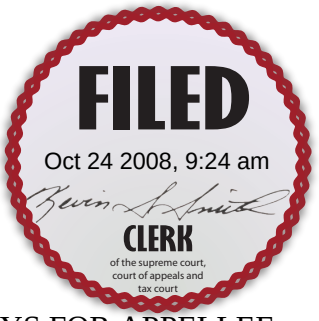

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IN THE
COURT OF APPEALS OF INDIANA

LEE K. ZIEGLER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 29A02-0806-CV-547
	)	
HEIDI S. (ZIEGLER) HUNT,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0709-DR-1103

October 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Lee K. Ziegler ("Husband") appeals a child support order entered in favor of Heidi S. (Ziegler) Hunt ("Wife"). We affirm.

Issues

We restate the issues as follows:

I. Did the trial court abuse its discretion in finding that Husband was voluntarily underemployed?

II. Did the trial court abuse its discretion in taking judicial notice of a child support docket from a separate proceeding?

III. Did the trial court abuse its discretion by failing to deduct from Husband's weekly gross income an amount subject to an order for support of a prior-born child?

Facts and Procedural History

On June 10, 2005, Husband filed a petition for dissolution of his marriage to Wife. On August 8, 2005, the trial court entered a dissolution decree and awarded Wife physical custody of the couple's three children. On March 29, 2006, the court held a hearing on Wife's petition to modify and rule to show cause and found that Husband owed a child support arrearage of $5,595.00.

On August 29, 2007, Husband filed a petition for modification of child support and for change of venue from judge. Husband's petition for change of judge was granted, and the new judge held a hearing on December 3, 2007. On January 30, 2008, the trial court issued a child support order in which it found that Husband was voluntarily underemployed and was not entitled to a credit for an unpaid child support obligation to a prior-born child. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Voluntary Underemployment

Husband contends that the trial court erred in concluding that he was voluntarily underemployed. We review child support orders for an abuse of discretion. *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 949 (Ind. Ct. App. 2006). An abuse of discretion occurs where the trial court's decision is clearly against the logic and the effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Id*. "A trial court's calculation of a child support obligation under the child support guidelines is presumptively valid." *Id*.

According to the Indiana Child Support Guidelines,

> If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community.

Ind. Child Support Guideline 3(A)(3).

> One purpose of potential income is to discourage a parent from taking a lower paying job to avoid the payment of significant support.
>
> ….
>
> (2) When a parent has some history of working and is capable of entering the work force, but voluntarily fails or refuses to work or to be employed in a capacity in keeping with his or her capabilities, such a parent's potential income should be determined to be a part of the gross income of that parent. The amount to be attributed as potential income in such a case would be the amount that the evidence demonstrates he or she was capable of earning in the past. If for example the custodial parent had been a nurse or a licensed engineer, it is unreasonable to determine his or her potential at the minimum wage level.

Ind. Child Support Guideline 3(A)(3), cmt. 2c.

Husband's earnings history indicates that when he filed his 2005 dissolution petition, he was employed as a salesperson by Indiana Mills ("IMMI"), at a base salary of $55,000.00 plus bonus and commission. Shortly thereafter, he left IMMI and began working for Ontario Systems ("Ontario"), at a base salary of $55,000.00. Ontario terminated his employment in April 2007, and he became a self-employed wedding photographer. Between July and October 2007, he photographed at least twelve weddings at a price of approximately $1700.00 each. Tr. at 71. On September 10, 2007, he began a forty-hour per week job with Sallie Mae, earning approximately $8.50 per hour. By the end of October 2007, he had ceased operating his photography business.

Based on the foregoing, the trial court entered the following findings:

> 2. In the Spring of 2007, [Husband] become [sic] self-employed as a photographer. [Husband] testified that for a four month period he grossed income in of [sic] approximately $20,000.00. On a yearly basis, this income would approximate his previous earnings history. [Husband] voluntarily chose to discontinue his photography business, maintaining for his own personal use the business assets, which include two cameras and a GMC Suburban.
>
> 3. The Court finds that [Husband] is voluntarily underemployed and imputes his income to be $828.29 per week.

Appellant's App. at 8. In applying the Child Support Guidelines to Husband's employment history, the trial court considered his earnings at IMMI and Ontario, both of which were at least $55,000.00 in annual gross income. In extrapolating the figures from his four-month excursion into self-employment, the trial court concluded that the roughly $20,000.00 gross earnings would have produced an annual gross income commensurate with those of his two previous positions.

Husband argues that such extrapolation would be unfair due to the seasonal nature of the wedding business and the overhead associated with owning one's own business.[1] However, we note that the trial court allowed for such exigencies when it entered an imputed weekly income of $828.29. This figure, when multiplied by fifty-two weeks, results in an imputed annual gross income of $43,071.08, not $55,000.00. In contrast, Husband's hourly wage at Sallie Mae produces a weekly gross pay of $340.00 which, when multiplied by fifty-two weeks, results in an annual gross income of only $17,680.00.

To the extent Husband argues that he needed to work at Sallie Mae to provide insurance benefits for his family, we note that the children's insurance was provided through Wife's policy at a cost to Husband of $37.00 per week. We recognize that there are "circumstances in which a parent is unemployed or underemployed for a legitimate purpose other than avoiding child support and in those circumstances, there are no grounds for imputing income." *Kondamuri*, 852 N.E.2d at 950 (citation and quotation marks omitted). This is not one of those circumstances. The trial court acted within its discretion in finding that Husband was voluntarily underemployed.

II. Judicial Notice

Husband next contends that the trial court abused its discretion in taking judicial notice of the child support docket from a separate proceeding indicating an existing unpaid child support obligation to a prior-born child. Indiana Evidence Rule 201(a) provides:

[1] In response to Husband's argument regarding the seasonal nature of the wedding photography business, we note that Husband's four-month earnings did not even include the typically busy months of April, May, and June.

> A court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Evidence Rule 201(c) gives the trial court discretion to take judicial notice, whether requested or not. "A trial court may take judicial notice of records of a case over which it presides; however, the trial court may not take notice of records of another case, even if it involves the same parties with nearly identical issues." *Richard v. Richard*, 812 N.E.2d 222, 225 (Ind. Ct. App. 2004). "Acts performed in the clerk's office outside the trial court's records have been held not to be entitled to judicial notice." *Payson v. Payson*, 442 N.E.2d 1123, 1129 (Ind. Ct. App. 1982). Thus, judicial notice was improper in this case.

However, we conclude that the error was harmless. A copy of the docket was admitted into evidence without objection. Tr. at 73-74. Husband therefore acquiesced in its introduction as evidence. As such, we find no grounds for reversal.

III. Prior-born Child

Finally, Husband contends that the trial court abused its discretion by failing to deduct from his weekly gross income an amount subject to an order for support of a prior-born child. Husband challenges the trial court's finding that nonpayment of the support obligation owed to his prior-born child disqualifies him from receiving a deduction in the present case:

> 5. The evidence establishes that the Petitioner's child support obligation for a prior born child in the sum of $100.00 per week. The Court … finds that the Petitioner has made no child support payments…. Therefore, the Court gives no credit with regard to that child support obligation that he has not paid.

Appellant's App. at 9.

Indiana Child Support Guideline 3(C)(1) provides, "The amount(s) of any court order(s) for child support for prior-born children should be deducted from weekly gross income. This should include court ordered post-secondary education expenses calculated on an annual basis divided by 52 weeks." Husband argues that the *existence* of the obligation, not the actual payment of it, determines the applicability of a deduction. The Commentary indicates otherwise: "A deduction is allowed for support *actually paid*, or funds actually expended, for children born prior to the children for whom support is being established." Ind. Child Support Guideline 3(C)(1), cmt. 2 (emphasis added). In contrast, we note that Husband has failed to cite any authority in support of his argument. We conclude that the trial court acted within its discretion in disallowing the deduction for unpaid support owed to Husband's prior-born child. Therefore, we affirm.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.