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ATTORNEY FOR APPELLANT:

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St. John, Indiana

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# IN THE
# COURT OF APPEALS OF INDIANA

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| IN RE: THE MARRIAGE OF | ) | |
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| JIMMY HOVEY, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | No. 45A05-1102-DR-123 |
| | ) | |
| JENNIFER HOVEY, | ) | |
| | ) | |
| Appellee. | ) | |

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APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John Sedia, Special Judge
Cause No. 45D03-0303-DR-352

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**August 26, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Chief Judge**

## Case Summary and Issues

In this long-running post-dissolution litigation, Jimmy Hovey ("Father") appeals the trial court's determination of his child support arrearage owed to Jennifer Hovey ("Mother"). For our review, Father raises three issues, which we restate as: 1) whether the trial court, on remand from a previous appellate decision, followed this court's instructions to conduct an evidentiary hearing on Father's arrearage; 2) whether the trial court otherwise abused its discretion in determining the amount of Father's arrearage; and 3) whether the trial court abused its discretion in ordering Father to pay part of Mother's attorney fees. Concluding the trial court conducted the required evidentiary hearing and did not abuse its discretion in determining the amount of Father's arrearage or in awarding Mother attorney fees, we affirm.

## Facts and Procedural History

Father and Mother were married and had a daughter ("Daughter") together, born in April 1993. A dissolution decree was entered on June 6, 1997, nunc pro tunc to April 10, 1997. At that time, Father owed Mother $3,853.13 in provisional child support arrears with interest at eight percent per year. Mother was given primary physical custody of Daughter, and Father was ordered to pay child support of $75.00 per week.[1] Father's obligation was increased effective December 8, 2001 to $92.00 per week, and again increased effective March 21, 2003 to $114.91 per week, continuing until December 14, 2004. In December 2004, Father obtained physical custody of Daughter pursuant to the parties' agreement approved by a Nevada court. Beginning in February 2005, Mother was ordered to pay child

[1] The dissolution decree has not been included in the record for this appeal. However, we assume Father's support payments were ordered to be made through the clerk's office because the trial court's order in

support of $270 per month. However, the Nevada court later issued an order annulling Mother's child support obligation as of May 2005, pursuant to a handwritten agreement purportedly made between Mother and Father. In April 2008, the Indiana trial court issued an order changing custody to Mother. The parties do not dispute the amounts of child support due and owing for the period after the April 2008 custody change. Rather, their dispute primarily concerns the amount of arrearage that was accumulated prior to December 2004.

On March 9, 2004, the trial court approved an agreed order determining that Father's child support arrearage was $15,188.30, in addition to unpaid legal fees to Mother's attorney of $3,080.00. The trial court reduced the arrearage and unpaid legal fees to judgments in favor of Mother and her attorney.

In May 2005, Mother's attorney filed a Verified Motion to Enforce Judgment by Proceedings Supplemental, seeking collection of his fees. On July 15, 2005, the trial court held a hearing on counsel's motion and instructed him to submit a proposed garnishment order. During the hearing, Father raised the issue of child support arrearage, indicating that mistakes had been made in the calculation. The trial court gave Father twenty days to submit documentation regarding the calculation of the arrearage.

On July 29, 2005, the trial court received Father's documentation of child support payments. On March 8, 2006, without the filing of any pleadings or evidentiary hearing, the trial court issued an order reducing Father's arrearage from $15,188.30 to $8,662.69.

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the instant appeal so states and Father does not challenge that finding by the trial court.

On June 9, 2006, the trial court participated in a telephonic conference with the Nevada court concerning jurisdiction over post-dissolution custody issues that had been raised by the parties in the Nevada court. The Nevada court then issued an order giving Indiana jurisdiction. A docket entry was made showing a status hearing set for July 24, 2006. However, there was no indication in the record that notice was sent to the parties informing them of the scheduled status hearing.

At the July 24, 2006 status hearing, only Father appeared. Because Mother did not appear, the trial court proceeded in her absence to hear arguments as to the arrearage. In an order issued that same day, the trial court ruled that Father no longer had any arrearage due and owing to Mother.

On August 10, 2006, the trial court held another status hearing. Mother appeared and moved to strike the March 8, 2006 and July 24, 2006 orders. The trial court ultimately denied Mother's motions to strike.

Mother appealed. This court issued an opinion stating that Father's request for relief during the proceedings supplemental hearing amounted to a motion for relief from judgment pursuant to Indiana Trial Rule 60(B). Hovey v. Hovey (*Hovey I*), 902 N.E.2d 896, 900 (Ind. Ct. App. 2009), reh'g denied, trans. denied. Declining to strictly enforce the one-year time limit for Father to challenge the trial court's March 9, 2004 calculation of the arrearage, we concluded Father's request for relief was not time-barred. Id. However, we held that "due to [the] trial court's procedural irregularities," including failure to give Mother notice of the July 24, 2006 hearing, "the trial court's Order[s] of March 8, 2006 and July 24, 2006 are void

and vacated." Id. at 902. Accordingly, we "remand[ed] to the trial court with instructions to conduct an evidentiary hearing on Father's child support arrearage." Id.

On remand, the parties stipulated to a change of judge, which was granted. An evidentiary hearing was scheduled for January 26, 2011. At the hearing, Father appeared in person and by counsel, and Mother appeared by counsel but not in person. Mother's counsel informed the trial court that Mother was living in Las Vegas, Nevada and had no testimony to submit.

On January 28, 2011, the trial court issued its order finding:

> 7. There is no dispute that [Father] accumulated a substantial arrearage in child support according to the support payment records of the Clerk. The dispute arises as to whether or not any support payments made by [Father] directly to [Mother] not conforming to the Order to pay them to the Clerk, should be credited to him.
> * * *
> 10. [Father], like the father in Smith [v. Smith, 793 N.E.2d 282 (Ind. Ct. App. 2003)] did not provide the court with cancelled checks to evidence payments he made to [Mother]. He produced a handwritten agreement that referred to an affidavit, apparently filled out by hand, that amounted to a receipt for over $19,000 in payments paid over many years that [Mother] asserts she signed out of coercion. A very important rationale for the general rule that child support payments are to be made through the Clerk is that there can be no dispute as to the amounts paid and the times at which they were paid. . . . Any allegation of coercion would be irrelevant if [Father] could produce a printout of payments received by the Clerk, cancelled checks or contemporaneously executed receipts showing payment of child support to [Mother]. He has not done so and, under the rationale of Payson [v. Payson, 442 N.E.2d 1123 (Ind. Ct. App. 1982)] and Smith should not be given credit for the amount set forth in the Affidavit.

Appellant's Appendix at 2-3. Thus, the trial court calculated the principal amount of Father's current arrearage as $14,252.70. That amount was reached by starting with the $15,188.30 arrearage from March 9, 2004, adjusting for support owed and payments made after that date,

and giving Father credit for a $1,080 child support judgment against Mother that the Nevada court found was owing to Father for the period of February through May 2005.

In addition, the trial court concluded:

> 12. Although [Father] certainly had the right to set forth a good faith request for relief from the Court's March 9, 2004 Order, the delay of more than a year in challenging the order which gave rise to the lengthy litigation in both the Lake Superior Court, Room Three, the Indiana Court of Appeals and this Court, supports an award of a portion of [Mother]'s attorney fees incurred.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:
> 1. [Father]'s Motion for Relief from Judgment of the March 9, 2004 Order is denied.
> 2. The principal amount of arrearage that is due and owing from [Father] to [Mother] is the amount of $14,252.70. . . .
> * * *
> 4. [Father] shall pay $10,000.00 of [Mother]'s attorney fees within sixty days of the date of this Order.

Id. at 4. Father now appeals. Additional facts will be supplied as necessary.

## Discussion and Decision

### I. Standard of Review

Here, although there was apparently no request for findings and conclusions,[2] the trial court explained its judgment in a manner we consider to constitute findings of fact and conclusions of law. When a trial court issues findings and conclusions sua sponte, the specific findings control only as to the issues they cover. Leever v. Leever, 919 N.E.2d 118, 122 (Ind. Ct. App. 2009). A general judgment standard applies to any issue upon which the trial court has not made findings, whereby the trial court may be affirmed upon any legal

[2] We say "apparently" because the chronological case summary has not been included in Father's appendix, contrary to our appellate rules. See Ind. Appellate Rule 50(A)(2)(a) (providing an appellant's

theory supported by the evidence. Id. The trial court's findings and judgment may not be set aside unless they are clearly erroneous. Ind. Trial Rule 52(A). We first determine whether the evidence supports the findings and then whether the findings support the judgment. Breeden v. Breeden, 678 N.E.2d 423, 425 (Ind. Ct. App. 1997). We consider only the evidence most favorable to the judgment and the reasonable inferences therefrom, and we neither reweigh the evidence nor assess the credibility of witnesses. Id. Findings or conclusions are clearly erroneous where there are no facts to support them either directly or by inference, or where review of the evidence leaves us with the firm conviction that a mistake has been made. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997).

Mother did not file an appellee's brief in this case. Where an appellee fails to file a brief, we need not undertake to develop an argument for the appellee. Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006). Rather, we will reverse the trial court's judgment if the appellant establishes prima facie error. Id. Prima facie error means error "at first sight, on first appearance, or on the face of it." Id. (quotation omitted).

II. Appellate Mandate for Evidentiary Hearing

Father first argues the trial court failed to follow this court's mandate on remand from *Hovey I*. When a judgment has been reviewed by an appellate court and the cause remanded, "it is the duty of the lower court to comply with the mandate and to obey the directions therein contained without variation." Holmes v. Holmes, 726 N.E.2d 1276, 1282 n.2 (Ind. Ct. App. 2000) (quotation omitted), trans. denied. Here, this court "remand[ed] to the trial

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appendix "shall" contain the chronological case summary).

court with instructions to conduct an evidentiary hearing on Father's child support arrearage. We reverse, vacate, and remand with instructions." *Hovey I*, 902 N.E.2d at 902.

Our review of the record shows the trial court did conduct an evidentiary hearing on Father's child support arrearage. At the start of the hearing, the trial court stated, "I guess counsel we're here on – I believe the major issue here is the arrearage?" Transcript at 27. During the course of the hearing, counsel for Mother and Father each introduced nine exhibits and made detailed arguments about how Father's arrearage should be calculated. To the extent Father may take issue with the fact that no witness testimony was presented, counsel for Father waived any such challenge by declining to call Father as a witness. At multiple points in the hearing, the trial court asked Father's counsel if it could be done by summary presentation, but indicated it was "up to you counsel" whether to proceed by summary presentation or introduce Father's testimony. Id. at 28. Father's counsel replied, "I can do it [in summary fashion] if – if Mr. Hoffman's [counsel for Mother] wanting to go that route." Id. at 45. In these circumstances, any error in the lack of witness testimony was invited when Father advised the trial court that testimony was unnecessary; thus it cannot serve as a basis for reversal. See Baxendale v. Raich, 878 N.E.2d 1252, 1254 n.2 (Ind. 2008) (party who advised trial court that findings and conclusions were unnecessary was estopped from arguing on appeal that trial court erred in not entering findings and conclusions).

Father contends the trial court erred by treating the evidentiary hearing as one on Father's motion for relief from judgment of the March 9, 2004 order. It is true, as Father points out, that the trial court's present appealed order reads in part, "[Father]'s Motion for

Relief from Judgment of the March 9, 2004 Order is denied." Appellant's App. at 4. However, the remaining substance of the trial court's findings and conclusions show it made a de novo determination of Father's child support arrearage. The trial court did not require Father to present evidence supporting the elements of relief from judgment under Trial Rule 60(B). Neither did it adopt without qualification the determination of arrearage contained in the March 9, 2004 order. Rather, the trial court made adjustments for events that occurred after March 9, 2004, in order to determine Father's current arrearage. In sum, the trial court complied with our mandate on remand, and Father has failed to show prima facie error as to this issue.

III. Calculation of Arrearage

Next Father argues that even assuming the trial court did conduct an evidentiary hearing as required, its calculation of his support arrearage was an abuse of discretion. Generally, decisions regarding child support rest within the sound discretion of the trial court. Painter v. Painter, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). "We will reverse a trial court's decision in child support matters only for an abuse of discretion or if the trial court's determination is contrary to law." Id.

Father specifically contends the trial court failed to consider all of the evidence regarding support payments he made through the clerk's office. However, the clerk's records of Father's payments were admitted into evidence by both Father and Mother, and Father does not point to any specific indication in the record that the trial court overlooked this evidence. Mother's Exhibit C is the calculation of Father's arrearage upon which the March

9, 2004 agreed order on Father's arrearage was purportedly based. This exhibit tracks Father's payments through the clerk's office and breaks down how much of each payment was applied to eight-percent interest, current weekly support obligations, and the arrearage principal. The interest accrued since each payment or amount due is also calculated. Thus, the exhibit contains a running tally of the principal balance of Father's arrearage, starting at $10,273.49 on December 6, 2001 and ending at $15,188.30 as of December 10, 2003, the amount of the March 9, 2004 agreed order.

Father's Exhibit 5 is his own calculation of what he believes the arrearage to be, but is faulty in that it does not include any interest on the arrearage after 1998. In 1999, 2000, and 2001, Father, by his own admission in Exhibit 5, paid far less child support through the clerk's office than he was obligated – $750 in 1999, $1,350 in 2000, and $650 in 2001. The support due for those years was $3,900, $3,900, and $3,951 respectively. The scant payments made in those years, when coupled with Father's failure to report interest on the growing arrearage, result in Father significantly underreporting the arrearage for the years after 1998 and support Mother's premise of a $10,273.49 arrearage as of December 6, 2001. In sum, the undisputed evidence of Father's payments through the clerk's office, together with Mother's and Father's respective calculations of the arrearage, does not persuade us that the trial court erred in its finding of a $15,188.30 arrearage as of March 9, 2004.

Father also contends the trial court abused its discretion by declining to give him credit for support payments he claimed he made directly to Mother and not through the clerk's office. Relatedly, Father contends the trial court's decision is erroneous in that it

gives effect to the parties' agreement presented to the Nevada court that Mother would no longer pay support when Daughter was in Father's custody, yet does not enforce that part of their agreement whereby Mother disclaimed that Father owed her any arrearage. We analyze these contentions in light of the following general principles regarding child support arrearages:

> One of the purposes of child support is to provide a child with regular and uninterrupted support. It has long been held the right to support lies exclusively with the child and a custodial parent holds the child support payments in trust for the child's benefit. As a constructive trustee, the custodial parent is the trustee of the non-custodial parent's obligation to pay and may not contract away the benefits of the constructive trust. In addition, once funds have accrued to the child's benefit, the trial court lacks the power to reduce, annul, or vacate the child support order retroactively. Ind. Code § 31-16-16-6(a)[.] Thus, a party is generally required to make support payments in the manner specified in the child support order until the order is modified or set aside.

Hicks v. Smith, 919 N.E.2d 1169, 1171-72 (Ind. Ct. App. 2010) (case citations omitted), trans. denied.

Consistent with these principles, an obligated parent generally will not be allowed credit for payments not conforming to the child support order. Decker v. Decker, 829 N.E.2d 77, 79 (Ind. Ct. App. 2005). Thus, Father was required to make his payments through the clerk's office or risk not receiving credit for them.

> However, Indiana courts have recognized narrow exceptions to this rule for (1) payments made directly to the mother, (2) payments made via an alternative method agreed to by the parties and substantially complying with the existing decree, (3) payments covered when the non-custodial parent takes custody of the children with the other parent's consent, and (4) payments made toward the funeral expenses of a child.

Id. at 79-80 (citing Kaplon v. Harris, 567 N.E.2d 1130, 1133 (Ind. 1991)).

Father argues he made cash payments directly to Mother, which would fall within exception one above. However, Mother's testimony at a prior court hearing, the transcript of which was admitted into evidence as Mother's Exhibit D, was that Mother never received any direct payments from Father. Mother also testified that only out of coercion by Father did she sign an affidavit stating Father had paid off, directly to her, a $19,185.68 support arrearage. Father claimed he made at least five thousand dollars of direct payments to Mother. Yet the only documentary evidence of direct payments is six money order receipts purporting to be $75 money orders from Father to Mother in October 1998. Even assuming Father could be given credit for those few direct payments, Father does not explain how they would require a recalculation of his support arrearage given that Mother's calculation, which the trial court adopted, began its tally in December 2001, well after the $450 payment in money orders was made.

As for Father's contention that the trial court enforced but one side of the parties' agreement to abate their respective child support obligations, it too must fail. The trial court did not issue a ruling abating Mother's support obligation, it merely admitted into evidence and recognized the fact that the Nevada court had previously annulled the greater part of Mother's obligation. Father has neither pleaded nor proven grounds, such as lack of jurisdiction or due process, sufficient to collaterally attack the Nevada court's judgment in that respect. Moreover, Father cites no authority for his implicit premise that if one side of an agreement to abate child support obligations has been erroneously enforced, a proper remedy is to enforce the other side as well. We are not persuaded that the trial court or this

court has authority to take such action. See Hicks, 919 N.E.2d at 1171-72. In sum, we conclude the trial court did not abuse its discretion, nor is its judgment clearly erroneous, regarding its calculation of Father's child support arrearage.

IV. Attorney Fees

Finally, Father argues the trial court abused its discretion by ordering him to pay $10,000 of Mother's attorney fees. In post-dissolution proceedings, a trial court may order a party to pay a reasonable amount for the other party's attorney fees. Julie C. v. Andrew C., 924 N.E.2d 1249, 1261 (Ind. Ct. App. 2010); see Ind. Code § 31-16-11-1. The trial court has broad discretion in awarding attorney fees. Julie C., 924 N.E.2d at 1261. We will reverse only where the trial court's award is clearly against the logic and effect of the facts and circumstances before the trial court. Id. In determining whether to award attorney fees, the trial court must consider the parties' resources, their economic condition, their ability to engage in gainful employment, and other factors that bear on the reasonableness of the award. Whited v. Whited, 859 N.E.2d 657, 665 (Ind. 2007). Any misconduct by a party that directly results in the other party incurring additional fees may also be considered. Claypool v. Claypool, 712 N.E.2d 1104, 1110 (Ind. Ct. App. 1999), trans. denied. The trial court is not required to explain the reasons for its attorney fees determination. Whited, 859 N.E.2d at 665.

Here, Mother requested attorney fees of $18,500. In support of that request, Mother's counsel introduced a fee affidavit and argued the following:

> [W]hat I've done with this [affidavit] is that I started with the point after which [the trial court] granted return custody of the parties' daughter to [Mother] and

> then focused on the child support issues. There were some contempt issues and I have tried to strike any time entries that I will use that were pertinent to that proceeding. That was the subject of a separate fee order. It does include the [prior] appeal because the sole issue on appeal was the validity of this arrearage determination, and my request to the Court is substantial, $18,500.
>
> Now, I know Court's [sic] struggle with the issue of fees . . . but it's disturbing to me if a – a party who is the support recipient prevails in a support collection proceeding that the award of attorneys fees is frequently substantially less than . . . what is asked for, which in reality then leaves the support recipient paying the attorneys fees out [of] the child support arrearage payments, which then deprives the child of the support benefit. Now, in order to avoid accruing $18,500 in fees [Mother] could have walked away from what at one time was an arrearage principle [sic] balance of $15,000 . . . . So in light of the period of time and the efforts that have been made in order to try and collect this money and the amount of the arrearage that is due and owing by my computation, I think that those fees are reasonable.

Tr. at 85-86. In awarding Mother $10,000 in fees, somewhat over half the amount requested, the trial court cited Father's "delay of more than a year," until July 2005, to challenge the trial court's March 9, 2004 determination of the arrearage. Appellant's App. at 4.

Neither Mother's nor the trial court's stated reasons for awarding attorney fees are sufficient to support the award. While Mother observes that a bill for attorney services may leave her with fewer resources to support Daughter, ordering Father to pay a substantial amount of Mother's fees leaves Father with fewer resources to pay his arrearage. Further, Daughter is now age eighteen, so she is presumably able to provide some of her own support. The trial court's rationale for its award is inapposite because there is no indication that Father's delay in challenging the amount of the arrearage caused Mother to incur additional fees. In *Hovey I* this court stated "because a T.R. 60(B) motion is based in equity and because some of the conventional temporal limitations applicable to most actions will not

apply to child support rights, we will accept that Father's action was timely raised." 902 N.E.2d at 900.

Despite the above, it was not clearly against the logic and effect of the facts and circumstances for the trial court to award Mother $10,000 in attorney fees. The record contains evidence, some of it conflicting, about the parties' financial circumstances. At the January 2011 hearing, Father and Father's counsel stated Mother is employed and earns about $27,000 per year. Mother's counsel stated Mother is not currently employed. It is undisputed that Father is employed as a firefighter for the City of Gary and earns about $40,000 per year. Thus, Father has somewhat more earning capacity than Mother. The record also reflects that Mother is remarried. Father's counsel stated that Mother's current husband makes a six-figure salary. In 2006, Mother's husband had income of approximately $97,000. However, there is no indication of the manner in which Mother's husband's income contributes to her overall financial circumstances or ability to afford legal counsel. We also consider that Father's failure to pay child support as ordered led to this lengthy post-dissolution litigation and need for proceedings to determine the amount of his arrearage. While Father was entitled to dispute the amount of his arrearage in good faith, and there is no contempt proceeding pending against him, there would have been no need for litigation had Father remained current on his support payments through the clerk's office. In these circumstances, and given our deferential standard of review, we cannot say the trial court abused its discretion in awarding Mother $10,000 in attorney fees.

## Conclusion

The trial court conducted the required evidentiary hearing on Father's child support arrearage and did not abuse its discretion in determining the amount of Father's arrearage or in awarding Mother partial attorney fees.

Affirmed.

BARNES, J., and BRADFORD, J., concur.