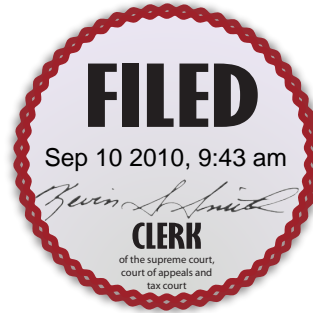


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JEANETTE HAGGARD,)

Appellant-Petitioner,)

vs.)

BRENT BOYD,)

Appellee-Respondent.)

No. 32A04-1001-DR-33

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Robert W. Freese, Judge
Cause No. 32D01-9809-DR-119

September 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Jeanette Haggard (“Mother”) appeals from the dissolution court’s grant of Brent Boyd’s (“Father’s”) petition to modify custody and support following a hearing. Mother presents two issues for our review:

1. Whether the dissolution court erred when it calculated the amount of child support Father has overpaid since he filed his petition to modify.
2. Whether the dissolution court abused its discretion when it ordered that Father may claim the parties’ child as a dependent on his tax returns.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Mother and Father dissolved their marriage in 1999, and they have one child of the marriage, E.B., a minor. The parties entered into a settlement agreement, which the dissolution court incorporated into the final decree. Mother was established as primary custodian of E.B., but shared legal custody with Father. The parties’ agreement provided in relevant part that Father would have “liberal visitation” with E.B., with the minimum amount of visitation being set by the Child Support Guidelines. Appellant’s App. at 18. Father agreed to pay \$96 per week in child support.

In 2004, Mother and Father orally agreed that they would exercise “alternating week parenting time” with E.B. Brief of Appellant at 6. While that was a change in visitation,¹ Father agreed to continue paying \$96 per week in child support. However, on February 21, 2008, Father filed a petition to modify custody and child support. In that

¹ The evidence does not reveal how much visitation Father exercised prior to 2004.

petition, Father alleged a substantial change in circumstances, including equal parenting time and E.B.'s age, warranting a modification of custody and child support. Father continued to pay \$96 per week in child support while the petition was pending.

Following a hearing, the dissolution court modified custody and child support and issued an order:

1. The statutory elements required for a modification of the prior Court order as to custody and support have been met in that the parties incur no day care expense, each party's wages have changed, and Father's parenting time has been significantly more than the credit received.
2. The parties shall share joint legal custody of [E.B.]
3. Mother shall be the primary custodian for controlled expenses.
4. The parties shall continue to alternate weeks for parenting time.
5. Each party shall pay for any extra curricular activities in which that party enrolls [E.B.]
6. The prior order as to payment of extra curricular and school expenses is terminated.
7. Father owes Mother \$4,582.81 toward prior court ordered expenses.
8. Support is modified effective February 21, 2008.
9. Father has overpaid support as of October 30, 2009, in the amount of \$11,876.03.
10. Thus, Mother owes to Father a net amount of \$7,293.22.
11. Father's support obligation is \$46.00 per week.^[2] Father shall receive a credit in that amount each week starting November 6, 2009[,] until such time as the \$7,293.22 is satisfied. [That is about 169 weeks]. Father shall submit an Income Withholding Order to the Court at least 14 days prior to the first payment to be due after the credit is satisfied.

² Father points out a scrivener's error in this paragraph. His support obligation is \$43 per week.

12. Mother shall pay the first \$434.00 per year and 33% thereafter and Father the other 67% thereafter of uninsured healthcare expenses for [E.B.] [For the balance of 2009, Mother shall pay the first \$72.00 with the parties paying their percentage thereafter].

13. Father shall maintain healthcare insurance for [E.B.]

14. Father shall be entitled to claim [E.B.] as an exemption for tax purposes for each tax year after 2009. In other words, Father shall have [E.B.] for the tax returns due April 15, 2010[,] and thereafter.

Id. at 8-9 (some bracketing original).

Mother filed a motion to correct error, alleging in relevant part that the dissolution court erred when it gave Father credit for child support overpayments he made prior to the date of his petition to modify and when it ordered that Father could claim E.B. as a dependent on his tax returns. The dissolution court denied Mother's motion and stated the following in its order:

1. The Court did not commit error by giving Father credit for overpayment of child support for the time period prior to the date of filing of the Modification Petition.

a. Pursuant to exhibit 110 and 111, from 07/26/99 until 02/21/08, a period of time amounting to 410 weeks, Father was ordered to pay \$96.00 per week in child support. This totals \$39,360.00.

b. Pursuant to exhibit 110 and 111, from 02/21/08 until 12/31/08, a period of time amounting to 45 weeks, Mother should have paid \$36.08 per week in child support. She did not. This totals an owed amount of \$1,623.60.

c. Pursuant to exhibit 110 and 111, from 01/01/09 until 06/30/09, a period of time amounting to 26 weeks, Father was ordered to pay \$46.47 per week in child support. This totals \$1,208.22.

d. Pursuant to exhibit 110 and 111, from 07/01/09 to 10/30/09, a period of time amounting to 18 weeks, Father was

ordered to pay \$42.78 per week in child support. This totals \$770.04.

e. Pursuant to exhibit 110 and 111, from 07/26/99 until 10/30/09, a period of time amounting to 499 weeks, Father was ordered to pay a total of \$41,338.26 in child support. Mother owes \$1,623.60 in child support.

f. Pursuant to exhibit 110 and 111, the net amount due by Father is \$39,714.66. [\$41,338.36 (ordered paid by Father) - \$1,623.60 (owed by Mother)].

g. Pursuant to exhibit 109, Father has paid \$51,590.69 in child support.

h. This amounts to an overpayment of \$11,876.03.

2. The Court did not commit error by granting Father the right to claim [E.B.] as an exemption for tax purposes for each tax year after 2009.

Id. at 12 (some bracketing original). This appeal ensued.

DISCUSSION AND DECISION

Issue One: Father's Overpayments

Mother first contends that the dissolution court erred when it calculated Father's child support overpayments. Mother maintains that the dissolution court "must have" included overpayments Father had made prior to the date of his petition to modify, February 21, 2008, and Mother asserts that that was improper. Brief of Appellant at 11. Father responds that he did not request reimbursement for overpayments he might have made prior to February 21, 2008, and that the dissolution court's order does not include any such reimbursement.

We need not address Mother's legal arguments regarding whether retroactive modification of child support is appropriate.³ Father maintains that he did not request, and the dissolution court did not award, modification of his child support obligation predating February 21, 2008. And on appeal, Father insists that the award in his favor dates back only to the date of his petition and he makes no claim that he is due any overpayments that predate that petition. Accordingly, we need only make mathematical calculations based on the evidence, which is undisputed, to determine the amount of Father's overpayment of child support.

Father consistently paid \$96 per week in child support from February 21, 2008, until the date of the hearing on his petition, which payments totaled \$8544. According to Father's exhibits, to which Mother made no objection,⁴ the parties' child support obligations since the date of his petition to modify consisted of the following:

From February 21, 2008 to December 31, 2008 (45 weeks), Mother owed \$36.08 per week in child support, for a total of \$1,623.60.

From January 1, 2009 to June 30, 2009^[5] (26 weeks), Father owed \$46.47 per week in child support, for a total of \$1208.22

From July 1, 2009 to October 30, 2009 (18 weeks), Father owed \$42.78 per week in child support, for a total of \$770.04.

See Exhibit 111. Thus, while Father paid a total of \$8544 during that time period, his obligation totaled only \$1978.26, which establishes an overpayment of \$6565.74 since

³ Mother cites to Becker v. Becker, 902 N.E.2d 818, 820 (Ind. 2009), for the general rule that a court may not retroactively reduce or eliminate child support obligations that predate a petition to modify.

⁴ Neither does Mother dispute the accuracy of Father's evidence on appeal.

⁵ Mother was unemployed and her unemployment benefits increased as of June 30, hence the difference in Father's child support obligation as of that date.

the date of his petition to modify. In addition, Mother owes Father \$1623.60 for her nonpayment of child support in 2008. Accordingly, Father has a net child support credit of \$8189.34. But the dissolution court also held, and the parties do not dispute, that Father owes Mother \$4582.81 “toward prior court ordered expenses.” Thus, in the end, Mother owes Father \$3606.53,⁶ which, as the dissolution court determined, shall be paid to Father through credits of \$43 per week until the total sum has been satisfied. We remand to the dissolution court with instructions to amend its order on Father’s petition to modify accordingly.⁷

Issue Two: Tax Exemption

Mother also contends that the trial court abused its discretion when it granted Father the right to claim E.B. as an exemption on his tax returns for each year starting in 2009. In Carpenter v. Carpenter, 891 N.E.2d 587, 596-97 (Ind. Ct. App. 2008), this court addressed the applicable law regarding the allocation of dependency exemptions:

Federal law grants a dependency exemption to the custodial parent, but allows that parent to execute a written waiver of that exemption. See 26 U.S.C. § 152(e). Indiana courts have held that “[i]n a proper case, the trial court may order the custodial parent to sign a waiver of the presumed right to claim the child as a dependent for federal income tax purposes.” Skinner v. Skinner, 644 N.E.2d 141, 149 (Ind. Ct. App. 1994). When determining whether to order such a waiver, the Child Support Guidelines recommend that a trial court consider the following factors:

⁶ That figure is arrived at by subtracting \$4582.81 from \$8189.34.

⁷ Our analysis of the evidence and the dissolution court’s order shows both that Father made overpayments prior to February 21, 2008, and that the court included those overpayments in the court’s final tally. Again, on appeal, Father contends that the dissolution court did not consider overpayments prior to the date of his petition to modify. Thus, we restrict our review to evidence of his payments and obligations after that date. To the extent Father argues on appeal that the dissolution court’s order includes only support owed since the date of his petition, he is incorrect. The discrepancy between the dissolution court’s computation of Father’s overpayment, \$11,876.03, and our computation is explained by the dissolution court’s consideration of Father’s payments and obligation predating Father’s petition to modify.

- (1) the value of the exemption at the marginal tax rate of each parent;
- (2) the income of each parent;

- (3) the age of the child(ren) and how long the exemption will be available;

- (4) the percentage of the cost of supporting the child(ren) borne by each parent;

- (5) the financial burden assumed by each parent under the property settlement in the case.

Ind. Child Support Guideline 6, Comment. “Taking into account those factors, a ‘trial court’s equitable discretion should be guided primarily by the goal of making the maximum amount of child support available for the child.” Sims v. Sims, 770 N.E.2d 860, 867 (Ind. Ct. App. 2002) (quoting Lamon v. Lamon, 611 N.E.2d 154, 159 (Ind. Ct. App. 1993)). “The noncustodial parent bears the burden of demonstrating the tax consequences of transferring the exemption and how such a transfer would benefit the child.” Harris v. Harris, 800 N.E.2d 930, 941 (Ind. Ct. App. 2003), trans. denied.

Although the Guidelines are worded in permissive terms (“it is recommended that at a minimum the following factors be considered”), our decisions make clear that a trial court should consider these factors if a party raises the issue of tax exemptions and that this court will assess these factors when determining whether the trial court abused its discretion. See Quinn v. Threlkel, 858 N.E.2d 665, 675 (Ind. Ct. App. 2006) (indicating that “there are at least five factors for trial courts to consider when deciding whether to order a release of an exemption,” and “considering all of these circumstances” in analyzing whether the trial court abused its discretion); Hull, 691 N.E.2d at 1309 (indicating that in Lamon, “we set forth factors to be considered in determining whether to order the custodial parent to sign a waiver of her right to the income tax dependency exemption” (emphasis added)); Skinner, 644 N.E.2d at 149 (recognizing that there are three factors “to be considered when assessing the trial court’s discretion in determining whether to order a release of an exemption” (emphasis added)); Lamon, 611 N.E.2d at 159 (stating that there are three factors “to be considered”); cf. Eppler v. Eppler, 837 N.E.2d 167, 179 (Ind. Ct. App. 2005) (concluding the trial court did not abuse its discretion in declining to order the wife to execute a waiver of her right to an exemption where the husband “fail[ed] to specifically demonstrate the tax consequences to the parties if the exemption were transferred and, most importantly, how such transfer would benefit the children”), trans. denied; Harris, 800 N.E.2d at

940 (reversing trial court's decision to order the mother to execute a waiver of the tax exemption where the record did not support a finding that Father would benefit from the exemption); Glover v. Torrence, 723 N.E.2d 924, 938 (Ind. Ct. App. 2000) (citing the five factors and concluding the trial court did not abuse its discretion based on the trial court's finding that the exemption "would serve to reduce the tax liability in Mother's Household").

(Footnote omitted).

Mother contends that the dissolution court did not consider the five factors set out in Carpenter and, therefore, that the court abused its discretion when it awarded Father the exemption. While the record does not indicate whether the dissolution court considered the factors, our analysis on appeal does not reveal an abuse of discretion. See Quinn v. Threlkel, 858 N.E.2d 665, 675 (Ind. Ct. App. 2006) (holding no abuse of discretion for dissolution court to grant dependent exemption to father despite no showing court considered five factors). Father earns substantially more than Mother, so "the exemption likely is worth considerably more" to Father. See id. In addition, Father has been assigned 67% of the burden of supporting E.B. See id. E.B. is sixteen years old, so the exemption will be available for an additional three or eight years, depending on whether E.B. remains a full time student after high school graduation. And Mother has taken the exemption every year to date. Finally, the financial burden assumed by each party under the settlement agreement is likely not a factor since the parties' marriage was dissolved in 1999. See id. We cannot say that the dissolution court abused its discretion when it granted the dependent tax exemption to Father.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, C.J., and MATHIAS, J., concur.