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FILED
Aug 25 2010, 8:54 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

JOHN L. DAVIS
Pritizke & Davis, LLP
Greenfield, Indiana

ATTORNEY FOR APPELLEE:

DAVID W. STONE, IV
Stone Law Office and Legal Research
Anderson, Indiana

IN THE
COURT OF APPEALS OF INDIANA

M.H.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 30A01-1003-DR-99
	)	
J.H.,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable Richard D. Culver, Judge
Cause No. 30C01-0602-DR-140

August 25, 2010

MEMORANDUM DECISION—NOT FOR PUBLICATION

BRADFORD, Judge.

Appellant-Petitioner M.H. ("Wife") appeals the trial court's order modifying certain terms of her agreement with Appellee-Respondent J.H. ("Husband"), which itself modified certain terms of their dissolution decree. Upon appeal, Wife challenges the trial court's calculation of income for child support purposes, claims that the trial court erred in refusing to modify the parties' tax exemption for their son C.H., disputes the court's treatment of her dependent care benefits for child care purposes, and claims that the trial court should have found Husband in contempt of court. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Husband and Wife were married in 1998 and had three children at the time of their October 2006 dissolution: C.H., who was sixteen, and adopted by Husband during the marriage; S.H., who was seven; and T.H., who was five. The dissolution decree ordered Husband to pay $305 in child support per week. The decree additionally provided that Wife would claim two of the children as dependents for the 2006 tax year, that Husband would claim the third child, and that thereafter, the parties would alternate the exemptions until only two of the children were eligible to be claimed as dependents, at which point each parent would claim one child. At such time as only one child was eligible to be claimed as a dependent, the parties were ordered to alternate claiming that child, beginning with Wife.

In June 2008, Wife filed a Petition for Modification of Support and for Allocation of College Expenses for C.H. In this petition, Wife sought direction by the court in the allocation of C.H.'s college expenses. In addition, Wife sought clarification of the tax exemption allocation. In July 2008, Father responded by filing his own petition to modify the

decree. On October 24, 2008, the parties entered into, and the trial court approved, an agreed entry modifying the dissolution decree to require Husband to pay $140 per week in child support as well as $9,000 per year to Rose Hulman Institute toward C.H.'s college education. The agreed entry further clarified that Husband was entitled to claim C.H. and T.H. as dependents and that Wife was entitled to claim S.H. as a dependent. Pursuant to the agreement, when C.H. no longer qualified as a dependent, Husband would claim T.H. and Wife would claim S.H., and when S.H. was no longer eligible to be claimed as a dependent, the parties would alternate claiming T.H.

On November 13, 2008, Wife filed a Motion for Relief from Judgment in which she contended, *inter alia*, that the agreed entry did not reflect the parties' actual agreement and that Husband had misrepresented his income, resulting in a lower support award than was warranted. Wife requested a hearing on the underlying issues and for a finding of fraud if Husband failed to explain his income. On November 17, 2008, Husband filed a Motion to Dismiss or in the Alternative to Convert to Petition to Modify in which he refuted Wife's allegations of income misrepresentation. On December 18, 2008, the trial court issued an order pending evidentiary hearing which provided, *inter alia*, that the parties' agreement with respect to tax exemptions would remain in place unless a substantial change in income were demonstrated by the parties. Following its issuance of this order, the trial court held a hearing on April 24, 2009.

Evidence introduced at the hearing included Husband's 2008 W-2 statement, which demonstrated that Husband's wages totaled $68,987.78 and that he had placed at least

$15,500 that year into his retirement account. Wife's 2008 W-2 statement demonstrated that her wages were $73,762.63 and that she had contributed approximately $4362.77 to her retirement account. In addition Wife's W-2 indicated that she had $3250 per year in dependent care benefits. The record at the hearing was not developed with respect to the nature or character of the parties' retirement account contributions.

With respect to C.H.'s tax exemption, Wife claimed at the hearing that she gave Husband C.H.'s tax exemption in negotiating with him to make a significant contribution toward C.H.'s college education. C.H. wished to attend Rose-Hulman Institute, and Wife wanted C.H. to attend his college of choice. Husband argued that he would have preferred to pay the reduced cost of C.H.'s attending Purdue University but did not dispute that he had agreed to pay $9,000 toward C.H.'s education at Rose-Hulman.[1]

Wife further contended that Husband had not paid this $9000 and that she had been forced to take out a student loan, and pay interest thereon, in order to pay the additional $9000 which Husband owed. According to Wife, given her considerable expenses for C.H.'s education, she was entitled to C.H.'s tax exemption. Husband did not dispute that he still owed $9,000 for C.H.'s college expenses but argued that his overpayment of child support should have been credited toward that amount. In addition, Husband contended that his failure to pay was partly due to Wife's failure to provide certain medical receipts to enable him to file his taxes, the proceeds from which he had planned to place toward this $9000

[1] According to the record, C.H.'s attendance at Rose-Hulman Institute cost $47,000 in 2008-09, of which Wife paid $24,000. Also according to the record, Purdue University costs $20,000 per year.

sum.

Following the hearing, on May 27, 2009, the trial court issued an order in which it excluded the parties' retirement contributions from their incomes and found Husband's income to be $68,988 per year and Wife's to be $73,762 per year. The court modified Husband's child support to $150 per week, which was retroactive to September 5, 2008. In addition, the trial court provided that Husband was entitled to credit his overpayment of support toward his $9,000 payment for C.H.'s college expenses, which Husband was ordered to pay within ten days. With respect to child care expenses, the trial court concluded that child care expenses were $100 per week reduced by the $3250 from Wife's dependent care benefit through her employer, as reflected on her W-2. The trial court additionally found Wife in contempt for twice failing to abide by its prior orders permitting Husband's visitation to commence on Thursday evenings. The trial court did not find Husband in contempt. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

> Modification of a child support order requires a showing of "changed circumstances so substantial and continuing as to make the terms unreasonable." Ind. Code § 31-16-8-1(1); *see also* Ind. Child Support Guideline 4 ("The provisions of a child support order may be modified only if there is a substantial and continuing change of circumstances.") Modification of a child support order "'involves a factual determination that substantial and continuing, changed circumstances render existing terms unreasonable.'" *Glass v. Oeder*, 716 N.E.2d 413, 416 (Ind. 1999) (quoting *Giselbach v. Giselbach*, 481 N.E.2d 131, 133 (Ind. Ct. App. 1985)). The standard of review to determine whether a trial court has abused its discretion in modifying a support order is well settled. *Meehan v. Meehan*, 425 N.E.2d 157, 161 (Ind. 1981). We do not weigh the evidence or judge the credibility of witnesses, but

> rather consider only that evidence most favorable to the judgment, together with the reasonable inferences that can be drawn therefrom. *Id.*

Sims v. Sims, 770 N.E.2d 860, 863 (Ind. Ct. App. 2002). The petitioner has the burden of establishing a substantial change in circumstances justifying modification. *Scoleri v. Scoleri*, 766 N.E.2d 1211, 1215 (Ind. Ct.App. 2002).

II. Retirement Account Contributions

Wife first contends that the trial court erred in excluding retirement account contributions from her own and her Husband's incomes for purposes of calculating its child support modification. Wife argues, based upon *Saalfrank v. Saalfrank*, 899 N.E.2d 671, 680 (Ind. Ct. App. 2008), that certain factors must be considered before excluding retirement contributions in income, which she alleges the trial court failed to do. If Wife had brought this matter to the attention of the trial court and demonstrated that the parties' retirement account contributions, especially Father's considerable $15,000+ contribution, were voluntary, it likely should have included such contributions in its assessment of income. *See id.* at 678-80 (suggesting that factors such as control over, and large size of, retirement contribution warrant its inclusion into a contributor's income calculation). Yet Wife failed to argue before the trial court that such factors should be considered, nor did she develop the record regarding these factors to enable either the trial court or this court to review the

parties' respective incomes in light of these factors.[2] "As a general rule, a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court." *GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002). Wife's claim on this point is waived.

III. Tax Exemption

Wife additionally challenges the trial court's failure to award her C.H.'s tax exemption. The original decree provided that Husband would claim two children as dependents in 2005; that Wife would claim two children as dependents, and Husband would claim the third, for the 2006 tax year; and that the parties would alternate the exemptions in this manner until two eligible children remained, at which point Husband and Wife would each claim one child. In petitioning for modification, Wife additionally sought clarification of the tax exemption allocation.

In their October 24, 2008 agreement, Husband and Wife agreed that Husband was to receive C.H.'s tax exemption and that Husband would pay $9,000 per year toward C.H.'s education at Rose-Hulman Institute. In its order pending evidentiary hearing, the trial court declined to alter the terms of this agreement.

Wife now claims that the trial court abused its discretion by failing to alter the terms of the agreement following the evidentiary hearing. "Generally, the custodial parent

[2] Wife alleges that the retirement contributions were voluntary and refers to Respondent's Exh. A in support. The exhibits were not included in the record on appeal. The transcript reveals that Respondent's Exh. A consists of W-2 statements, tax returns, and a proposed child support calculation. The mere inclusion of these forms as exhibits, without any accompanying testimony or explanation regarding how they do or do not demonstrate voluntariness or the other *Saalfrank* factors, is inadequate to preserve this claim for appellate review.

automatically receives the dependent tax exemptions for the minor children; however, the custodial parent may execute a written waiver of the exemption for a particular tax year." *Eppler v. Eppler*, 837 N.E.2d 167, 178 (Ind. Ct. App. 2005), *trans. denied*. A party seeking transfer of an exemption for a dependent child must demonstrate the tax consequences to each parent of transferring the exemption and how such a transfer would benefit the child. *See Sims v. Sims*, 770 N.E.2d 860, 867 (Ind. Ct. App. 2002).

Commentary to Child Support Guideline 6, which addresses tax exemptions,[3] provides as follows:

> Development of these Guidelines did not take into consideration the awarding of the income tax exemption. Instead, it is recommended that each case be reviewed on an individual basis and that a decision be made in the context of each case. Judges and practitioners should be aware that under current law the court cannot award an exemption to a parent, but the court may order a parent to release or sign over the exemption for one or more of the children to the other parent pursuant to I.R.C. s 152(e).… Judges may wish to consider ordering the release to be executed on an annual basis, contingent upon support being current at the end of the calendar year for which the exemption is ordered as an additional incentive to keep support payments current. It may also be helpful to specify a date by which the release is to be delivered to the other parent each year. Shifting the exemption for minor children does not alter the filing status of either parent.
>
> In determining when to order a release of exemptions, it is recommended that at minimum the following factors be considered:
> (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; and
> (5) the financial burden assumed by each parent under the property settlement in the case.

[3] Effective January 1, 2010, Guideline 9 addresses tax exemptions.

The above commentary suggests that transfers of dependent exemptions be on a year-to-year basis, contingent upon support being current. Here, in contrast, Husband simply received C.H.'s tax exemption, apparently with no additional provisions. But this was by clear agreement of the parties, and the Guidelines do not prohibit such a term.

In challenging the trial court's failure to modify the agreement and award her C.H.'s exemption, Wife argues that Husband never paid the $9,000 he owed and that she paid his share plus an additional contribution, totaling $24,000, suggesting that C.H.'s exemption was more rightfully hers. In support of her claim, Wife points to Indiana Child Support Guidelines commentary, which provides as follows with respect to the specific matter of extraordinary educational expenses:

> While tax planning on the part of all parties will be needed to maximize the value of these subsidies, no one party should disproportionately benefit from the tax treatment of post-secondary expenses. Courts may consider who may be entitled to claim various education tax benefits and tax exemptions for the minor child(ren) and the total value of the tax subsidies prior to assigning the financial responsibility of post-secondary expenses to the parents and the child.

Child Supp. G. 6 cmt. According to Wife, Husband disproportionately benefits because he has sole claim to C.H.'s tax exemption even though she pays a greater share of C.H.'s tuition. Wife contends that the trial court was required to explain its deviation from the guidelines permitting Husband to keep his exemption in light of his failure to pay.

Here, the alleged deviation from the guidelines was by clear agreement of the parties. While agreement by the parties does not preclude subsequent modification, there must be a showing of a substantial change in circumstances. *See Adams v. Adams*, 873 N.E.2d 1094, 1098 (Ind. Ct. App. 2007). Yet Wife fails to demonstrate what substantial change in

circumstances has occurred to warrant additional modification. Husband apparently failed to timely pay his $9,000 share, but he did not dispute that he owed it, he agreed to pay it, and the trial court ordered him to pay it within ten days of the order. While Wife may pay a greater share of the tuition costs than Husband, it was her desire, not his, that C.H. attend Rose-Hulman, and she was wiling to exchange her exemption for C.H. to achieve that goal. The trial court was within its discretion to conclude that a substantial change in circumstances had not occurred to warrant transfer of the tax exemption.

Furthermore, apart from arguing that she deserved a dependent exemption for C.H. given her extra tuition payments on his behalf, Wife failed to demonstrate to the trial court how the transfer of C.H.'s exemption back to her benefited C.H. and/or his siblings in light of the factors cited in the guidelines. Indeed, Husband's and Wife's respective incomes place them in roughly the same tax bracket, Husband has been ordered to pay the agreed-upon amount which entitled him to the exemption under the agreement, and there is no showing that transferring the exemption to Wife would materially improve her ability to care for C.H. or his siblings. We find no abuse of discretion.

IV. Dependent Child Care

Wife next challenges certain findings by the trial court in reaching its child support award, including its finding that her child care expenses were $100 per week rather than $176 or $179 per week.

Child care costs incurred due to employment should be added to the basic child support obligation for the purposes of calculating the guideline amount. *Kyle v. Kyle*, 582

N.E.2d 842, 847-48 (Ind. Ct. App. 1991) (citing Child Supp. G. 3(E)(1)), *trans. denied*. Employment related child care expenses should be shared by both parents because, depending on the circumstances, custodial parents may find it economically impracticable to work if they must bear the expense alone. *Id.* That custodial parents should be able to afford to work is an important public policy goal. *Id.* Whether to increase a basic child support award to offset employment related child care expenses is a matter for the trial court's discretion, and a decision not to allow such an increase does not require a written finding justifying a deviation from the guideline amount. *Id.*

The trial court stated as follows with respect to child support and employment-related expenses:

> Respondent's child support to Petitioner is hereby modified to the sum of One Hundred and Fifty Dollars ($150.00) retroactive to September 5, 2008, with Petitioner to pay the first One Thousand, Five Hundred and Thirty-three Dollars ($1,533.00) annually of uninsured healthcare expense and any uninsured healthcare expense incurred thereafter annually shall be paid forty-seven percent (47%) by Respondent and fifty-three percent (53%) by Petitioner based on the parties' 2008 W-2 income for which Petitioner['s income] was $73,762.00 and Respondent's income [was] $68,988.00 with childcare in the amount of $100.00 per week less Petitioner's dependent childcare credit received through her employer as reflected on her 2008 W2 of $3,250.00 reducing said weekly daycare amount to $32.50.

App. p. 45.

There was conflicting evidence in the record regarding child care costs. Wife testified that child care cost $176-179 per week due to high costs for summer care. Wife also testified that her mother cared for the children during school year mornings for $100 a week and that the children did not attend daycare in the afternoons. Husband testified, however, that his

mother was willing to provide daycare at no cost, which Wife refused to take advantage of. Given the conflicting evidence on cost and availability of various daycare options, the trial court was within its discretion to approximate the cost of daycare at $100 per week, which was well within the scope of the evidence.

Wife also challenges the trial court's treatment of the dependent care benefit, which her W-2 statement indicates amounted to $3250 in 2008. Wife's argument is somewhat puzzling, because she construes the child care credit as a cost which she must pay a percentage of, but she also claims that the trial court erred in "reducing" her credit to $32.50 per week. It appears that the trial court deducted Wife's dependent care contribution, which constituted part of her pre-tax income, from the $100-per-week child care costs presumably shared by both Husband and Wife. It is unclear how the trial court reached the $32.50-per-week amount.[4] In any event, the $3250 reflected on Wife's 2008 W-2 for dependent child care is money Wife contributed from her paycheck. Any potential tax benefit to Wife does not equate to a dollar-for-dollar reduction of the cost of daycare, which the trial court determined to be $100 per week.[5] We therefore reverse and remand to the trial court with instructions to recalculate child support utilizing $100 per week as the work-related child

[4] Child care costs of $100 per week minus $65 ($3250 divided by 50 weeks per year) equals $35 per week. Child care costs of $100 per week minus $62.50 ($3250 divided by 52 weeks per year) equals $37.50 per week.

[5] According to commentary accompanying Child Support Guideline 3(E), "In circumstances where a parent claims the work-related child care credit for tax purposes, it would be appropriate to reduce the amount claimed as work-related child care expense by the amount of tax saving to the parent." Wife contended at the hearing that she did not take a daycare expense deduction on her tax return but was willing to investigate to see if such a deduction or credit were available.

care expense on its child support obligation worksheet and adjust Husband's support obligation accordingly.

V. Contempt

Wife finally contests the trial court's failure to find Husband in contempt for his failure to pay his $9,000 share to Rose-Hulman for C.H.'s education. To be held in contempt, a party must have willfully disobeyed a court order. *Hamilton v. Hamilton*, 914 N.E.2d 747, 755 (Ind. 2009). The determination of whether a party is in contempt is a matter left to the discretion of the trial court. *Id.* We will reverse a trial court's contempt findings only if there is no evidence or inferences drawn therefrom to support them. *Id.*

At the hearing, Husband did not contest that he had agreed to pay the $9,000 provided for in the parties' agreement, nor did he contest that he owed this money and fully intended to pay it. According to Husband, he had planned to make this payment, at least in part, with tax proceeds from the filing of his tax return, which he had not yet filed because Wife had failed to provide him with certain necessary receipts. In addition, Husband indicated that although he had failed to pay the $9,000, he had still been paying $305 in child support, part of which he knew was in excess of the amount owed given C.H.'s enrollment in college. The trial court subsequently credited Husband's excess payments toward the $9,000 owed. The trial court was fully within its discretion to conclude that Husband's failure to pay the ordered $9,000 was not a result of bad faith, and not entirely within his control, and did not warrant a contempt finding. We find no abuse of discretion.

VI. Conclusion

We have determined that Wife's challenges to the trial court's calculation of income, treatment of tax exemptions, and failure to find contempt do not constitute an abuse of discretion, but that its assessment of child support warrants recalculation. Accordingly, we affirm in part, reverse in part, and remand to the trial court with instructions to recalculate the cost of child support.

The judgment of the trial court is affirmed in part, reversed in part, and remanded.

DARDEN, J., and BROWN, J., concur.