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IN THE COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF:	)	
	)	
MARY K. (BUTLER) WEIR,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A05-1105-DR-287
	)	
STEVEN J. BUTLER,	)	
	)	
Appellee-Respondent.	)	
	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Charles F. Pratt, Judge
Cause No. 02D07-9811-DR-507

November 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Mary (Butler) Weir ("Mother") appeals the trial court's decision in favor of her former husband, Steven Butler ("Father"). We reject Mother's argument that the trial court erred in retroactively modifying Father's child support obligation by crediting Father for college expense payments. We conclude that the trial court properly awarded this credit as the parties agreed to and carried out an alternative method of payment that substantially complied with the spirit of the original child support order. We affirm.

Facts and Procedural History

Mother and Father were married in 1984 and have two children, Ashley, born June 1, 1987, and Jeffrey, born June 12, 1990. In November 1998, Mother filed a petition for dissolution. During dissolution proceedings, Mother and Father entered into a settlement agreement. The agreement provided that Mother would have primary physical custody of the children and Father would pay $2500 per month in child support. The parties agreed to revisit the issue of support when each child reached the age of eighteen. The dissolution court approved and incorporated the settlement agreement into the dissolution decree and dissolved the parties' marriage in November 2000.

In early 2005, while Ashley was a senior in high school, Mother and Father began to discuss Ashley's anticipated college expenses. The parties reached an agreement regarding child support and post-secondary educational support for Ashley. The agreement was reduced to writing and provided that Father would pay two-thirds of

Ashley's college expenses and Ashley would pay the remaining one-third.[1] As to Father's existing child support obligation, the parties agreed that Father would make monthly support payments of $1562.50 directly to Mother.[2] Mother and Father also agreed to reevaluate Jeffrey's child support needs when he turned eighteen. The parties did not submit this agreement to the court but abided by it for more than four years.

In 2008, Mother and Father began to discuss payment of Jeffrey's anticipated college expenses, but they could not reach an agreement. In May 2009, Father filed a petition to modify his child support obligation. In his petition, Father also sought to establish an educational support order for Jeffrey.[3] In January 2010, Mother filed a motion to hold Father in contempt and calculate his child support arrearage. Mother also requested attorney's fees from Father.

At the hearing on the parties' respective motions, both parties discussed the 2005 agreement. Father stated that he believed the agreement was valid and he had relied on it for more than four years. Mother testified that she only signed the 2005 agreement because she "was afraid not to sign it" and that Father "had made many threats to [her]." Tr. p. 241. Regarding payment of Ashley's college expenses, Father argued that he should receive credit for the educational expenses he had paid. Father argued that

[1] This amount included "tuition, books, on campus university-provided housing costs, and other expenses . . . ." Appellant's App. p. 63. Father and Ashley kept records of these expenses. *See* Tr. p. 148.

[2] During periods of time that Ashley resided at Mother's home, Father paid Mother the original child support amount, $2500 per month.

[3] While awaiting the court's ruling on his modification petition, Father paid two-thirds of Jeffrey's college expenses in the same type of arrangement as he executed with Ashley. *See* Appellant's App. p. 20.

educational support could be recognized as nonconforming child support payment, for which a parent could receive credit. *Id.* at 147. Mother disagreed, contending that Father was not entitled to any credit for these payments, and further argued that they were not considered child support. *Id.* at 143.

The trial court granted Father's petition, finding that Ashley's emancipation due to her graduation constituted a substantial and continuing change in circumstances rendering the original support award unreasonable.[4] The trial court modified Father's child support obligation to $387 per week and approved the same college expense arrangement for Jeffrey that had been utilized with Ashley. The trial court also recognized the educational support payments made by Father as nonconforming child support payments and declared Father current in his support obligation.

Mother now appeals.

Discussion and Decision

On appeal, Mother raises multiple issues, which we combine and restate as follows: whether the trial court erred in retroactively modifying Father's child support obligation by crediting Father for educational support payments made for the benefit of the parties' daughter.

Initially, we note Father's argument that Mother has waived her arguments on appeal by way of her failure to file a post-trial brief. A party will not be deemed to have waived their arguments if the issues raised on appeal were inherent in the resolution of the case, the opposing party had unequivocal notice of the issue below and the chance to

[4] *See* Ind. Code § 31-16-8-1 (2008) (providing that child support orders may be modified based "upon a showing of changed circumstances so substantial and continuing as to make the terms [of an existing order] unreasonable").

litigate it, or if the trial court actually addressed the issue. *Grathwohl v. Garrity*, 871 N.E.2d 297, 302 (Ind. Ct. App. 2007). The issues presented by Mother on appeal are the same issues litigated by the parties at the trial level, and it is apparent from the trial court's order that the court addressed these issues. From this, we conclude that Father had unequivocal notice of the issues now raised by Mother and therefore proceed to address.

Decisions regarding child support are within the sound discretion of the trial court. *Hicks v. Smith*, 919 N.E.2d 1169, 1171 (Ind. Ct. App. 2010), *trans. denied*. We reverse a court's determination regarding child support only if there has been an abuse of discretion or the determination is contrary to law. *Id.* An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.*

Custodial parents who receive child support funds are considered trustees who hold those funds for the benefit of a child. *Vagenas v. Vagenas*, 879 N.E.2d 1155, 1158 (Ind. Ct. App. 2008), *trans. denied*. Acting as trustee, the custodial parent is prohibited from contracting away the benefits of the trust. *Id.* It follows, then, that a court "may not retroactively reduce or eliminate child support obligations after they have accrued." *Id.* A parent who is subject to a child support order must comply with that order and make payments in accordance with it until the order is set aside or modified by the court. *Id.* However, retroactive modification may be permitted where "the parties have agreed to and carried out an alternative method of payment which substantially complies with the spirit of the decree." *Id.* A parent seeking credit for nonconforming payments must

establish that both parties agreed to the change in the form of payment, the payment amount is verifiable, and there was no reduction in the amount of support. *Id.* Where the nonconforming payment at issue relates to educational support, we have held that payment of college expenses equates to payment of child support. *Id.* at 1159.

In support of her argument that Father should not receive credit for nonconforming child support payments, Mother points to a series of cases in which fathers were denied such credit. For example, in *O'Neil v. O'Neil*, our Supreme Court restated the general rule that a parent obligated to pay child support may not receive credit for nonconforming child support payments. 535 N.E.2d 523, 524 (Ind. 1989). In declining to assign credit for a father's payment of educational expenses, the Court noted, "there were no express agreements between the parties that the Mother would deem the Father's payment of educational expenses as full satisfaction of his support arrearage . . . ." *Id.*

Mother also directs our attention to *Ogle v. Ogle*, in which a father was required to pay educational expenses as well as child support directly to the mother. 769 N.E.2d 644, 646 (Ind. Ct. App. 2002), *trans. denied*. The father paid educational expenses while his daughter was in college but failed to pay the required child support. *Id.* We held that the father was not entitled to a credit for these payments. *Id.* at 650. Given Father's failure to pay the entire amount of support ordered, which resulted in an overall reduction in support, we concluded that crediting Father for educational support payments would result in an impermissible retroactive modification of his support obligation. *Id.*

O'Neil and *Ogle*, as well as *Fiste v. Fiste*, also cited by Mother, are all distinguishable from the current case. *O'Neil* and *Ogle* are factually dissimilar. In

O'Neil, there was no express agreement between the parties regarding Father's payment of educational support, which exists here. In *Ogle*, Father was required to pay child support and educational support, but he paid only educational support, thereby reducing the total amount of support paid. In the current case, Father's support obligation *increased* under the parties' 2005 agreement. Though Mother cites a portion of *Fiste* indeed relevant here, "sums voluntarily paid for a child's educational costs do not entitle the noncustodial parent to a credit," she omits the beginning of the same sentence, which reads, "But for a few narrow exceptions . . . ." 627 N.E.2d 1368, 1373 (Ind. Ct. App. 1994). Those exceptions—specifically cases in which parties agree to and carry out an alternative method of payment that substantially complies with the spirit of the decree—are precisely what is at issue here.

We agree with the trial court and Father that the dispositive case here is *Vagenas*.[5] The father in *Vagenas* was ordered to pay $500 per month in child support for his son. He paid this amount until his son enrolled in college. *Vagenas*, 879 N.E.2d at 1157. The parents then agreed that the father would pay one-half of the son's educational expenses and continue to pay support to the mother when their son was living at home. After the mother claimed that the father had failed to pay child support, the trial court credited the father for the educational support payments, and we affirmed. In holding that the father's payment of college expenses substantially complied with the spirit of the child support

[5] Mother argues that we should limit *Vagenas* to cases in which there is "only one child for which an obligated parent is paying child support." Appellant's Br. p. 35. We find no suggestion in *Vagenas* that it should be so limited, nor do we find persuasive support for Mother's contention that an indivisible, in gross child support order should be exempt from application of the nonconforming payment exception. *See* Appellant's Br. p. 14.

order, we noted that college expenses are in the nature of child support, and importantly, the father had paid more according to the parties' agreement than he would have otherwise paid under the support order. *Id.* at 1160. We also noted that the parties had abided by their agreement for over a year and the father had reasonably relied upon it.

In this case, the decree of dissolution required Father to pay $2500 per month, or $30,000 per year in child support. In 2005, the parties reached an informal agreement regarding the payment of college expenses for their daughter, Ashley, and reduced this agreement to writing.[6] The agreement provided that Father would pay $1562.50 per month in child support—$18,750 annually—directly to Mother. The parties also agreed that Father would pay two-thirds of Ashley's college expenses, approximately $18,650 per year.[7] Thus, Father was required to pay approximately $37,400 in child support annually, an increase in support as compared to the original order. Mother, Father, and Ashley abided by this agreement for the duration of Ashley's post-secondary education.

We conclude that Father's payment of Ashley's college expenses substantially complies with the spirit of the decree. In reaching this conclusion, we reject Mother's

[6] Mother proffers various arguments regarding the enforceability of the parties' 2005 agreement. These arguments are not persuasive. Mother's claims that she felt pressure to sign the agreement or that she was otherwise threatened to do so are invitations to reweigh the evidence, which we may not do. Further, Mother provides a lengthy analysis of our court's treatment of "verbal or written agreement[s] between the parents to *reduce* support obligations . . . ." Appellant's Br. p. 20 (emphasis added). These cases are distinguishable as the parties here reached an agreement that *increased* Father's child support obligation. Mother's reliance on the proposition that a party may not contract away their support obligation is distinguishable on the same basis. *Id.* at 19. Finally, Mother's argument that Father was required to file a child support obligation worksheet at the time they entered into the agreement is not persuasive. *See* Child Supp. G. 6 Commentary. This fact has no relevance with regard to the nonconforming payment exception.

[7] From April 2005 until March 2009, Father paid approximately $74,600 in college expenses. *See* Appellant's App. p. 19. Father continued to pay two-thirds of Ashley's educational expenses for a fifth year as she pursued her Master's degree. *See* Tr. p. 122, 157.

argument that Father's payment of Ashley's college expenses did not so comply because it resulted in the reduction of "undivided, in gross court-ordered" support. By way of calculated wording, Mother would have us ignore the fact that Father's total child support obligation *increased* according to the parties' 2005 agreement. Her contention that "[Father's] decision to pay his daughter's college expenses reduced the amount of child support for both Ashley and Jeffrey" is similarly misguided. Father financed the majority of his adult daughter's education, as well as many of her living expenses while she was enrolled in college, and continued to pay the original amount of support at times when Ashley resided with Mother. We conclude that Father's payment of Ashley's college expenses substantially complies with the spirit of the decree.

Further, Father has established that the amount of support was not reduced; rather, it increased according to the 2005 agreement. The amount is verifiable as records were kept and Father made payments directly to the college from which Ashley graduated. We conclude that the trial court did not err in crediting Father for nonconforming child support payments.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.