had said a trial court may "accept, modify, or reject in whole or in part a settlement agreement." Pond apparently disapproved of saying trial courts may "modify" a settlement agreement, which it characterized as dicta not supported by any of the four authorities Meehan cited for that proposition. See Pond, 700 N.E.2d at 1132 n. 4.

We need not address whether a trial court may modify a settlement agreement because even if the trial court could modify the settlement agreement, we find that the trial court erred by modifying the settlement agreement.

burden of proving the necessary change of circumstances to justify modification. Weiss v. Frick, 693 N.E.2d 588, 590 (Ind. Ct. App. 1998), trans. denied.

Here, the trial court found that Mother's request to modify the agreement for payment of S.J.'s post-secondary educational expenses at Butler "should be granted as it is in [S.J.]'s best interests." Appellant's Appendix at 11. Father argues that "[t]he entry by [S.J.] into a private school does not constitute a change of circumstances as college was contemplated by the parties in their agreement." Appellant's Brief at 22. Father also argues that he and Mother did not leave the "college education expense contribution open to speculation" but "voluntarily agreed, at the time of the divorce, what their limits would be: a Bachelor's degree or 4 [1/2] years of higher education at state tuition rates." Appellant's Brief at 23. Mother argues that "Father's adjusted gross income is over One-Half (1/2) Million Dollars and he objects to paying for seventy percent (70%) of the daughter's college expense at Butler University while the Mother, with limited resources, is agreeable to paying the other thirty percent (30%), which is almost ten percent (10%) above her nineteen and 18/100 percent (19.18%) share of weekly adjusted income." Appellee's Brief at 22.

Father cites Hay v. Hay, 730 N.E.2d 787, 793 (Ind. Ct. App. 2000). In Hay, the mother and father's settlement agreement stated that "[father] shall pay for post high school education at a state supported trade school or college for the parties[']children." Hay, 730 N.E.2d at 791. The father filed a petition to modify alleging that the daughter expressed an intention to attend Vincennes University and a substantial change in

circumstances had occurred. Id. The court stated that the sole issue before it was whether the college expense paragraph could be modified. Id. The trial court concluded that modification was not appropriate and ordered the father to comply with the terms of the agreement and reimburse the mother for any payments made toward the daughter's college education. Id. On appeal, we held that a child's enrollment in a post-secondary education program is a substantial change in circumstances justifying a modification of support when the parties have not made provision for college expenses or have been unable to reach an agreement. Id. at 793. "However, where the parties have agreed and the child support order provides for payment of college expenses, the mere fact that a child actually enrolls in college is not a change in circumstances as such enrollment was contemplated by the parties." Id. We concluded that the fact that the daughter "actually enrolled does not change the circumstances under which [the father] obligated himself to pay her college expenses." Id. at 793.

Mother relies on Borth v. Borth, 806 N.E.2d 866 (Ind. Ct. App. 2004), for her argument that the trial court did not abuse its discretion. In Borth, mother and father entered into a settlement agreement, which stated, in part:

> 7. Post-Secondary Education: Each of the parties agree that they will share in the future post-secondary educational expenses incurred by each of the minor children in such sum as would be appropriate for a student attending a state support [sic] Indiana University, unless otherwise agreed, in shares proportionate to their incomes which are 63% for the Petitioner and 37% for the Respondent.

Borth, 806 N.E.2d at 868. While the daughter was a senior in high school, her father took her to visit four colleges, including a private school. Id. at 868-869. The mother knew of these trips and helped with one of them. Id. at 869. The daughter decided to attend the private school. Id. The mother drove her daughter to the private school. Id. The mother refused to pay 37% of the cost of the private school, and instead insisted that her responsibility was capped at 37% of the cost of attending Indiana University. Id. The father filed a motion for rule to show cause and a petition to modify. Id. The trial court ordered the mother to pay 37% of the cost of her daughter's freshman year at the private school and 40% of her expenses. Id.

On appeal, we held:

> Unlike in Hay, the parties here did not agree as to the issue of post-secondary educational expenses. Their agreement does not specify how the expenses in excess of those attributed to attendance at an in-state post-secondary school should be apportioned. Moreover, while the parties' relative financial position has not changed substantially, their overall financial position has changed dramatically. At the time of the dissolution, Mother earned $41,000 and Father earned $81,800. At the time of the hearing on Father's petition, father earned $140,000 and Mother earned $91,000. This 89% increase in the parties' income, coupled with Sarah's decision to attend an out-of-state institution, represents a substantial change of circumstances justifying modification of the support order.

Id. at 870. We also noted:

> In spite of our holding in this case, we urge trial courts to embark with caution when modifying an agreement to require parties who have agreed to pay for an in-state college education to pay for expenses at an out-of-state institution. We recognize that individuals make financial planning decisions years in advance of known financial burdens, and increasing these burdens at the eleventh hour could certainly work an inequitable hardship in certain circumstances. Nonetheless, here, because of Mother's

> prior knowledge and participation in [the daughter]'s college decision, we believe that the trial court did not err in this case.

Id. at 871.

Here, the parties' settlement agreement stated that "[t]he obligation of the parents will be limited to the amount of tuition, room and board and books and related college expenses for a state supported college in Indiana." Appellant's Appendix at 17. The trial court granted Mother's request for modification "as it is in [S.J.]'s best interests." Appellant's Appendix at 11. The trial court based the modification solely on S.J.'s decision to attend Butler University. Unlike in Borth, the trial court did not make a finding that the parties' income increased. Further, Father did not have involvement in the decision making process. We cannot say that a child's decision, standing alone, to attend a private college constitutes a showing of changed circumstances so substantial and continuing as to make the terms unreasonable. Thus, we conclude that the trial court abused its discretion by modifying the child support order regarding post-secondary education.

IV.

The next issue is whether the trial court abused its discretion by failing to order Father to pay Mother's attorney fees. Mother argues that "[g]iven the facts of this case, the vast disparity of income and vast disparity of net worth, the Father must be required to pay the Mother's attorney's fees and costs herein." Appellee's Brief at 23-24.

Ind. Code § 31-15-10-1(a) (2004) provides that "[t]he court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment." The statute affords the trial court broad discretion in assessing attorney's fees, but does not mandate the court to assess attorney's fees in the first instance. See Thomas v. Abel, 688 N.E.2d 197, 201 (Ind. Ct. App. 1997) (holding that Ind. Code § 31-1-11.5-16[6] (Repealed by P.L. No. 1-1997, § 157 (eff. July 1, 1997)), which addressed attorney fees in dissolutions of marriage, did not mandate the trial court to assess attorney's fees), reh'g denied. "There is no abuse of discretion for the trial court not to do that which it is not required to do." Id. at 202. Thus, Mother's claim regarding attorney's fees must fail. See, e.g., id.; Russell v. Russell, 693 N.E.2d 980, 984 (Ind. Ct. App. 1998) (holding that trial court did not abuse its discretion when it failed to award attorney fees to wife despite disparity of income between the parties), trans. denied; Rump v. Rump, 526 N.E.2d 1045, 1047 (Ind. Ct. App. 1988) (holding that trial court did not abuse its discretion when it failed to award attorney fees to wife), trans. denied.

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[6] Ind. Code § 31-1-11.5-16 (1993) provided, in pertinent part:

> The court from time to time may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorneys' fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceedings or after entry of judgment.

For the foregoing reason, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

KIRSCH, C. J. concurs

MATHIAS, J. concurs in part and dissents in part with separate opinion

IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF	)	
	)	
BERT MARCUS JONES,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 14A01-0601-CV-35
	)	
GINA LYNN JONES,	)	
	)	
Appellee-Respondent.	)	

MATHIAS, Judge, **concurring in part and dissenting in part**

I fully concur with the majority's decision concerning the trial court's calculation of Father's weekly gross income and repudiation of the parent-child relationship. However, I disagree with the majority's conclusion that "the trial court abused its discretion by modifying the child support order regarding post-secondary education." Slip op. at 23.

At the time the parties entered into their Settlement Agreement in 2002, Father's weekly income was $4,269.23 per week or approximately $220,000 per year. Father's income increased in the years 2003 and 2004, and his average weekly income for those two years was $6,897, approximately $358,000 per year. Finally, from March 2005 to June 2005, Father deposited $127,562 into his bank accounts. This evidence of Father's

increased income[7] combined with the trial court's finding that pursuing a college education at a smaller university is in S.J.'s best interests constitutes a substantial change in circumstances justifying a modification of the parties' child support agreement. Therefore, I would hold that the trial court did not abuse its discretion when it ordered Father to pay for S.J.'s tuition at Butler University.

Finally, I am constrained to concur with the majority's conclusion that the trial court did not abuse its discretion when it failed to order Father to pay Mother's attorney fees. See Whited v. Whited, 844 N.E.2d 546, 554-55 (Ind. Ct. App. 2006), trans. pending (quoting Kovenock v. Mallus, 660 N.E.2d 638, 643 (Ind. Ct. App. 1996), trans. denied) ("'A disparity in Husband's annual income and Wife's household annual income alone is insufficient to compel a trial court to grant attorney's fees.'")). However, in a case such as this, where there is a substantial disparity in the parties' incomes, it is more than appropriate for the trial court to award attorney's fees to the party with significantly less financial resources. See e.g. Balicki v. Balicki, 837 N.E.2d 532, 543 (Ind. Ct. App. 2005), trans. denied ("This vast disparity in the parties's earnings supports the trial court's findings that Mark should pay a portion of Darcy's attorney fees.").

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[7] In its decision, the majority states, "[u]nlike in Borth [v. Borth, 806 N.E.2d 866 (Ind. Ct. App. 2004)], the trial court did not make a finding that the parties' income increased." Slip op. at 23. Although the trial court did not expressly state that Father's income increased, the increase in Father's income is evident from the trial court's findings numbers 4, 5, and 6. See Appellant's App. pp. 8-9.