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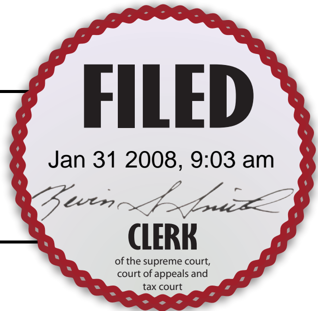

IN THE
COURT OF APPEALS OF INDIANA

RICHARD KEELEY,)
)
Appellant-Respondent,)
)
vs.) No. 45A05-0706-CV-295
)
DEBORAH KEELEY,)
)
Appellee-Petitioner.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Elizabeth Tavitas, Judge
Cause No. 45D03-0202-DR-668

January 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Richard Keeley (Father) appeals the denial of his petition to modify support and his motion for relief from various judgments. We affirm.

FACTS AND PROCEDURAL HISTORY

Father married Deborah Keeley (Mother) in 1985, and they had three children. Mother filed a petition for dissolution on February 14, 2002. They entered a stipulated property settlement agreement, which the court incorporated into its decree of dissolution on September 2, 2003. At that time, Father was laid off from his job as a boilermaker. Anticipating he would be able to return to work, Father agreed to calculate child support based on his previous earnings of $864 per week.

On June 10, 2004, Mother filed a petition for contempt citation because Father had not paid child support since the dissolution. A contempt hearing was held on August 26, 2004. Father failed to appear, and the court ordered him to appear. Another hearing was held on October 27, 2004, and Father again failed to appear. The court determined his child support arrearage and ordered it paid by a qualified domestic relations order from an annuity held by Father.

On June 20, 2005, Mother again filed a petition for contempt citation. A hearing was held on August 11, 2005, and Father did not appear. Father was found in contempt. The court calculated his child support arrearage, assessed eighteen percent interest, and added $2,700 in attorney fees. The court also issued a warrant for Father's arrest.

On February 21, 2006, Father filed a petition to modify support, motion to recall the arrest warrant, and a motion for relief under Trial Rule 60 from all orders issued since August 26, 2004. Father alleged he had not received notice of the contempt hearings because he was living at his Wheatfield, Indiana residence only sporadically due to his wife's hospitalization at Walter Reed Army Medical Center in Washington, D.C.

On November 14, 2006, Mother filed another petition for contempt citation. On January 26, 2007, a hearing was held on all the pending petitions and motions. The hearing was continued to March 14, 2007. Father testified several unforeseen events prevented him from returning to work as a boilermaker and limited his ability to work full time. According to Father, he did not return to his work as a boilermaker because he developed diverticulitis in October 2003. He underwent surgery and was restricted to lifting no more than ten pounds until March 2004. In November 2003, Father married an Army officer, Allison. Allison's work has required them to relocate several times. Allison was deployed to Iraq for approximately two months, and during that time, Father stayed home with Allison's four children from a previous marriage.[1] Allison returned from Iraq and was hospitalized at Walter Reed for a period of about eighteen months beginning in July 2005. She retired from the Army and is in the process of seeking government benefits and a contract that would allow her to work from home. Father currently stays home with Allison and two of her children, ages fifteen and nineteen. He

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[1] The record is not clear as to the ages of these children. They were all old enough to be in school, and the youngest was "probably 12" at the time. (Tr. at 37.)

has numbness in his right index finger, which limits his ability to work with his hands, but would not prevent him from doing some type of work.

The court's order of March 13, 2007 denied Father's petition to modify support and his T.R. 60 motion. The court determined Father's child support arrearage is $22,057.45. Father was found in contempt and sentenced to sixty days in jail; however, the sentence was stayed provided Father would pay $10,000 toward the arrearage within sixty days. The order also states:

> [A] wage withholding order shall be entered to the Father's new employer, Arc Enterprises, in the amount of $300.00 per week. This includes the support amount of $233.65 which is the current child support order as well as an additional payment of $66.35 towards the arrearage. The Court notes that, based upon the Father's current income, the full amount may be able to be withdrawn from the Father's pay check.

(Appellant's Br. at 33.)[2] Father was ordered to pay $3,000 of Mother's attorney fees.

DISCUSSION AND DECISION

Father raises four issues on appeal: (1) whether the trial court abused its discretion by denying his petition for modification; (2) whether the trial court improperly ordered all of his income to be withheld; (3) whether the trial court abused its discretion in ordering him to pay attorney fees and eighteen percent interest; and (4) whether the trial court erred by denying his T.R. 60 motion as to attorney fees and interest.

1. Petition for Modification

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[2] Father attached a copy of this order to his brief, but did not include it in the appendix as required by Ind. Appellate Rule 50(A)(2)(b). For purposes of citation, we have numbered the pages attached to the back of Father's brief consecutively with the pages of his brief.

In reviewing a determination of whether child support should be modified, we reverse only if the trial court has abused its discretion. *In re Paternity of E.M.P.*, 722 N.E.2d 349, 351 (Ind. Ct. App. 2000). An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id*. We consider the evidence most favorable to the judgment and the reasonable inferences to be drawn therefrom. *Id*. We do not reweigh evidence or reassess the credibility of witnesses. *Id*. As the moving party, Father had the burden of establishing grounds for modifying his child support obligation. *Scoleri v. Scoleri*, 766 N.E.2d 1211, 1215 (Ind. Ct. App. 2002).

Child support obligations may be modified only in two situations:

> (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.

Ind. Code § 31-16-8-1(b). Father argues he established he was entitled to a modification of support under both parts of this statute.

A. Substantial and Continuing Circumstances

Father argues evidence of the following facts demonstrated a substantial and continuing change in circumstances: Father's physical condition; Allison's deployment to Iraq; and Allison's current medical needs. Father had diverticulitis in October 2003, but was released from work restrictions in March 2004. Father does not claim this

medical condition continues to hinder his ability to work. Although he complains of numbness in one of his fingers, he presented no objective medical evidence of this condition. He believed the numbness would prevent him from working as a boilermaker, but acknowledged he could do other types of work.

Allison's children may have benefited from having Father stay home full time while Allison was deployed, but this does not obviate Father's obligation to his own children. *See C.M.L. ex rel. Brabant v. Republic Servs., Inc.*, 800 N.E.2d 200, 206 (Ind. Ct. App. 2003) (parent has legal obligation to support children, but not stepchildren), *trans. denied sub nom. Ludwick v. Republic Servs., Inc.*, 812 N.E.2d 804 (Ind. 2004); *see also Meredith v. Meredith*, 854 N.E.2d 942, 947-48 (Ind. Ct. App. 2006) (income may be imputed to parent who chooses not to work even if for legitimate reasons and not to evade child support). While Father argued he could not work full time while Allison was deployed, the evidence indicates he did not even look for part-time work. All of Allison's children were old enough to attend school, and Father did not demonstrate it was necessary for him to stay home full time with them.

Likewise, Father has not demonstrated Allison's fifteen-year-old and nineteen-year-old currently need him to stay home full time. Allison testified she has post traumatic stress disorder, fibromyalgia, Lyme Disease, and acid reflux. We do not question the sincerity of Allison's physical complaints. Nevertheless, Father bore the burden of showing he was needed at home. The record contains no description of Allison's medical needs or what Father does to help meet them. In light of the record before the trial court, we cannot say the trial court abused its discretion in determining

Father was still capable of working and had not experienced a substantial and continuing change in circumstances.

Father argues even if the trial court properly found he was voluntarily underemployed, the amount of income imputed to him was incorrect. Father argues there was no evidence he was still able to earn $846 per week, as he did in 2003 when his support obligation was originally calculated. However, as the party seeking modification, Father had the burden of demonstrating his circumstances had changed. *Scoleri*, 766 N.E.2d at 1215. The record demonstrates Father made little effort to find a job after his marriage to Mother was dissolved. Allison's income was sufficient to support herself and Father, and we cannot say the trial court abused its discretion in determining Father chose to be underemployed. *See* Ind. Child Support Guideline 3, cmt. (2)(d) ("The marriage of a parent to a spouse with sufficient affluence to obviate the necessity for the parent to work may give rise to a situation where . . . imputed income . . . should be considered . . . ."). Nor, in the absence of any clear evidence Father was unable to work, can we say the trial court abused its discretion by finding he was capable of earning the same income he previously earned.

B. Twenty Percent Deviation

In the alternative, Father argues he established his child support obligation deviated by more than twenty percent from the amount he would owe under the guidelines if his current income were used. Father argues his child support obligation should be calculated using $300 as his weekly earnings. Father testified he had gotten a job the previous day that would pay $300 per week and allow him to work from home.

Father offered no evidence substantiating his testimony. As discussed above, the trial court was justified in imputing income to Father because he was voluntarily unemployed for a number of years and is now voluntarily underemployed. Accordingly, the court did not err in failing to find a deviation greater than twenty percent. We find no error in the denial of his petition to modify.

2. Income Withholding

Father next argues the trial court improperly ordered all of his income to be withheld. Specifically, he challenges the portion of the trial court's order of March 13, 2007, which states:

> [A] wage withholding order shall be entered to the Father's new employer, Arc Enterprises, in the amount of $300.00 per week. This includes the support amount of $233.65 which is the current child support order as well as an additional payment of $66.35 towards the arrearage. The Court notes that, based upon the Father's current income, the full amount may be able to be withdrawn from the Father's pay check.

(Appellant's Br. at 33.)

Father argues this order is improper because $300 is the total amount he earns each week, while Ind. Code § 24-4.5-5-105(3)(a) limits withholding to fifty percent of his weekly disposable earnings because he is supporting his spouse.[3] Father acknowledges the wage withholding order has not been entered, but argues the March 13 order must be reversed because it says a withholding order shall be entered.

Mother emphasizes the portion of the order which states the "full amount may be able to be withdrawn from the Father's pay check." (Appellant's Br. at 33.) In light of

[3] We assume *arguendo* this is the applicable provision. Some evidence suggested Allison was continuing to seek employment, while Father is once again unemployed.

the uncertain evidence concerning Father's employment, we agree with Mother the order merely expresses the trial court's intent that $300 be withheld if possible. If an order violating the withholding laws is entered, Father may certainly challenge such an order thereafter.

3. Attorney Fees and Interest

Trial courts have broad discretion to impose attorney fees, and we reverse only for abuse of discretion. *Claypool v. Claypool*, 712 N.E.2d 1104, 1110 (Ind. Ct. App. 1999), *trans. denied* 735 N.E.2d 227 (Ind. 2000). The trial court need not specifically state its reasons for awarding attorney fees. *Hartley v. Hartley*, 862 N.E.2d 274, 287 (Ind. Ct. App. 2007). The trial court may consider the resources of the parties and their relative earning abilities. *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 224 (Ind. Ct. App. 2006). The trial court may also consider whether misconduct on the part of one party caused the other party to incur additional fees. *Id*.

Father has on several occasions failed to pay any support for months at a time. Mother has had to ask the court to enforce the child support order on several occasions. At the time of the hearing, Father had an arrearage of over $22,000. He was found in contempt and does not dispute the arrearage or his contempt citation. Mother submitted affidavits concerning her attorney fee, along with itemized billing statements that demonstrate she incurred over $3,000 in attorney fees. We cannot say the trial court abused its discretion in finding $3,000 was a reasonable fee for the work completed and Father should be responsible for paying that sum. Although Father argues he was not at fault for his failure to pay, the trial court properly found he was willfully underemployed.

Father advances the same argument in regard to the order that he pay eighteen percent interest. However, the March 13, 2007 order does not address interest. The order of August 11, 2005 is the only order in the record before us that assesses eighteen percent interest. Therefore, we will address this issue as whether the trial court erred by denying his T.R. 60 motion.

4. T.R. 60 Motion

Finally, Father argues the trial court erred by denying his T.R. 60 motion to the extent it denied relief from the orders assessing attorney fees and eighteen percent interest.[4] A trial court has considerable discretion to grant or deny a motion to set aside a default judgment. *Progressive Ins. Co. v. Harger*, 777 N.E.2d 91, 94 (Ind. Ct. App. 2002). We will reverse the trial court's decision only for abuse of discretion. *Miller v. Moore*, 696 N.E.2d 888, 889 (Ind. Ct. App. 1998). To obtain relief under T.R. 60, Father must show the default judgment was the result of mistake, surprise, or excusable neglect and he had a meritorious defense. *Moore v. Terre Haute First Nat'l Bank*, 582 N.E.2d 474, 476-77 (Ind. Ct. App. 1991).

Father argues he did not receive notice of the hearings of August 6, 2004, October 27, 2004, and August 11, 2005, because Allison was at Walter Reed during that time and he was at their Wheatfield residence only sporadically. Father's argument asks us to reweigh the evidence, which we decline to do. The trial court specifically found Father received adequate service. Although Father presented some evidence he was unaware of

[4] The motion requested relief from several orders, which in addition to assessing interest and fees, found arrearages and held Father in contempt. Father subsequently acknowledged he owed the arrearages. Nor is he challenging his contempt citations on appeal.

the hearings, there was also evidence he maintained the Wheatfield residence, was present there from time to time, had a mailbox there at all relevant times, and used that address for official purposes such as tax returns. There was also evidence Father learned about the earlier hearings prior to the hearing on August 11, 2005 and was aware additional proceedings would take place. The hearing on August 11, 2005 is when the court made the order Father is challenging on appeal.

Nor has Father demonstrated he had a meritorious defense.[5] He advances the same arguments concerning the propriety the interest assessment that the trial court rejected in imputing income to him. A trial court has discretion to award interest of up to 1.5% per month, for a maximum of 18% per year. I.C. § 31-16-12-2. Father invites us to reweigh the evidence and substitute our judgment for that of the trial court, which we decline. Therefore, we affirm the denial of the T.R. 60 motion.

The trial court's order of March 13, 2007 is affirmed in all respects.

Affirmed.

KIRSCH, J., and RILEY, J., concur.

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[5] Father argues "irrespective of whether he received sufficient notice of the contempt hearing, because he was not present, the Trial Court could not make the determinations necessary to apply the proper factors for assessing a reasonable rate of interest and attorney fees award." (Appellant's Reply Br. at 20.) We firmly disagree with Father's contention that his absence in and of itself mandates relief from the default judgments against him.