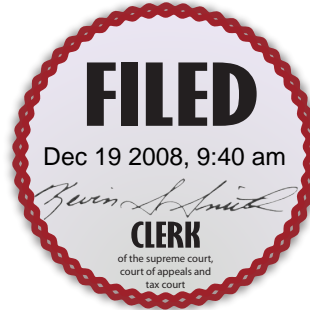


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ATTORNEY FOR APPELLANT:

MICHAEL R. COCHRAN
Princeton, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MARSHANE BONAPARTE,)
)
Appellant-Petitioner,)
)
vs.) No. 42A05-0803-CV-172
)
PHYLLIS BONAPARTE,)
)
Appellee-Respondent.)

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable W. Timothy Crowley, Special Judge
Cause No. 42D02-0304-DR-110

December 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

In this post-dissolution of marriage proceeding, the trial court entered an order resolving several issues relating to contempt and child support in a manner that was adverse to Marshane Bonaparte and favorable to Marshane's ex-wife, Phyllis Bonaparte. On appeal, Marshane raises three issues, which we restate as 1) whether the trial court abused its discretion when it refused to find Phyllis in contempt of court; 2) whether the trial court abused its discretion when it calculated Marshane's child support arrearage; and 3) whether the trial court abused its discretion when it calculated Marshane's weekly child support obligation. Concluding that the trial court abused its discretion when it refused to find Phyllis in contempt, but that the trial court did not abuse its discretion when it calculated Marshane's child support arrearage and weekly child support obligation, we affirm in part and reverse in part.

Facts and Procedural History

At some point in 2003 (the record is unclear on the exact date), the trial court entered an order that, among other things, dissolved the Bonapartes' marriage, granted custody of the Bonapartes' three minor children to Phyllis, and ordered Marshane to pay child support.¹ On June 25, 2007, Marshane filed a motion seeking 1) a contempt finding against Phyllis due to her alleged inclusion of two of the children as dependents on her 2005 and 2006 income tax

¹ The record's failure to disclose the exact date of the dissolution of the Bonapartes' marriage is due to Marshane's failure to include a copy of the dissolution decree in his appendix. Marshane also failed to include copies of other orders and pleadings that would have been helpful in resolving this appeal, such as copies of his motions that were denied by the trial court and from which he now appeals. We remind Marshane's counsel of Indiana Appellate Rule 50(A)(2)(f) and note that but for our strong preference to decide cases on their merits, see Novatny v. Novatny, 872 N.E.2d 673, 677 (Ind. Ct. App. 2007), Marshane's failure to provide us with copies of these documents would have resulted in waiver.

returns and 2) a reduction in his weekly child support obligation due to the alleged emancipation of Mt.B, the Bonapartes' eldest child. On October 31, 2007, Marshane filed a motion seeking a finding that he had fully paid a previous child support arrearage. On November 1, 2007, the trial court conducted a hearing on Marshane's motions and, on January 30, 2008, entered an order that 1) declined to find Phyllis in contempt; 2) found Marshane was \$1,550.00 in arrears with his child support obligation; and 3) modified Marshane's weekly child support obligation to \$106.00 based in part on a finding that Marshane "has carried his burden concerning an abatement of support for [Mt.B.] effective with the date of this order." Appellant's Appendix at 13. The modification, however, actually resulted in a slight increase in Marshane's weekly obligation because the trial court refused to award him some overnight credit that had been awarded previously. On February 26, 2008, Marshane filed a motion to correct error, which the trial court denied three days later. Marshane now appeals.

Discussion and Decision

I. Standard of Review

Marshane argues the trial court abused its discretion when it refused to find Phyllis in contempt and when it calculated his arrearage and weekly child support obligation. This court reviews a trial court's contempt determination for an abuse of discretion. Norris v. Pethe, 833 N.E.2d 1024, 1029 (Ind. Ct. App. 2005). This court also applies an abuse of discretion standard when reviewing a trial court's decision relating to child support matters generally, Decker v. Decker, 829 N.E.2d 77, 79 (Ind. Ct. App. 2005), as well as decisions

involving arrearages and the calculation of weekly child support obligations specifically, see Thompson v. Thompson, 811 N.E.2d 888, 924-26 (Ind. Ct. App. 2004), trans. denied; Naggatz v. Beckwith, 809 N.E.2d 899, 903-04 (Ind. Ct. App. 2004), trans. denied. Abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Norris, 833 N.E.2d at 1029. In determining whether the trial court abused its discretion, we neither reweigh evidence nor judge witness credibility, and consider only the evidence and reasonable inferences supporting the trial court's decision. Id. We also note that Marshane's burden on appeal is relaxed somewhat because Phyllis has not filed an appellee's brief. In such cases, we will not attempt to develop an argument for the appellee and may reverse if the appellant demonstrates prima facie error. McKinney v. McKinney, 820 N.E.2d 682, 685 (Ind. Ct. App. 2005). "Prima facie" means "at first sight, on first appearance, or on the face of it." Id. (quoting Jones v. Harner, 684 N.E.2d 560, 562 n.1 (Ind. Ct. App. 1997)).

II. Propriety of Trial Court's Order

A. Contempt

Turning first to the trial court's refusal to find Phyllis in contempt, we note that some additional background is necessary to resolve this issue. Marshane requested a contempt order based on an allegation that Phyllis had claimed the children as dependents on her 2005 and 2006 income tax returns. Although Marshane has not included a copy of the dissolution decree as part of the record, he has included an order entered after the dissolution decree stating that he is entitled to claim two children as dependents for 2005 and 2006. See

Appellant's App. at 22 (trial court's November 23, 2005, order stating that Marshane "shall be entitled to claim two (2) children, as dependents for taxation purposes, for the tax year 2005/2006"). Moreover, Phyllis admitted during the hearing that she claimed the children as dependents on her tax returns for those years. See Transcript at 55 ("[Trial Court]: And you're saying despite that [(referring to the trial court's order permitting Marshane to claim the children as dependents)] you went ahead and claimed all three kids? [Phyllis]: Yeah.").

The foregoing establishes that the trial court gave Marshane the right to claim two children as dependents on his 2005 and 2006 tax returns, that Phyllis was aware of this right, and that she nevertheless claimed all three children on her tax returns. Such evidence presents a straightforward case for contempt. See Ind. Code § 34-47-3-1; Heagy v. Kean, 864 N.E.2d 383, 386 (Ind. Ct. App. 2007) ("[I]ndirect contempt is the willful disobedience of any lawfully entered court order of which the offender has notice.") (citation omitted), trans. denied. The trial court, however, concluded that Phyllis should not be held in contempt because Marshane's child support payments were in arrears. The trial court acknowledged that its "prior orders made no mention of the necessity for [Marshane] to be current in his child support to claim the children" as dependents, but nevertheless reasoned that the arrearage constituted sufficient grounds to deny Marshane's motion for contempt as well as his right to claim the children because "it is the standard position in most Courts that a non-custodial parent who is not current in his child support obligation would not be entitled to claim the children for those years that the non-custodial parent is not current in his child support." Appellant's App. at 13. The flaw in this reasoning is that the "standard position"

of “most Courts” cannot be the basis for determining whether Marshane’s right to claim the children as dependents is contingent on staying current with child support payments. To be binding, such a contingency should have been included in either the dissolution decree or a subsequent order. Because the trial court failed in this respect, and instead relied on the “standard position” of “most Courts,” Marshane has made a prima facie showing that the trial court abused its discretion when it declined to find Phyllis in contempt for claiming all three children as dependents on her 2005 and 2006 income tax returns.²

B. Arrearage Calculation

Marshane appears to argue that the trial court abused its discretion when it calculated his arrearage because it relied on the clerk’s record of payments.³ To support this argument, Marshane quotes from this court’s observation in Richardson v. Hansrote, 883 N.E.2d 1165, 1173 (Ind. Ct. App. 2008), that the clerk’s payment records “may not always be conclusive and may require extrinsic evidence to be fully understood.” This observation can hardly be read to mean that such records require extrinsic evidence in all cases and, at any rate, Marshane overlooks that because he initially moved the trial court for a finding that he had

² The dissent would conclude the trial court did not abuse its discretion in part because Marshane “does not direct us to evidence that [Phyllis] acted with willful disobedience.” Dissent, slip op. at 10. We think Phyllis’s admission that she was aware of the trial court’s November 23, 2005, order coupled with the fact that she claimed all three children as dependents on her tax returns establishes willful disobedience as a matter of law. Moreover, regarding the dissent’s statement that it is not convinced “there is no rational basis for the trial court’s denial of the contempt motion,” *id.*, we think the trial court’s stated reason for denying the motion – that is, the “standard position” of “most Courts” – is not a rational basis for denying such a motion.

³ Marshane also goes on to argue that the trial court’s calculation was an abuse of discretion because its order “does not indicate where an arrearage was calculated off of.” Appellant’s Brief at 9. Attached to the trial court’s order, however, is a schedule listing Marshane’s arrearage balance as of October 28, 2005, as well as amounts owed and payments made from that date to the date of the January 30, 2008, hearing. Although it is not clear whether these amounts were obtained from the clerk’s record of payments, we will assume that they were for purposes of addressing Marshane’s argument.

paid his arrearage in full, it was his burden to present evidence on this point. Our review of the record, however, indicates that Marshane did not present any such evidence to the trial court.⁴ Marshane's failure to present evidence that he paid his arrearage in full compels a conclusion that the trial court did not abuse its discretion when it calculated his child support arrearage.

C. Child Support Calculation

Marshane argues the trial court abused its discretion when it calculated his child support obligation, specifically amounts relating to his overnight credit, his health insurance credit, and Phyllis's weekly earnings. Turning first to Marshane's overnight credit, the trial court awarded him credit for 65 overnights based on a finding that he exercised "significantly less visitation with his children" than the 140 overnights that he initially had been awarded. Appellant's App. at 11. Marshane and Phyllis presented conflicting evidence regarding how many overnights the children actually spent with their father during the previous year. Marshane sought credit for 140 overnights, which was the amount the trial court had initially awarded him (presumably pursuant to the dissolution decree), see respondent's exhibit C, but Phyllis testified that Marshane spent 34 overnights, the majority of which were spent with only one child, see tr. at 59-60. Because the trial court's decision to award Marshane with 65 overnights is within the range of the evidence presented, it follows that the trial court did not abuse its discretion when it calculated Marshane's overnight credit.

Nor did the trial court abuse its discretion when it calculated Marshane's health

⁴ It is possible that Marshane included evidence of payment in his October 31, 2007, motion, but he did not include a copy of that motion in his appendix. See supra, note 1.

insurance credit and Phyllis's weekly earnings. Regarding the health insurance credit, Marshane argues he should have received a weekly credit of \$69.69, but overlooks that he introduced a worksheet indicating a weekly credit of \$46.46. See Respondent's Ex. B. That the trial court awarded him this amount is invited error at best, and hardly an abuse of discretion. Regarding Phyllis's weekly earnings, we acknowledge that Marshane's calculation of \$256.35 is consistent with a strict reading of Phyllis's testimony, see tr. at 49-54, but the trial court's decision to calculate Phyllis's weekly earnings as slightly less than this amount, \$243.00, is apparently attributable to the fact that Phyllis's testimony regarding her weekly earnings was based on estimates of hours worked among four jobs. We cannot say that the trial court's decision to calculate Phyllis's weekly earnings in an amount slightly less than the estimates she provided constitutes an abuse of discretion.

Conclusion

The trial court abused its discretion when it declined to find Phyllis in contempt, but did not abuse its discretion when it calculated Marshane's child support arrearage or when it calculated Marshane's weekly child support obligation. We therefore affirm the trial court's calculation of the arrearage and weekly child support obligation, but remand with instructions that the trial court fashion an appropriate sanction to remedy Phyllis's contempt. On remand, the trial court need not conduct a hearing if it so chooses.

Affirmed in part, reversed in part, and remanded with instructions.

MAY, J., concurs

NAJAM, J., concurs in part and dissents in part with separate opinion.

**IN THE
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Appellant,)	
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vs.)	No. 42A05-0803-CV-172
)	
PHYLLIS BONAPARTE,)	
)	
Appellee.)	

NAJAM, Judge, concurring in part and dissenting in part.

I fully concur with the majority on the issues of the trial court’s calculation of Marshane’s child support obligation and child support arrearage. But with regard to the trial court’s denial of Marshane’s petition for contempt, I respectfully dissent.

A determination of whether a party is in contempt of court is a matter committed to the trial court’s sound discretion, and we will reverse a trial court’s decision in that regard only for an abuse of discretion. Kicken v. Kicken, 798 N.E.2d 529, 533 (Ind. Ct. App. 2003). Our review is limited to considering the evidence and reasonable inferences drawn therefrom that support the trial court’s judgment. Piercey v. Piercey, 727 N.E.2d 26, 31 (Ind. Ct. App. 2000). Where the trial court declined to find a party in contempt, we may reverse “only where there is no rational basis for the trial court’s action.” Heagy v. Kean, 864 N.E.2d 383, 386 (Ind. Ct. App. 2007) (quoting Clark v. Clark, 404 N.E.2d 23, 37 (Ind. Ct. App. 1980)) (emphasis added).

In order to be punished for contempt of a court's order, there must be an order commanding the accused to do or refrain from doing something. Piercey, 727 N.E.2d at 32.

To hold a party in contempt for a violation of a court order, the trial court must find that the party acted with "willful disobedience." Id. Here, Marshane appeals from the trial court's denial of his motion for contempt. Marshane had the burden to prove both (1) that Phyllis violated the terms of the decree and, (2) that she acted with willful disobedience. Thus, Marshane appeals from a negative judgment.

Marshane does not direct us to any evidence in the record to support his contentions on this issue. Even assuming that Phyllis violated the decree, Marshane does not direct us to evidence showing that Phyllis acted with willful disobedience.

The determination of whether a party willfully disobeyed an order is left to the sound discretion of the trial court. Heagy, 864 N.E.2d at 386. During the hearing, Phyllis offered an explanation for her actions, and the trial court weighed the evidence and judged the credibility of the witnesses in determining whether Phyllis acted with willful disobedience. I cannot say that the trial court abused its discretion, nor can I say that there is no rational basis for the trial court's denial of the contempt motion. See id.

For these reasons, I would hold that the trial court did not abuse its discretion when it denied Marshane's petition for contempt.