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IN THE COURT OF APPEALS OF INDIANA

GLORY (JORDAN) HARRIS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 02A03-0704-CV-152
	)	
JONATHAN J. JORDAN,	)	
	)	
Appellee.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Stanley A. Levine, Judge
Cause No. 02D07-9807-DR-331

December 28, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Glory Harris appeals the trial court's order modifying the child support obligation of her ex-husband, Jonathan Jordan, and ordering her to pay part of Jordan's attorney fees. We reverse and remand.

Issue

Harris raises five issues. We address only the dispositive issue of whether the trial court's ex parte investigation in the case violated Harris's due process rights.

Facts

Harris and Jordan were divorced in April 1999. The parties had two minor children, and Harris was granted custody of them. Jordan was ordered to pay $105.00 per week in child support, or $227.50 semi-monthly. Additionally, Jordan was granted visitation in accordance with standard rules in place in Allen County at the time. He also was entitled to receive an abatement in his support obligation any time he had visitation for six or more consecutive days.

In February 1996, Harris had filed a petition to receive child support from Jordan, even though the parties appear to have been married at the time.[1] The State Division of Family and Children intervened in this support action. At this time, Jordan was ordered to pay $76.00 per week in support. On December 11, 1997, Jordan was found to be $2080.00 in arrears in this support obligation. In September 2002, the State filed a

[1] The petition was filed under Harris's married name.

motion to consolidate this support action with the parties' dissolution action, which the trial court granted.

On April 17, 2006, Jordan filed a petition to modify custody, or alternatively to modify his parenting time. The petition also sought to hold Harris in contempt for having interfered with Jordan's parenting time, and sought the issuance of an injunction to prevent Harris from so interfering in the future. Finally, the petition sought to have the trial court establish that Jordan was not in arrears in his support obligation.

On November 3, 2006, the trial court held a hearing on the petition.[2] Jordan was represented by counsel, and Harris appeared pro se. Jordan began the hearing by withdrawing his request to modify custody. Jordan then testified that he wanted to modify his parenting time so that it reflected the current uniform Indiana Parenting Time Guidelines, subject to a few modifications. Jordan also testified as to alleged interference with his parenting time by Harris. He then stated that he was seeking an injunction to prevent future interference by Harris. This segued into a discussion of whether Jordan was current in his child support payments, which would be a necessary prerequisite to the issuance of an injunction against Harris.[3] Jordan did not request a modification of his child support obligation at the hearing.

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[2] The transcript states that the hearing took place on October 12, 2006. However, the chronological case summary clearly indicates that the hearing took place on November 3.

[3] Under Indiana Parenting Time Guideline 6(B), a non-custodial parent can seek an injunction to enforce parenting time, but the parent seeking the injunction must establish that he or she "regularly pays support . . . ."

Jordan presented evidence, in the form of self-created worksheets and a printout from the trial court clerk's office, that he was current in his child support since his and Harris's divorce. He also asserted that, in fact, he had overpaid child support because he had not received abatements for extended visitation as the dissolution decree had allowed. Jordan also discussed the fact that in March 2006, the State intercepted his federal income tax refund in the amount of $724.80. Jordan asserted that Harris had initiated this intercept by falsely representing to the Allen County Prosecuting Attorney's child support office that Jordan was in arrears in support. However, Jordan presented no independent evidence, or any testimony from anyone in the prosecutor's office, to support this claim.

Jordan testified that he believed he had overpaid support in the amount of approximately $1500.00 when not counting the 2006 tax refund intercept, or approximately $2224.00 when the intercept was included. Jordan completed his direct testimony by asking the trial court to require Harris to pay his attorney fees in this matter in the amount of $1825.50. Harris then conducted some cross-examination of Jordan, which focused on Jordan's claims of parenting time interference, as well as the 2006 tax intercept.

Harris then took the stand and began testifying on her own behalf. After discussing visitation and parenting time issues for some time, the trial court began questioning Harris about the 2006 tax intercept. Harris denied having initiated that intercept, and also testified that she could not remember whether she ever actually received the money. The trial court asked Harris to bring copies of her bank statements

to its office later so that it could review them and ascertain whether she had received the money. The trial court also stated:

> What we will do when we leave here is we will go over together and we will go to the support office if we have time and we will find out what happened to the $724.00 because this lady is not making a claim and if that's your money, sir, you get it back.

Tr. p. 71. The "we" the trial court referred to appears to have been directed to Jordan's attorney. The trial court also told Harris, "If I don't find you in contempt you won't be paying his attorney's fees." Id. at 85. This essentially concluded the evidence presented at the November 3, 2006 hearing.

Shortly after the hearing, Harris attempted to provide some documentary evidence to the trial court. The trial court refused to accept the evidence and it wrote a letter to Jordan's attorney stating, "none of the material will be considered evidence as it was delivered ex parte after the evidence closed and the hearing was over." App. p. 215.

On January 5, 2007, the trial court entered an order, accompanied by specific findings. The court modified Jordan's parenting time as requested. It also declined to find Harris in contempt for alleged parenting time interference. The order also included the following findings:

> 10. That prior to the filing of the Dissolution of Marriage in this case, Respondent on June 6, 2000, [sic][4] filed an Application for Assistance for herself and the parties' two minor children with the Department of Child Services, wherein she assigned to Department of Child Services all support rights she had against Petitioner.

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[4] This date appears to be incorrect. It is unclear what the correct date would be.

11. Thereafter on February 1, 1996, Respondent, (as Petitioner therein), filed through the Allen County Prosecutor's Office a Verified Petition to Establish Child Support in the Allen Circuit Court.

12. That in [sic] same February 1, 1996, Respondent herein and Petitioner filed an Agreed Entry wherein he agreed to pay $76.00 per week for the support of the two minor children of the parties and an Income Withholding Order was entered for same.

13. That on September 17, 2002, the Prosecuting Attorney's Office filed motion to Transfer the aforesaid Circuit Case to this cause by reason of April 19, 1999 Decree of Dissolution in this cause, and the aforesaid $105.00 per week support order entered herein; and said cause was ordered consolidated with this case on said September 17, 2002.

* * * * *

16. That in March of 2000 the sum of $1,903.00 was withheld from Petitioner by means of a tax intercept initiated by the State of Indiana from his Federal Tax Refund and the sum of $144.00 was withheld by a tax intercept of his State Tax Refund.

17. That on March 10, 2006, $724.80 was withheld from Petitioner's tax refund by reason of a tax intercept initiated by the State of Indiana.

18. That Respondent denied under oath receiving any portion of said 2006 tax intercept; which she did in fact receive.

* * * * *

20. That the explanation of the Allen County Prosecutor's Office that the problem at least as to the 2006 tax intercepts arose from an "improper interface" between the computers used by the State and the Allen County Clerk's Office is an insufficient cause for the aforesaid tax intercepts, in light of

the transfer of the Circuit court case set out in paragraph 13 wherein the Prosecuting Attorney's Office knew of the Decree of Dissolution entered in this case and should have known that no arrearage determination could be made thereafter in any other case than this case.

21. In this Court's opinion, contrary to law, Respondent knowingly and improperly received TANF assistance payment of seven payments of $139.00 from September 1, 1999 to March 1, 2000, totaling $973.00; two payments of $119.00 for April 1, 2000 to May 1, 2000 for a total of $238.00; and six payments of $139.00 from Jun [sic] 1, 2000 to November 1, 2000 for a total of $834.00; all while she was being paid support for said children by Petitioner.

22. That the TANF payments totaling $2,045.00 are owed to the State of Indiana.

23. That Respondent should not have been receiving TANF payments for the minor children of the parties since she was receiving regular child support from Petitioner at the same time.

24. That the State received $2635.00 by means of tax intercepts and was previously ordered to pay $590.00 by this Court to Petitioner's attorney.

25. That the tax intercepts that withheld monies from the tax refunds of Petitioner were a direct result of Respondent's receipt of TANF payments owed to the State and/or an improper determination of support arrearage on the part of the Allen County Prosecutor's Office.

26. That representatives of the Allen County Prosecuting Attorney's Office have been most cooperative in assisting the Court to make its factual determinations in this case.

27. That including $840.00 due to Petitioner as a reimbursement of one-half (1/2) of support for periods in excess of six (6) days, and overpayments made to Respondent by means of tax intercepts, Respondent owes the sum of $2,845.00 to Petitioner, after crediting the $590.00 ordered to be paid by the State.

28. That Petitioner has been paying $227.50 bi-monthly in support.

29. That Petitioner's support is modified to $190.00 bi-monthly for a period of seventy-six (76) payments so that by means of said reduction in support "Respondent repays" to Petitioner the aforesaid overpayment, which modification shall be effective as soon as a new income withholding order is executed by Petitioner in accord with the modification.

* * * * *

32. Petitioner has requested the payment of his fees and expenses by Respondent in the sum of $1,825.50. While this Court is mindful of its determination that as to support, Petitioner has without fault had his tax refunds intercepted, this Court is without evidence as to Respondent's finances, cannot order her to pay all of Petitioner's attorney fees. However, to underscore her of irresponsibly [sic] in creating a situation where Petitioner's tax refunds have been wrongfully withheld, this Court orders Respondent to pay to Petitioner's attorney the sum of $585.00, within 120 days from the date of this order.

33. The State of Indiana is ordered not to withhold any monies by means of tax intercept, absent an order from this Court determining an arrearage in the payment of support by Petitioner. Any such determination made by the Department of Child Services, the Indiana Family and Social Services Administration and/or the Prosecuting Attorney of this or any other county shall not be a proper basis for said intercepts. Any potential tax intercept for tax refunds to be received by Petitioner for 2007 are ordered to be cancelled by the State of Indiana.

34. Respondent is ordered to receive no further public assistance for the two minor children so long as Petitioner is paying support for both or either of them, and any violation of this order shall be considered direct contempt of the orders of this Court.

App. pp. 46-50. On January 8, 2007, the trial court entered a nunc pro tunc order correcting finding 29 to clarify that Jordan's support obligation was $190.00 semi-monthly, not bi-monthly.

On February 5, 2007, Harris, now represented by counsel, filed a motion to correct error. It was accompanied by an affidavit from Stella Kizer, a supervisor from the Allen County Office of Family and Children. Kizer asserted that at least with respect to the 2000 tax refund intercepts, the State had a right to them as repayment of TANF amounts that had been paid for Jordan's children between July 1995 and January 1998. In any event, Kizer stated that the total amount of the 2000 intercepts was $2047.00, not $2635.00 as found by the trial court. Finally, Kizer claimed that Harris was entitled to TANF payments between September 1999 and November 2000 because she was caring for a niece who was living in her home at the time, and that the TANF payments were not for Harris and Jordan's children.

On February 26, 2007, the trial court denied the motion to correct error. It expressly refused to consider Kizer's affidavit because "NONE of the evidence in said affidavit was presented by Respondent in the hearings before this Court." App. p. 19. Harris now appeals.

Analysis

We begin by noting that Jordan has not filed a brief in response to Harris's brief. When an appellee does not submit a brief we need not undertake the burden of developing an argument on the appellee's behalf. 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 in this context is defined as, 'at first sight, on first appearance, or on the face of it.'" Id. (quoting Santana v. Santana, 708 N.E.2d 886, 887 (Ind. Ct. App. 1999)). If an appellant does not meet this burden, we will affirm. Id.

Harris asserts the trial court relied on ex parte evidence, uncovered by the court's own investigation, in issuing its order. She contends this violated her due process rights because she was not given an opportunity to respond to this evidence or present her own countervailing evidence. "[E]x parte communications most often become an issue if a judge communicates outside the courtroom without disclosing those communications to everyone involved. These communications are prohibited." Worman Enter., Inc. v. Boone County Solid Waste Mgmt. Dist., 805 N.E.2d 369, 375 (Ind. 2004). "Due process may be denied if the parties are not given the opportunity to hear and comment on all of the evidence considered in their case." Id.

If a trial court pursues, receives, and considers evidence outside the presence of the parties, reversal of a resulting order based on that evidence is required. See Garrard v. Stone, 624 N.E.2d 68, 69-70 (Ind. Ct. App. 1993). Additionally, a judge who received and considered such evidence must recuse if a party files a change of judge motion under Indiana Trial Rule 79. See id. at 70. This is because where a judge may have personal knowledge of disputed evidentiary facts concerning the proceeding, a reasonable question concerning his or her impartiality arises. Id. at 70. "Indeed, '[e]x parte communications by their nature suggest partiality.'" Id. (quoting Tyson v. State, 622 N.E.2d 457, 459 (Ind. 1993) (Shepard, C.J., explaining recusal)).

We appreciate the trial court's concern that the parties here did not present the "full" picture at the November 3, 2006 hearing. We also acknowledge that the court was perfectly free to consult its own docket sheets and CCS entries in order to attempt to come to a just and equitable result. However, we are concerned that the trial court apparently conferred with representatives of the Allen County Prosecutor's Office and made several findings of fact based on these consultations. No representative from the Prosecutor's Office ever testified at the November 3 hearing, and this ex parte communication was improper.

There also is a troubling area of judicial inquiry regarding the TANF payments Harris received and the 2000 intercept of Jordan's state and federal tax refunds. The trial court made several findings concerning these matters. However, there simply is no evidence we have before us from the November 3 hearing that spoke to these matters. The record does reflect the trial court rejected Kizer's affidavit, submitted by Harris as part of her motion to correct error. Kizer was attempting to furnish the court with more information concerning Harris' receipt of TANF payments and the 2000 tax intercepts. It is perplexing that the trial court faulted Harris for not presenting such evidence at the November 3 hearing, when the affidavit primarily addressed issues not mentioned at that hearing, and that the trial court ruled on sua sponte on the basis of ex parte evidence.

We conclude that the trial court's consideration of ex parte evidence, in violation of Harris' due process rights, clearly influenced its decisions regarding modification of Jordan's child support obligation, as well as the partial award of attorney fees. The court also improperly issued factual findings on issues not raised at the November 3 hearing

regarding the 2000 tax intercepts and TANF benefits, including that Harris allegedly owed the State over $2045.00 in improperly received benefits. All of the trial court's findings and orders regarding Jordan's child support obligation, the State's interception of tax refunds, Harris's receipt of TANF benefits, and attorney fees are reversed. This includes the prohibition against the State seeking tax intercepts or Harris applying for TANF benefits in the future. We do note that Harris does not challenge the validity of the trial court's findings and orders regarding parenting time, which do not appear to have been affected by consideration of ex parte evidence, and those remain intact.

Conclusion

We reverse the trial court's findings and orders regarding child support, income tax refund intercepts, TANF benefits, and attorney fees. We remand for further proceedings consistent with this opinion.

Reversed and remanded.

KIRSCH, J., and ROBB, J., concur.