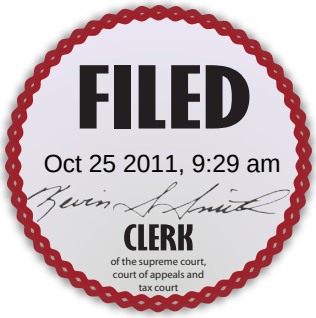

APPELLANT PRO SE:

DAVID L. FIST
Cooper City, Florida

IN THE
COURT OF APPEALS OF INDIANA

DAVID LEE FIST,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 47A05-1010-DR-674
	)	
CARRI MULLIS,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable J. David Holt, Special Judge
Cause No. 47C01-9412-DR-956

October 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

In a 1996 divorce decree, David Lee Fist ("Father") was ordered to pay Carri Mullis ("Mother") $176 in weekly child support for their two sons, then ages ten and three. Fourteen years later, Father filed a petition for modification of support, citing as substantial changes his prolonged unemployment and the older son's death.

After a hearing, the trial court reduced Father's weekly child support obligation from $176 to $60. Father now appeals, claiming that his reduced support obligation should have been made retroactive to the date of his petition; that the trial court lacked sufficient documentary evidence to determine Mother's weekly income; and that the trial court violated his due process rights as well as the Indiana Child Support Guidelines by modifying the original divorce decree concerning the younger son's health insurance. Finding no reversible error, we affirm.

Facts and Procedural History

Father and Mother were married in 1984 in Florida. They had two children of the marriage, M.F. (born April 1, 1986) and N.F. (born December 30, 1992). At some point, Mother relocated to Indiana. On December 28, 1994, Mother filed for dissolution of the marriage in Indiana. Following a February 9, 1996 hearing, the trial court entered a dissolution decree that awarded Mother physical custody of the children and Father five weeks of visitation per year. Father was ordered to pay $176 in weekly child support. In 2004, M.F. turned eighteen and did not attend college. In 2007, M.F. moved to Florida to

live with his Father. N.F. continued to live in Indiana with Mother. In September 2008, M.F. died.

As of December 31, 2009, Father was unemployed. On April 21, 2010, he filed a petition for modification of child support, citing as substantial changes in circumstances his unemployment and M.F.'s death.

The trial court held a hearing on July 30, 2010. Both parties proceeded pro se, and the only exhibits introduced were Father's unemployment benefits receipts. The trial court examined both parties and compiled a child support worksheet. On August 30, 2010, the trial court entered a modification order, reducing Father's weekly support obligation. In its findings, the trial court stated in part,

> 1. The Decree of Dissolution was entered on February 23, 1996, and it has not been modified previously. Among other things, the Decree awarded Mother the custody of two minor children and ordered Father to pay child support. The older child is now deceased. The younger child [N.F.], is now a senior in high school.
>
> 2. For many years Father was employed by Citigroup but he was laid off on December 31, 2009. He has not found either full time employment or part time employment. He has exhausted savings and receives unemployment insurance. Mother currently is employed only part time.
>
> 3. The foregoing constitutes a continuing and substantial change in circumstances warranting a modification of the child support previously ordered.
>
> 4. Neither Father nor Mother currently has medical insurance, but Mother's present husband has provided medical insurance. The evidence does not include the amount of the premium paid by him for [N.F.]. Father is now ORDERED to provide health care insurance for [N.F.] when such health care insurance is available at a reasonable cost from any employer of Father.

> 5. The Court has prepared a child support worksheet based on the limited evidence provided at the hearing. A copy of the child support worksheet is attached. The worksheet indicates that the child support guidelines calculate the child support as $52.00 per week. The Court, however, is considering that Mother's spouse is providing health care insurance for [N.F.]. According[ly], the Court now modifies the child support to $60.00 per week beginning September 3, 2010.

Appellant's App. at 15-16.

Father now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Father challenges the trial court's determination of his modified support obligation. Child support orders may be modified "upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable." Ind. Code § 31-16-8-1(b)(1). Ordinarily, we review a trial court's modification of a child support order for an abuse of discretion. *Burke v. Burke*, 809 N.E.2d 896, 898 (Ind. Ct. App. 2004). In conducting such review, we neither reweigh evidence nor judge witness credibility; rather, we consider only the evidence and reasonable inferences most favorable to the judgment. *Id*. Here, Mother has failed to file an appellee's brief. As such, we will not undertake the burden of developing arguments for her and may reverse upon a showing of prima facie error. *Strowmatt v. Rodriguez*, 897 N.E.2d 500, 502 (Ind. Ct. App. 2008). Prima facie error is defined as error "at first sight, on first appearance, or on the face of it." *Id*. (citation and quotation marks omitted).

At the outset, we note that both Father and Mother proceeded pro se in all the modification proceedings. It is well settled that pro se litigants are held to the same standard as are licensed lawyers. *Goossens v. Goossens*, 829 N.E.2d 36, 43 (Ind. Ct. App. 2005).

I. Effective Date of Modified Support Obligation

Father contends that the trial court's decision not to make its modification order retroactive to the date of the filing of the modification petition "was unfair, illogical and with unlawful effect." Appellant's Br. at 21. "A trial court has discretion to make a modification of child support relate back to the date the petition to modify is filed, *or any date thereafter*." *Becker v. Becker*, 902 N.E.2d 818, 820 (Ind. 2009) (emphasis added). Father filed his petition for modification on April 21, 2010. Therefore, the trial court was free to make a modification of support payments effective on that date or any date thereafter.[1] Although Father asserts that he was up-to-date on his support payments as of the date he filed his petition, the trial court noted in its findings that "No evidence was submitted to permit a calculation of the child support arrearage." Appellant's App. at 16. As a result, the trial court merely "admonished [him] that he is obligated to pay such child support arrearage without delay." *Id*. Considering the vacuum of information presented at the hearing, the trial court merely chose to apply its order prospectively.

Father claims that the trial court's refusal to apply its August 30, 2010 modification order retroactively to April 21, 2010, resulted in an obligation that impermissibly exceeded

[1] To the extent Father claims that he "overpaid" support for six years after his oldest son reached majority, we note that modification was available to him during that time and that overpayment is generally treated as a gratuity to the children rather than a credit. *Brown v. Brown*, 849 N.E.2d 610, 615 (Ind. 2006).

the 50% limitation on garnishment of his disposable earnings. 15 U.S.C. § 1673(b)(2); Ind. Code Ch. 31-16-15. Father asserts that he was up-to-date on his support obligation as of April 2010 and that any arrearage covers only the four months between April 21 and September 3, 2010. In 1996, the trial court issued a garnishment order to Father's former employer, Citigroup, requiring the employer to withhold $176 per week from his wages for payment of child support. As of December 2009, when Father ceased to be employed at Citigroup, the garnishment order was no longer applicable. Thus, during the four-month timeframe at issue here, no garnishment order was in place.

In short, the record is scant in this case. The parties, each proceeding pro se, were ill-prepared for the hearing. The trial court did its best to calculate the parties' incomes and obligations based on very little supporting evidence. In declining to apply the modification order retroactively, the trial court acted within its discretion. We find no error here.[2]

II. Mother's Weekly Income

Father next argues that the trial court abused its discretion in determining Mother's weekly gross income without any documentary evidence to support her testimony. Again, we note that Mother and Father each proceeded pro se and, as such, were held to the standard of a licensed attorney. *Goossens*, 829 N.E.2d at 43. Although Father complains about the lack of documentary evidence to support Mother's testimony regarding her income, neither he nor

[2] We note that Father cites an unpublished, noncitable case in attempting to distinguish between circumstances that justify a prospective application versus a retroactive application of a modification order. Appellant's Br. at 13. See Ind. Appellate Rule 65(D) ("Unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppels, or law of the case.").

Mother provided the trial court with a child support worksheet as required under Indiana Child Support Guideline 3(B)(1).[3] To the extent Father claims that he had a worksheet available and that the trial court refused to take it, we note that he failed to offer it during the hearing, and that it was only when the trial court noted the lack of any worksheets at the conclusion of the hearing that Father first mentioned his worksheet. By that time, the trial court had already taken notes and was prepared to draw up its own worksheet based upon the evidence previously elicited during the hearing. Such evidence included Mother's testimony about her income, to which Father did not object. Thus, because the evidentiary vacuum of which Father now complains is partially due to his own failure, he cannot now be heard to complain about it. *See Batterman v. Bender*, 809 N.E.3d 410, 412 (Ind. Ct. App. 2004) (stating that a party may not take advantage of error he invites, and such error is not subject to review by this Court).

III. Health Insurance

Father also challenges the trial court's treatment of N.F.'s health insurance. The August 2010 modification order shifted from Mother to Father the responsibility to pay for N.F.'s health insurance. However, because of Father's unemployment, the trial court found that Mother's current husband would continue to cover N.F.'s insurance through his employer's plan and that $8 per week would be added to Father's $52 weekly modified obligation to account for N.F.'s insurance until Father could obtain insurance through a new

[3] The trial court closed the hearing by stating, "One of the things that a court always appreciates is individuals who are representing themselves to come in with a child support worksheet that's already been prepared. And neither of you ha[s] done that." Tr. at 24.

employer. Appellant's App. at 15. He challenges the trial court's action on the basis of due process and the Indiana Child Support Guidelines.

A. Due Process

Father claims that the trial court violated his due process rights when it shifted to him the responsibility of paying for N.F.'s health insurance. Due process requires reasonable notice and an opportunity to be heard before support obligations are modified. *Trigg v. Al-Khazali*, 881 N.E.2d 699, 702 (Ind. Ct. App. 2008). A party is entitled to advance notice that an issue is going to be tried and determined by a court. *Carter v. Dayhuff*, 829 N.E.2d 560, 564 (Ind. Ct. App. 2005). Father essentially claims that he did not know that N.F.'s health insurance would be considered as part of the modification order. However, our supreme court has held that health insurance is "in the nature of support." *Cubel v. Cubel*, 876 N.E.2d 1117, 1119 (Ind. 2007) (citation and quotation marks omitted). Father was the one who filed a petition to modify child support and thereby re-opened all matters pertaining to N.F.'s support. Thus, N.F.'s health insurance became part of the total support equation. Consequently, he cannot now complain that he was deprived of due process on that basis.

B. Deviation from Child Support Guidelines

Finally, Father argues that the trial court's addition of $8 to his modified weekly support obligation for N.F.'s health insurance was "random" and resulted in an unsupported deviation from the Indiana Child Support Guidelines. Child Support Guideline 3(F)(2) states that if, after considering statutory factors, the trial court finds that the guideline amount is unjust or inappropriate, the court may state a factual basis for deviating from the guideline

amount. Indiana Code Section 31-16-6-4(a) states, "A child support order must require either parent or both parents to provide medical support for the child through health insurance coverage if the health insurance coverage is available to the parent at a reasonable cost."

Here, the trial court took into account the scant evidence submitted by the parties and reduced Father's weekly support obligation by approximately 65%. Notwithstanding, the trial court shifted the responsibility of N.F.'s health insurance prospectively to Father. However, in recognition of Father's current unemployment and resulting lack of access to insurance at a reasonable cost, the trial court ordered that until Father could obtain health insurance through future employment, Mother would continue to provide N.F.'s insurance through her new husband's policy and Father would pay an additional weekly sum of $8 in lieu of buying the insurance himself. Father admitted during the hearing that he had not contributed to any of N.F.'s past medical expenses despite the provision in the original decree requiring him to contribute 60%. Thus, in reality, Mother had shouldered both the health insurance cost and 100% of the unreimbursed medical expenses for N.F. Tr. at 23. The trial court considered Mother's part-time employment and Father's unemployment and came up with a solution that greatly reduced Father's weekly obligation, yet built into that obligation a small sum for health insurance. Essentially, the trial court provided Father with access he otherwise lacked: access to healthcare for N.F. at a reasonable cost of roughly $35 per month. Findings 4 and 5 explain the shift of responsibility for the insurance, the unemployment concern, and the plan for providing N.F. with inexpensive coverage in the interim. We find no error here.

In sum, Father has failed to establish prima facie error in any respect. As such, we affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.