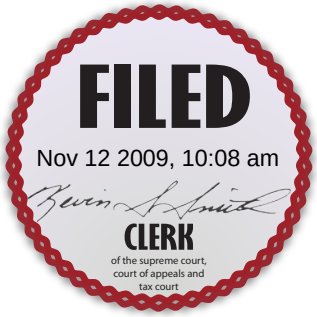

APPELLANT PRO SE:

LARRY R. ROTHER
Louisville, Kentucky

IN THE
COURT OF APPEALS OF INDIANA

LARRY R. ROTHER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0905-CV-412
	)	
ANN M. CURTIS,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Thomas J. Carroll, Judge
Cause No. 49D06-9209-DR-1665

November 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Larry Rother appeals, *pro se*, the trial court's partial grant of a petition for modification of a dissolution decree filed by Rother. Rother raises four issues, which we consolidate and restate as whether the trial court's modification of the terms of the dissolution decree pertaining to spousal maintenance was clearly erroneous. We affirm.

Before addressing the relevant facts and the arguments raised by Rother, we note that he did not submit a transcript of the bench trial upon which the trial court's findings of fact and conclusions thereon are based.[1] Ind. Appellate Rule 9(F)(4) provides:

> The Notice of Appeal shall designate all portions of the Transcript necessary to present fairly and decide the issues on appeal. If the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence.

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[1] The statement of facts in Rother's brief states: "Comes now petitioner, pro se, pursuant to Ind. Appellate Rule 31(A), and states that the following recitation of evidence was produced at the March 19, 2009 hearing on Petitioner's motion to terminate maintenance." Appellant's Brief at 4. Rother attempted to supplement the record by filing a verified statement of the evidence pursuant to Ind. Appellate Rule 31(A). However, the trial court denied Rother's Rule 31 motion. Ind. Appellate Rule 31(A) provides:

> *If no Transcript* of all or part of the evidence *is available*, a party or the party's attorney may prepare a verified statement of the evidence from the best available sources, which may include the party's or the attorney's recollection. The party shall then file a motion to certify the statement of evidence with the trial court or Administrative Agency. The statement of evidence shall be attached to the motion.

(Emphasis added).

In the Amended Notice of Completion of Clerk's Record, filed on June 10, 2009, the clerk indicated that the transcript was not requested in the notice of appeal. Also, the original Notice of Completion of Clerk's Record, filed on May 28, 2009, indicated that the transcript was "[n]ot yet completed." Thus, Larry's attempt to utilize Ind. Appellate Rule 31 was improper because there is nothing in the record to indicate that the transcript was unavailable. Had the transcript been unavailable, the clerk could have so indicated in its June 10, 2009 notice by circling "No transcript to prepare" on the Notice of Completion of Clerk's Record form. C.f., e.g., White v. White, 878 N.E.2d 854, 856 (Ind. Ct. App. 2007) (allowing an Ind. Appellate Rule 31 certified statement to substitute for a transcript where the recording equipment at the hearing failed); Bettencourt v. Ford, 822 N.E.2d 989, 992 n.1 (Ind. Ct. App. 2005) (noting that "[t]he hearings were not recorded; therefore, Mother prepared a 'verified statement of the evidence from the best available sources' pursuant to Ind. Appellate Rule 31").

The Indiana Supreme Court addressed a similar situation in Pabey v. Pastrick, 816 N.E.2d 1138, 1141-1142 (Ind. 2004), reh'g denied. There, the appellant failed to submit a transcript of the evidentiary hearing. The appellant argued that no transcript was necessary because he did not contend that the trial court's findings of fact were unsupported by the evidence; in fact, he repeatedly cited the trial court's findings of fact and did not reference facts outside those found by the trial court. 816 N.E.2d at 1142. Relying in part upon Ind. Appellate Rule 49(B), which provides that the failure to include an item in an appendix shall not waive any issue or argument, and Ind. Appellate Rule 9(G), which allows supplemental requests for transcripts to be filed, the court held that the appellants' failure to submit a transcript was not a basis for dismissing the appellant's appeal. Id.

The Court also relied upon its opinion in In re Walker, 665 N.E.2d 586, 588 (Ind. 1996). Id. In Walker, the appellants did not submit a transcript and argued that a transcript was unnecessary because there was no challenge to the trial court's findings of fact and the appellate review entailed determining only whether the findings supported the judgment and whether the conclusions of law and the judgment were clearly erroneous based upon the findings. 665 N.E.2d at 588. The Court noted that the "failure to include a transcript works a waiver of any specifications of error which depend upon the evidence." Id. (quoting Campbell v. Criterion Group, 605 N.E.2d 150, 160 (Ind. 1992), and discussing prior appellate rules). However, the Court encouraged "litigants to

utilize and reviewing courts to permit the utilization of procedures that minimize expense and administrative burdens for the parties and the court system." Id. Consequently, the Court addressed the issues presented in the appeal. Id.

"Based upon Pabey and Walker, we will attempt to address the issue raised by Rother. However, any arguments that depend upon the evidence presented at the bench trial will be waived." Fields v. Conforti, 868 N.E.2d 507, 511 (Ind. Ct. App. 2007) (citing Walker, 665 N.E.2d at 588; Kocher v. Getz, 824 N.E.2d 671, 675 (Ind. 2005) (holding that, where the appellant failed to provide a transcript of the trial court's hearing on his motion to stay execution and request for bond less than the full amount of the judgment, appellant failed to demonstrate that the trial court abused its discretion)); see also Ctr. Townhouse Corp. v. City of Mishawaka, 882 N.E.2d 762, 769 (Ind. Ct. App. 2008) (holding that "[b]ecause the City did not provide us with the transcript as required by Ind. Appellate Rule 9(F)(4), that argument is waived"), trans. denied.

We also note that Ann Curtis, Rother's ex-wife, did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing appellee's arguments, and we apply a less stringent standard of review, that is, we may reverse if the appellant establishes prima facie error. Zoller v. Zoller, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). This rule was established so that we might be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. Wright v. Wright, 782 N.E.2d 363, 366 (Ind. Ct. App.

2002). Questions of law are still reviewed *de novo*, however. McClure v. Cooper, 893 N.E.2d 337, 339 (Ind. Ct. App. 2008).

We now set out the relevant facts as stated in the trial court's findings of fact. The marriage between Rother and Curtis was dissolved on January 4, 1994, pursuant to a settlement agreement which had been approved by the trial court. Section A of the agreement "provided for Larry Rother to pay Ann Curtis the sum of $1,725.00 [per month] Spousal Maintenance due to her physical incapacity and its affect [sic] on her ability to support herself." Order at 1. The settlement agreement listed five specific grounds for which the spousal maintenance could be terminated, and it also stated that "the maintenance award is subject to modification pursuant to Indiana statute." Id.

In his Petition for Termination or Modification of Maintenance, Rother alleged that there was a substantial change in circumstances which supported a termination of maintenance. Specifically, Rother alleged that there existed "a substantial change in his income and that Ann Curtis is not incapacitated to the extent that she can not earn sufficient income to support herself." Id. at 1-2.

The trial court found, based on testimony by Curtis, Curtis's physician, and Rother, that "Rother's allegation that Ann Curtis is not incapacitated to the extent that she is capable of earning sufficient income to support herself is not supported by the evidence . . . ." Id. at 2. The trial court denied Rother's petition to terminate maintenance. The trial court did, however, find "a substantial and continuing change of circumstances regarding Larry Rother as his income ha[d] been significantly reduced and he ha[d]

remarried and ha[d] a minor child to support." Id. at 3. The trial court then determined "that Larry Rother is underemployed and capable of earning more than his present income given his education and prior work experience." Id. The trial court ordered a modification of Rother's monthly spousal maintenance payment from $1,725.00 to $1,225.00 per month.

The sole issue is whether the trial court's modification of the terms of the dissolution decree pertaining to maintenance was clearly erroneous. It appears from the record presented to us that the trial court entered sua sponte findings of fact and conclusions thereon. Sua sponte findings control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id. When a court has made special findings of fact, we review sufficiency of the evidence using a two-step process. Id. First, we must determine whether the evidence supports the trial court's findings of fact. Id. Second, we must determine whether those findings of fact support the trial court's conclusions of law. Id.

Findings will be set aside only if they are clearly erroneous. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or conclusion is

clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made. Id.

Rother makes a three-pronged argument challenging the trial court's order. Specifically, Rother argues that the trial court erred when it (A) "accepted [Curtis's] expert witness' opinion that [Curtis] was not incapacitated but did not terminate [Rother's] maintenance obligation completely in contravention of the separation agreement entered into between the parties;" (B) "offered no statutory or case law explanation for the reduction [of $500.00 per month] and, specifically did not rely on Indiana statute regarding the formula as found in the child support and maintenance guidelines;" and (C) "determined that [Rother] is capable of earning more money than he is even though there was absolutely no evidence presented at the hearing that [Rother] could earn more." Appellant's Brief at 9. We examine each of Rother's arguments in turn.

A. Trial Court's Findings Regarding Curtis's Incapacity

First, Rother argues that the trial court erred when it "accepted [Curtis's] expert witness' opinion that [Curtis] was not incapacitated but did not terminate [Rother's] maintenance obligation completely in contravention of the separation agreement entered into between the parties." Appellant's Brief at 9.

We first review the general legal framework the trial court was applying when it issued its order modifying Rother's spousal maintenance from $1725.00 per month to $1225.00. Where a trial court finds that a spouse is physically or mentally incapacitated

to the extent that the ability of that spouse to support himself or herself is materially affected, the trail court should normally award incapacity maintenance in the absence of extenuating circumstances that directly relate to the criteria for awarding incapacity maintenance. Cannon v. Cannon, 758 N.E.2d 524, 527 (Ind. 2001).

Generally, a party to a dissolution may be obligated to make spousal maintenance payments in two different ways. First, the trial court may on its own award "only 'three, quite limited' varieties of post-dissolution maintenance: spousal incapacity maintenance, caregiver maintenance, and rehabilitative maintenance." Dewbrew v. Dewbrew, 849 N.E.2d 636, 644 (Ind. Ct. App. 2006) (citing Ind. Code § 31-15-7-2). Second, "the parties may themselves provide for maintenance in settlement agreements where the court could not otherwise order it." Id. (citing Voigt v. Voigt, 670 N.E.2d 1271, 1277 (Ind. 1996)). However, "[w]here a court has no authority to impose the kind of maintenance award that the parties forged in a settlement agreement, the court cannot subsequently modify the maintenance obligation without the consent of the parties." Id. (quoting Voigt, 670 N.E.2d at 1280). There is an exception to this rule, though, for circumstances where the trial court would have had the authority to order the spousal maintenance itself under Ind. Code § 31-15-7-2, because "to hold otherwise may circumvent the parties' ability or desire to bargain independently without court intervention." Id. (quoting Zan v. Zan, 820 N.E.2d 1284, 1289 (Ind. Ct. App. 2005)). Here, the trial court determined that although the spousal maintenance was part of a settlement agreement, under Zan it had "authority to order spousal maintenance due to

the incapacity of a spouse and therefore the Court [could] modify the agreement of the parties."[2] Order at 2.

Thus, it was within the trial court's discretion to modify the spousal maintenance provision of the separation agreement, and, under the applicable standard, the question is whether the trial court's modification was clearly erroneous. In order for us to review this question, it is necessary that we determine whether the evidence supports the trial court's findings of fact. Yanoff, 688 N.E.2d at 1262. If the findings are supported by the evidence, we then ask whether those findings support the trial court's conclusions of law. Id. Adequate review of this question is not possible, however, because Rother has not provided us with a transcript to examine.

Had we been provided with a transcript, we would be able to determine whether the findings of fact relied on by the trial court were supported by the evidence. While the trial court stated that Dr. Hilburn testified that Curtis was not incapacitated, the court also stated that Dr. Hilburn testified that Curtis "*may* not be capable of working part time under supervision." Order at 2 (emphasis added). Further, the trial court stated that Curtis had "been determined to be disabled by the Social Security Administration." Id. The trial court found that Curtis would have to take taxicabs or public transportation to and from work and that "Rother's allegation that Ann Curtis is not incapacitated to the extent that she is capable of earning sufficient income to support herself is not supported

[2] We note that the settlement agreement itself states that "[t]he maintenance award hereunder is subject to modification pursuant to I.C. 31-1-11.5-17(a) [currently I.C. 31-15-7-3]." Settlement Agreement at 4.

by the evidence." Id. Based upon the trial court's order alone, we cannot say that the trial court erred. To the extent that Rother makes arguments which require this court to review the transcript, those arguments are waived. See Walker, 665 N.E.2d at 588; Ctr. Townhouse Corp., 882 N.E.2d at 769. Moreover, the record does not demonstrate that the trial court erred.

B. Statutory or Case Law Bases for the Modification of Maintenance

Second, Rother argues that the trial court erred when it "offered no statutory or case law explanation for the reduction [of $500.00 per month] and, specifically did not rely on Indiana statute regarding the formula as found in the child support and maintenance guidelines." Appellant's Brief at 9. Rother cites to the Commentary under Guideline 2 of the Indiana Child Support Rules and Guidelines for the proposition that "an award of maintenance should leave an obligor with adequate income for subsistence" and argues that "[u]nder the Court's ruling [Rother] has not been left with adequate income for his own subsistence. Clearly the Court disregarded this guideline." Id. at 14.

In evaluating a petition for modification of spousal maintenance, there is no such requirement to look to the Indiana Child Support Rules and Guidelines.[3] Rather:

> The trial court considers the factors underlying the original maintenance award in determining whether a substantial change in circumstances occurred, which are: the financial resources of the party seeking to continue maintenance, the standard of living established in the

[3] Indeed, the commentary to Guideline 2 specifically states "that the recommendations concerning maintenance apply only to temporary maintenance, not maintenance in the Final Decree. An award of spousal maintenance in the Final Decree must, of course, be made under IC 31-15-7-2. *These Guidelines do not alter those requirements*." Ind. Child Support Guideline 2, Commentary (emphasis added).

> marriage, the duration of the marriage, and the ability of the spouse paying maintenance to meet his or her own needs.

Mitchell v. Mitchell, 875 N.E.2d 320, 323 (Ind. Ct. App. 2007), trans. denied.

In its order, the trial court cited the fact that Rother "has remarried and has a minor child to support" as a "substantial and continuing change of circumstances." Order at 3. The trial court also found that Rother was "underemployed and capable of earning more than his present income given his education and prior work experience," as well as that "Larry Rother's allegation that Ann Curtis is not incapacitated to the extent that she is capable of earning sufficient income to support herself is not supported by the evidence . . . ." Id. at 2-3. The trial court applied the correct legal standard, and we cannot say that the trial court's order modifying Rother's monthly spousal maintenance payments was clearly erroneous on the bases found by the trial court.

C. Rother's Earning Capacity

Third, Rother argues that the trial court erred when it "determined that [Rother] is capable of earning more money than he is even though there was absolutely no evidence presented at the hearing that [Rother] could earn more." Appellant's Brief at 9. Rother's argument refers to paragraph 14 of the trial court's order in which the trial court made the finding of fact "that Larry Rother is underemployed and capable of earning more than his present income given his education and prior work experience." Order at 3. We cannot review this finding of fact without an examination of the transcript, and thus we conclude that Rother has waived this issue for review. See Walker, 665 N.E.2d at 588; Ctr.

Townhouse Corp., 882 N.E.2d at 769. The record does not demonstrate that the trial court erred.

For the foregoing reasons, we affirm the trial court's order granting petition for modification of maintenance.

Affirmed.

CRONE, J., and MAY, J., concur.