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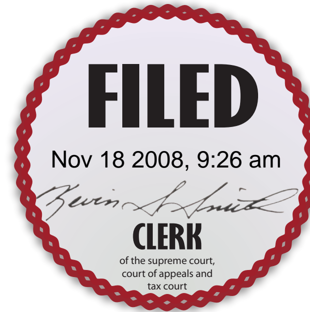

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IN THE
COURT OF APPEALS OF INDIANA

MELANIE MCNEECE JOHNSON,)
)
Appellant-Petitioner,)
)
vs.) No. 42A05-0806-CV-337
)
JAY MCNEECE,)
)
Appellee-Respondent.)

APPEAL FROM THE KNOX CIRCUIT COURT
The Honorable Sherry L. Biddinger Gregg, Judge
Cause No. 42C01-9704-DR-89

November 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Melanie McNeece Johnson ("Mother") appeals the trial court's determination that Jay McNeece ("Father") does not owe a child support arrearage. We affirm.

Issues

Mother presents two issues for review:

I. Whether the trial court abused its discretion by finding that no child support arrearage exists; and

II. Whether the trial court abused its discretion by declining to award Mother attorney's fees.

Facts and Procedural History

On June 30, 1997, the parties' marriage was dissolved. Their only child, Shea, now age twenty-five, was then fourteen years old. Pursuant to the parties' dissolution agreement adopted by the dissolution court, Father was ordered to pay Mother child support of $64.00 per week. He paid this weekly amount until April of 2001, shortly after Shea turned eighteen. At that time, Shea moved into Father's home in Vincennes, Indiana, in anticipation of attending Vincennes University. Mother moved to Bloomington to reside with her husband. Neither party petitioned the dissolution court for the modification of child support.

Shea resided in Vincennes with Father and attended Vincennes University for two years. She then transferred to Indiana University in Bloomington, Indiana and chose not to live with either parent. Father paid Shea's apartment rent in Bloomington for a period of nine months. Shea eventually obtained an undergraduate degree and moved into her grandmother's residence.

During August of 2007, Mother filed her "Petition to Establish Child Support Arrearage and for Collection of the Same." (App. E-4.) A hearing was held on March 10, 2008. On April 30, 2008, the trial court entered an order to the effect that Father's child support arrearage was zero. Mother appeals.

Discussion and Decision

I. Child Support

Mother contends that she is entitled to child support arrearage of $10,880.00 for the years that Shea was aged eighteen to twenty-one. In particular, Mother points to the lack of a court-ordered modification of child support at any time before Shea turned twenty-one. Father contends that he fulfilled his child support obligation in an alternate manner, by taking custody of Shea with Mother's acquiescence and then providing for Shea's financial needs directly. The trial court adopted Father's reasoning and found that the parties had formed an agreement that Father take custody of Shea and support her in his home.

Generally, decisions regarding child support rest within the sound discretion of the trial court, and we will reverse its determination only if there has been an abuse of discretion or the trial court's determination is contrary to law. Billings v. Odle, 891 N.E.2d 106, 108 (Ind. Ct. App. 2008). We will consider only the evidence and reasonable inferences favorable to the judgment. Naggatz v. Beckwith, 809 N.E.2d 899, 902 (Ind. Ct. App. 2004), trans. denied. We have observed that, ultimately, the purpose of child support is the welfare of the child and not the punishment of the noncustodial parent. Billings, 891 N.E.2d at 108.

Subject to two narrow exceptions, court orders for child support remain effective until a court changes them. Whited v. Whited, 859 N.E.2d 657, 662 (Ind. 2007). Retroactive

modification is permitted when: (1) the parties have agreed to and carried out an alternative method of payment which substantially complies with the spirit of the decree, or (2) the obligated parent takes the child into his or her home, assumes custody, provides necessities, and exercises parental control for a period of time such that a permanent change of custody is made. Id. In these situations, the welfare of the child, which is the objective of child support, has not been disregarded. See, e.g., Smith v. Smith, 793 N.E.2d 282 (Ind. Ct. App. 2003). Accordingly, in some rare circumstances, we have recognized that the conduct of the parties with respect to a custodial agreement may create an implied contract. In re Paternity of P.W.J., 846 N.E.2d 752, 760 (Ind. Ct. App. 2006), clarified on rehearing, 850 N.E.2d 1024, (citing Smith, 793 N.E.2d at 285). An implied contract is equally as binding as a written or express contract. Id.

Here, Father testified that Shea moved in with him at age eighteen, taking "all of [her] furniture and all of her clothing." (Tr. 49.) Father paid various expenses, including food, utilities, automobile maintenance and repairs, and some medical and dental costs. Mother paid for some of Shea's expenses, including medical care, cell phone costs and insurance costs (with some lesser contribution from Father). Through Mother's spouse, Shea was able to obtain half-price tuition at Indiana University and health insurance coverage. In order to obtain the tuition discount, Father permitted Mother to claim Shea as her dependent for tax purposes each year despite the decree provision that the exemption would be alternated.

Shea lived in Father's residence from April or May of 2001 until August of 2003, when she transferred from Vincennes University to Indiana University at Bloomington. At that time, the parties had "discussions about where [Shea] would live," and Father agreed to

co-sign Shea's lease. Ultimately, Father paid nine months rent for Shea while she attended her third year of college.

Mother testified in relevant part:

> Question: When Shea was eighteen and done with high school she moved where?
>
> Mother: She moved in with her dad.
>
> Question: And she lived there for how long?
>
> Mother: She was there for approximately two years of VU.
>
> Question: And at that time where did you live?
>
> Mother: I lived in Bloomington four days a week and three days a week I lived here at my mother's house.

(Tr. 21.) Although Mother argues that she did not ever agree that Father could cease making child support payments to her, it is apparent that she acquiesced to the effective change of physical custody. It is also uncontroverted that Father paid significant sums on Shea's behalf and that Mother never raised the issue of non-payment of child support while Shea was with Father. The evidence supports the trial court's determination that an implied contract was formed by the conduct of the parties regarding the custodial arrangement. The trial court did not abuse its discretion by finding Father's child support arrearage to be zero.

II. Attorney's Fees

Mother further contends that the trial court should have awarded her attorney's fees because she had to pursue Father for the payment of child support arrearage. Pursuant to Indiana Code Section 31-16-11-1, the trial court presiding over a child support matter may

order a party to pay a reasonable amount for attorney's fees (emphasis added). The trial court must consider the parties' resources, their economic condition, and their ability to engage in gainful employment. Whited, 859 N.E.2d at 664. The determination regarding attorney's fees is within the sound discretion of the trial court and will be reversed only upon a showing of a clear abuse of that discretion. Id.

Here, Mother presented no evidence with regard to the parties' respective financial positions. Nor did she present evidence of the amount of attorney's fees requested. Accordingly, we find no abuse of the trial court's discretion in its decision not to award Mother attorney's fees.

Conclusion

The trial court did not abuse its discretion by failing to award Mother child support arrearage or attorney's fees.

Affirmed.

RILEY, J., and BRADFORD, J., concur.