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**IN THE  
COURT OF APPEALS OF INDIANA**

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WESTBROOK SCOTT ALLEN, )

Appellant-Petitioner, )

vs. )

GLORIA JENKINS, )

Appellee-Respondent. )

No. 32A01-0606-JV-230

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APPEAL FROM THE HENDRICKS SUPERIOR COURT  
The Honorable David H. Coleman, Special Judge  
Cause No. 32D02-0511-JP-2

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**December 29, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Appellant-Petitioner Westbrook Scott Allen (“Father”) appeals an order of the Hendricks Superior Court on Father’s petition to establish paternity and to determine custody and support of C.A., Father’s child with Appellee-Respondent Gloria Jenkins (“Mother”). We reverse the custody and child support provisions of the order and remand for further proceedings.

### **Issues**

Father presents five issues for review. We address the dispositive issue:

- I. Whether the trial court applied the appropriate legal standard in the custody determination.

Because it is likely to arise on remand, we also address the following issue:

- II. Whether the trial court properly imputed income to Father based upon the earnings of his wife.

### **Facts and Procedural History**

C.A. was born on December 4, 1995, at which time Father signed a Paternity Affidavit. Mother and Father lived together until C.A. was two and one-half years old. Thereafter, Mother and Father informally agreed upon the division of parenting time and child support.

On July 27, 2004, Father filed a Petition to Establish Paternity, Custody and Support. He sought to be awarded the legal and physical custody of C.A. Evidence was heard on January 5, 2006 and on April 13, 2006. On May 5, 2006, the trial court ordered that Mother retain custody of C.A. and that Father have parenting time according to the Indiana Parenting Time Guidelines and pay child support of \$153.00 weekly.

Father filed a motion to correct error, which was deemed denied. He now appeals.

## **Discussion and Decision**

### I. Custody Standard

Father contends that the trial court applied an incorrect legal standard in determining custody, evidenced by the language of the custody order, as follows:

The petitioner failed to present egregious evidence showing that the respondent is unfit, or that she is unable to care for [C.A.]. A change of physical custody from the respondent to the petitioner would completely disrupt [C.A.'s] life. A change of physical custody is not justified merely because the petitioner decided to move to the Carmel area and it will be more convenient for him to have [C.A.] in his home most of the time. Additionally, the petitioner's household will be under stress when the new baby arrives.

(App. 6.) A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. In re the Marriage of Nienaber, 787 N.E.2d 450, 454 (Ind. Ct. App. 2003).

Indiana Code Section 31-14-13-1 provides in pertinent part: "A biological mother of a child born out of wedlock has sole legal custody of the child, unless a statute or court order provides otherwise[.]" Because Mother had the sole legal custody of C.A. for ten years, a modification of custody standard, rather than an initial determination of custody standard, is appropriate. See In re Paternity of Winkler, 725 N.E.2d 124, 128 (Ind. Ct. App. 2000) (holding that a custody modification standard applied when the mother had custody of an out-of-wedlock child for twelve years because "the same concerns about stability and continuity present in sole and joint custody modifications are present"). But see Hughes v. Rogusta, 830 N.E.2d 898, 901 (Ind. Ct. App. 2005) (finding that the custody modification standard did not apply where the father did not acquiesce in the mother's custody but immediately filed to establish paternity and determine custody after the mother moved out).

Indiana Code Section 31-17-2-21 provides that a court may not modify a child custody order unless (1) modification is in the child's best interests and (2) there is a substantial change in one of several factors that a court may consider in initially determining custody. Those factors include the following: (1) The child's age and sex; (2) the wishes of the child's parent or parents; (3) the child's wishes, with more consideration given to the wishes of a child who is at least fourteen years old; (4) the child's interaction and interrelationship with his or her parents, siblings, and any other person who may significantly affect the child's best interests; (5) the child's adjustment to his or her home, school, and community; (6) the mental and physical health of all individuals involved; (7) evidence of a pattern of domestic or family violence by either parent; and (8) evidence that the child has been cared for by a de facto custodian. Ind. Code § 31-17-2-8. Both parents are presumed equally entitled to custody when the initial custody determination is made. Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). On the other hand, a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered. Id.

However, the petitioner is not, as the trial court here suggested, required to establish the unfitness of the custodial parent by presenting "egregious evidence." Because it appears that the trial court did not utilize the appropriate legal standard in making its custody determination, the judgment is clearly erroneous and we reverse the custody order and remand for further proceedings.

## II. Imputation of Step-Parent Income

Because it will likely arise on remand, we address Father's contention that the trial court improperly imputed \$300.00 of his current wife's salary as weekly income available to him for the support of C.A.

The Indiana Child Support Guidelines ("Guidelines") broadly define "weekly gross income" as actual weekly gross income of the parent if he or she is employed to full capacity, potential income if unemployed or underemployed, and imputed income based upon "in-kind" benefits. Ind. Child Support Guideline 3(A)(1). In-kind benefits a parent receives "that reduce his or her living expenses" may be imputed as income. Ind. Child Support Guideline 3(A), cmt. 2.

A trial court may determine, after consideration of an obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community, that he or she is voluntarily under-employed and should have potential income attributed to him or her. Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001). The trial court's decision to impute income may discourage a parent from taking a lower-paying job in order to avoid the payment of child support or fairly allocate the support obligation when one parent chooses to be unemployed or underemployed because of additional household income. Id. Nevertheless, there is no basis for determining that a parent is underemployed when the level of his or her earnings has remained relatively constant over a number of years. Id. at 626.

The circumstances present here do not indicate that Father is "voluntarily underemployed" because of additional household income, as contemplated by the Guidelines. Nor does the evidence suggest that he receives a reduction in his living expenses because of

the receipt of in-kind income. His spouse is employed but has two children to support, i.e., her children with Father. There is no indication that she is able to contribute excess earnings to reduce Father's obligation to pay his share of household expenses. Moreover, the Guidelines do not contemplate that a step-parent is directly responsible for the support of a step-child. Here, there is no legal justification for the imputation of the step-parent's income to Father for the support of C.A.<sup>1</sup>

Reversed and remanded.

VAIDIK, J., and BARNES, J., concur.

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<sup>1</sup> We also observe that the trial court's calculation of Father's support obligation did not comply with Child Support Guideline 3(A)(4), which states: "In determining a support order, there should be an adjustment to Weekly Gross Income of parents who have natural or legally adopted children living in their households, and who were born or adopted subsequent to the prior support order."