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IN THE
COURT OF APPEALS OF INDIANA

LORI SHELDON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 34A02-0910-CV-977
	)	
WILLIAM SHELDON,	)	
	)	
Appellee.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable George A. Hopkins, Judge
Cause No. 34D04-0605-DR-389

February 11, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Lori Sheldon (Mother) appeals the trial court's order denying her petition for modification of child support.

We affirm.

ISSUE

Whether the trial court erred by denying Mother's petition for modification of her child support.

FACTS

Mother and William Sheldon ("Father") were married on December 25, 1989. Their daughter K. was born October 7, 1991, and their son J. was born November 16, 1995. On April 17, 2003, their marriage was dissolved, and the decree incorporated their agreement providing that the parties would have joint physical custody and neither would pay child support.[1] Subsequently, on December 8, 2006, Father was awarded custody of both children, and Mother was ordered to pay child support. Thereafter, on November 8, 2007 (when K. was sixteen, and J. was twelve), the trial court ordered that pursuant to the agreement of the parties, Father would have custody of J.; Mother would have custody of K.; Father would have no overnight visitation with K., but Mother would "encourage K[.] to visit" Father; and Father would pay child support of $39.00 per week. (App. 28).

On February 27, 2009, Father filed a pro se petition to modify, alleging that substantial change had occurred. His subsequent verified petition asserted that he had

[1] The agreement reflected that Father and Mother were both employed at Delphi-Delco Electronics, and the child support work sheet indicated their weekly gross incomes to be nearly identical.

lost his job, he sought overnight visitation with K., and his weekly income was unemployment benefits. The trial court heard evidence on April 1, 2009. On April 6, 2009, the trial court issued its order, granting Father overnight visitation with K. The trial court also found that Father was "not employed," and had not worked "since September 30, 2008, when his position at Delphi was eliminated." (App. 55). After considering Father's "net separation payment of $25,000.00" from Delphi, and his unemployment benefits of $390.00 per week, and Mother's employment "at an hourly rate of $28.00," it prepared child support obligation worksheets and ordered Mother to pay child support of $47.00 per week. *Id.*

Mother filed a motion to correct error on April 21, 2009, arguing that the trial court erred in giving Father credit in its child support calculation for overnight visitation with K. On May 8, 2009, the trial court denied Mother's motion, finding that evidence proved that Father wanted to have K. visit with him, but K. -- who "resides with" Mother -- was "often allowed to decide if or when the visits will occur"; that Father had "not engaged in any conduct that would cause the Court to determine that he should have fewer overnight visits than are provided in the Indiana Parenting Time Guidelines"; and that "[d]ecisions pertaining to overnight visits [were] being made outside the control of" Father. (App. 65).

Six days later, on May 14, 2009, Mother filed the instant petition to modify the support order. She alleged a "substantial and continuing change in conditions justifying

the modification to decrease the child support." (App. 68). On June 19, 2009, the trial court heard evidence.

Father testified that on April 27, 2009, he began a job making $23.00 per hour, but he had "turned in [his] notice" because he "c[ould]n't afford $250.00 a week in gas and five hours a day on the road" commuting to the job in Spencer from his home in Kokomo. (Tr. 26, 27). Father testified that thereafter, he would be employed at Purdue, but he did not know what his salary or benefits there would be. Father also testified that despite the current order granting him overnight visitation with K., she had not stayed overnight at his residence but only visited – "[his] daughter's choice, not [his]." (Tr. 25).

K. testified that although the court had granted Father overnight visitation, she "d[id]n't stay" overnight. (Tr. 39). She visited him, but "not regular at all," because she was "busy." (Tr. 40, 41). K. admitted that Father had asked her to spend the night, and she "could" do overnight visits, but "that it doesn't happen." (Tr. 45, 44).

On June 24, 2009, the trial court issued its order. It found that Father was "now employed" in "his second job since he left his former employment in September of 2008," a job which "[h]opefully . . . will be permanent." (App. 77). The trial court noted that "[w]hile this changed circumstance may be substantial," it could not "say at this time that the changed circumstance [was] continuing." *Id.* The trial court further held that even if it considered evidence of changed financial circumstances, such had occurred in significantly less than the statutory one-year period. The trial court then denied Mother's petition to modify support.

DECISION

Mother sought a modification of the existing child support order pursuant to Indiana Code section 31-16-8-1. The statute provides, in relevant part, that modification of a child support order

> may be made only
> (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
> (2) upon a showing that:
> (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
> (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was set.

Ind. Code § 31-16-8-1(b) (emphasis added). Mother "admits that she does not fall within the requirements" of the latter section, inasmuch as less than two months "had passed since the last support modification." Mother's Br. at 6. She argues that the trial court "erred in not finding a substantial and continuing change in circumstances since the last court order." *Id.*

As the petitioner, Mother "had the burden here of establishing changed circumstances so substantial and continuous as to make the terms of the" two-month old order "unreasonable." *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 940 (Ind. 2005). Whether the standard of review for the trial court's decision on a petition for modification of a child support order "is phrased as 'abuse of discretion' or 'clear error,'" *see id.* at n.3 (citing "cases from both [our Supreme] Court and the Court of Appeals that phrase the standard of review each way."), we give "considerable deference to the findings of the

trial court, including findings of 'changed circumstances' within the meaning of Indiana Coe section 31-16-8-1." *Id.* Further, we review the evidence most favorable to the judgment without reweighing the evidence or reassessing the credibility of witnesses. *In re Marriage of Kraft*, 868 N.E.2d 1181, 1185 (Ind. Ct. App. 2007).

The trial court found that Father's current employment was a "changed circumstance" that "may be substantial," (app. 77, emphasis added), but it did not find that "at this time . . . the changed circumstance" was a "continuing" one. (App. 77). Mother argues that this finding cannot be sustained because "nothing in the record" indicates that Father's "new income may not be 'continuing in nature.'" Mother's Br. at 7.

The record contains only evidence of Father's income at the position in Spencer – the position from which he testified that he had resigned; there is no evidence of his income from the subsequent employment. Further, our Supreme Court's discussion in *MacLafferty* suggests that when the facts fail to support the 20+% financial-change-after-more-than-a-year prong of the modification statute (*i.e.*, I.C. § 31-16-8-1(b)(2)), then the financial change itself would not constitute the "changed circumstances . . . substantial and continuing" prong, I.C. § 31-16-8-1(b)(1)). 829 N.E.2d at 942. Moreover, it was the trial court that heard Father's testimony about his employment circumstances, and we give "substantial weight" to its credibility assessment and "inferences." *Id.* at 941. It is true that at the time of the April 24, 2009 order, Father was unemployed; but the evidence at the subsequent hearing showed Father had been employed from October 1, 2008, until

late April of 2009; he was employed from late April until June by one employer, in a position which required his expenditure of $250.00 per week for gasoline; and was then employed by a second employer for a short period before the June 24, 2009 denial of Mother's petition for modification. There was no evidence as to the terms of Father's second employment or the likelihood of continued employment there. Accordingly, we find that the evidence supports the trial court's reasonable inference that Father's employment in June did not establish a "continuing" change in circumstances. (App. 77).

Mother also argues that the trial court erred in not finding Father's "lack of overnight visitations with K.[] a 'substantial' and 'continuing' change as he previously received a significant 'parenting time credit' towards his child support," but he "was not having overnight visits with his daughter and therefore he should not have received the credit." Mother's Br. at 6, 7. We are not persuaded.

Mother asserted the trial court's error in this regard in her May 2009 motion to correct error; the trial court expressly found that Father's lack of overnight visitation with K. was a matter beyond his control; and Mother did not appeal that decision. The doctrine of res judicata bars litigation of an issue where there has been a final adjudication on the merits of the same issue between the same parties. *Counceller v. Counceller*, 810 N.E.2d 372, 376 (Ind. Ct. App. 2004). Mother did not appeal the earlier trial court modification order, which renders the matter res judicata. *Id.* Further, the unappealed order denying Mother's motion to correct error in that regard also expressly held that Mother was "correct . . . that historically the father has not enjoyed ninety eight

overnight visits." (App. 65). The order is dated May 8, 2009; hence, evidence of any lack of such overnight visitation in June of 2009 could not constitute a change that would warrant modification.

We find no error in the trial court's order that denied Mother's motion for modification of the April 6, 2009 order.

Affirmed.

KIRSCH, J., and MAY, J., concur.