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IN THE COURT OF APPEALS OF INDIANA

LEIGHANN HALL,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 15A04-1009-DR-552
	)	
DENVER HALL,	)	
	)	
Appellee.	)	

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable James D. Humphrey, Judge
The Honorable Kimberly A. Schmaltz, Magistrate
Cause No. 15C01-0010-DR-253

May 5, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

D.H. ("Father") and L.H. ("Mother") have three children, and Father has accumulated a significant child support arrearage. In 2009, Mother filed a contempt petition in Dearborn Circuit Court to address Father's arrearage, and the State intervened because Mother receives welfare benefits. In response, Father filed a petition to modify his child support obligation. After imputing minimum wage income to both parties, the trial court reduced Father's child support obligation to $16.73 per week. The trial court also ordered that the child support modification be retroactive to March 1, 2006. The State appeals and raises the following issues, which we restate as:

> I. Whether the trial court abused its discretion when it imputed minimum wage income to both Mother and Father; and
>
> II. Whether the trial court erred when it retroactively modified Father's child support obligation.

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Facts and Procedural History

Mother and Father have three children: sixteen-year-old C.H., ten-year-old D.H., and nine-year-old J.H. Mother's and Father's marriage was dissolved in 2001, and Father was ordered to pay child support in the amount of $140 per week. Mother was given custody of the children, but in 2005, C.H. began to reside with Father.

In 2005, the State intervened in this cause because Mother was receiving State assistance and Father had a child support arrearage. During contempt proceedings, the trial court reduced Father's arrearage to $10,757.96 because the oldest child was residing

with Father. Appellee's App. p. 8. But Father was ordered to continue to pay $140 per week in child support plus an additional $15 each week toward his arrearage. Father's arrearage had increased to $13,956.10 in January 2010. Father has not missed any child support payments, but also has not paid the full court-ordered amount each month.

On November 24, 2009, Mother filed an "Affidavit for Contempt" alleging that Father was in arrears in his child support payments. Father then filed a motion to modify his child support obligation alleging changed circumstances because the parties' oldest child has been living with Father and Father has suffered an involuntary decrease in income.

A hearing was held on the parties' pleadings on February 26, 2010. At the hearing, Mother testified that she is disabled because she has degenerative disk disease. Her last employment was stuffing envelopes for a company in Batesville. She depends on food stamps and welfare benefits, and a friend to pay her rent in the amount of $460 per month. Mother's three applications for social security disability have been denied.

Father does painting and drywall work, as well as odd jobs such as selling scrap metal. Father has no physical limitations but testified that there has been a "general decline in job opportunities over the last couple of years[.]" Tr. p. 26. In 2007, Father earned approximately $14,000, and his income had decreased to $8212 in 2009.

On March 4, 2010, the trial court issued an order finding that Father was not in contempt because he "has not willfully refused to obey this Court's order to pay child support." Appellant's App. p. 9. The trial court imputed income to both Mother and Father in the amount of $290 per week. The court concluded that Father owed child

support in the amount of $50.19 per week and Mother owed $33.46 per week. Therefore, Father was ordered to pay child support in the amount of $16.73 per week. The trial court also concluded that the modification was retroactive to March 1, 2006 "due to the prior credit being given on his arrearage." Id. at 10. The State now appeals. Additional facts will be provided as necessary.

Standard of Review

When we review a determination of whether child support should be modified, we reverse only if the trial court has abused its discretion. Cross v. Cross, 891 N.E.2d 635, 641 (Ind. Ct. App. 2008). 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 the 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).

The modification of child support orders is controlled by Indiana Code Section 31–16–8–1. That statute provides in relevant part:

> Provisions of an order with respect to child support ... may be modified or revoked.... Modification may be made only:
> (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 set.

Ind. Code § 31–16–8–1 (2008).

I. Imputing Income to Mother and Father

The first step in establishing a child support obligation is to determine each parent's weekly gross income. Scott v. Scott, 668 N.E.2d 691, 696–97 (Ind. Ct. App. 1996). Indiana Child Support Guideline 3(A) sets forth the following definitions of weekly gross income:

> 1. Definition of Weekly Gross Income. ... For purposes of these Guidelines, "weekly gross income" is defined as actual Weekly Gross Income of the parent if employed to full capacity, potential income if unemployed or underemployed, and imputed income based upon "in-kind" benefits....
> 2. Self–Employment, Business Expenses, In–Kind Payments and Related Issues. Weekly Gross Income from self-employment [or] operation of a business ... is defined as gross receipts minus ordinary and necessary expenses. In general, these types of income and expenses from self-employment or operation of a business should be carefully reviewed to restrict the deductions to reasonable out-of-pocket expenditures necessary to produce income....
> 3. Unemployed, Underemployed and Potential Income. If a court finds a parent is voluntarily unemployed or underemployed without just cause, child support shall be calculated based on a determination of potential income.

Ind. Child Support Guideline 3(A). One of the purposes behind imputing potential income is "to discourage a parent from taking a lower paying job to avoid the payment of significant support." Child Supp. G. 3 cmt. 2(c). However, "[c]hild support orders cannot be used to force parents to work to their full economic potential or make their

career decisions based strictly upon the size of potential paychecks." Elliott v. Elliott, 634 N.E.2d 1345, 1349 (Ind. Ct. App. 1994). Where a parent is unemployed or underemployed for a legitimate purpose other than avoiding child support, there are no grounds for imputing potential income. Kondamuri v. Kondamuri, 852 N.E.2d 939, 950 (Ind. Ct. App. 2006).

The State argues that the trial court's decision to modify Father's child support obligation was "based on its erroneous decision to impute income at minimum wage . . . to both Mother and Father." Appellant's Br. at 8.

A. *Mother*

The only evidence of Mother's prior employment history is a job stuffing envelopes. On the date of the hearing, Mother had no income. She depends on food stamps and welfare benefits, as well as a friend to pay her rent. Mother testified that she had degenerative disk disease, narrowing of the spinal cord, and nerve damage in her left leg. Mother has unsuccessfully applied for social security disability on three occasions.

Citing Brown v. Brown, 849 N.E.2d 610, 615 (Ind. 2006), the trial court determined that it was appropriate to impute minimum wage income to Mother. Specifically, the trial court relied on the Brown court's conclusion that "the filing of a petition to modify on grounds that a Social Security disability determination has been requested entitles the parent to a credit retroactive to the date of the petition in the event of a favorable determination, [but] the filing of the petition does not relieve the parent of the parent's child support obligation until such time as there is a modification, if any, of

the existing child support order." Appellant's App. pp. 9 (quoting Brown, 849 N.E.2d at 615).

The trial court acted within its discretion when it weighed Mother's testimony concerning the extent of her disability and ability to work, particularly in light of the fact that Mother's application for social security disability benefits has been denied. For these reasons, the trial court did not abuse its discretion when it imputed minimum wage income to Mother.

B. *Father*

Next, the State argues that "the trial court's decision to impute minimum wage to Father completely overlooked his earning potential." Appellant's Br. p. 10. The trial court noted that Father's current income is less than minimum wage, but found that imputing minimum wage to Father was appropriate because he is "able bodied and able to work." Appellant's App. p. 9.

Father testified that he does drywall work, and that there has been less work available in the past few years because of the bad economy. Specifically, Father testified that he earned approximately $14,000 in 2007, approximately $10,000 in 2008, and approximately $8,000 in 2009. Tr. pp. 39-40. Father testified that the company he works for stays busy, but that he is not needed every day of the week. Tr. p. 40. Father stated that he is willing to work more hours if there is available work. Under these facts and circumstances, the trial court acted within its discretion when it imputed only minimum wage income to Father.

II. Retroactive Modification of Father's Child Support Obligation

In general, the "trial court has the discretionary power to make a modification for child support relate back to the date the petition to modify is filed, or any date thereafter." Haley v. Haley, 771 N.E.2d 743, 752 (Ind. Ct. App. 2002). "The right to support lies exclusively with the child and the custodial parent holds the support in trust for the benefit of the child." Id. Indiana Code Section 31–16–16–6(b) provides:

> A court with jurisdiction over a support order may modify an obligor's duty to pay a support payment that becomes due:
> (1) after notice of the petition to modify the support order has been given either directly or through the appropriate agent to:
> (A) the obligee; or
> (B) if the obligee is the petitioner, the obligor; and
> (2) before a final order concerning the petition for modification is entered.

"'The general rule in Indiana is that retroactive modification of support payments is erroneous if the modification relates back to a date earlier than the filing of the petition to modify.'" Becker v. Becker, 902 N.E.2d 818, 820 (Ind. 2009) (quoting Donegan v. Donegan, 605 N.E.2d 132, 133 n.1 (Ind. 1992)). "And Indiana courts have long held that, 'after support obligations have accrued, a court may not retroactively reduce or eliminate such obligations.'" Id. (quoting Whited v. Whited, 859 N.E.2d 657, 661 (Ind. 2007)).

Accordingly, under the general rule prohibiting retroactive modification of child support, the trial court was not permitted to modify Father's child support to a date before his petition to modify child support was filed. However, retroactive modification is permitted when "the obligated parent takes the child into his or her home, assumes

custody, provides necessities, and exercises parental control for such a period of time that a permanent change of custody is exercised." Whited, 859 N.E.2d at 662. If a parent is subject to an order in gross, this exception can only be applied where all children subject to the order permanently change custody. Id. at 663.

In this case, Father was subject to a child support order in gross for all three children. In 2005, the oldest child began to reside with Father, a change in custody to which Mother acquiesced. The trial court acknowledged this fact in a November 29, 2005 order finding Father in contempt for failing to pay his ordered child support obligation. Specifically, the order provided:

> The Court further finds that Respondent, [Father], owes an arrearage in the amount of . . . $10, 757.96 as of November 11, 2005. That said arrearage is an agreed reduced amount based upon a credit to the Respondent for extended summer visitation with all three (3) minor children. That this reduced amount also takes into consideration that the oldest minor child, [C.H.] has been residing with the Respondent since May, 2005.

Appellee's App. p. 8.

But subsequent to the 2005 order, the two younger children continued to reside with Mother, and the trial court ordered Father to continue to pay $140 per week in child support in gross. Under these facts and circumstances, the trial court and our court are bound by Whited. Since the permanent change-of-custody did not involve all three children, the exception does not apply, and the trial court was not permitted to modify Father's child support obligation to a date prior to February 8, 2010, the date Father filed his petition to modify child support. See Appellant's App. p. 12.

Conclusion

The trial court did not abuse its discretion when it imputed minimum wage income to both Mother and Father. However, the trial court erred when it retroactively modified Father's child support obligation to a date prior to the filing of Father's petition to modify child support. We therefore reverse and remand this case to the trial court for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

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