

Julie Collins (Mother) appeals the trial court's modification of Theodore Collins's (Father) child support obligation. Mother presents four issues for our review, which we consolidate and restate as the following:

1. Did the trial court abuse its discretion in imputing income of only \$9.00 per hour to Father, thereby resulting in a reduction of Father's child support obligation from \$250 per week plus a percentage of additional income to \$69.48 per week?
2. Did the trial court abuse its discretion in failing to make an adjustment to the tax dependency exemptions?

Father cross-appeals, claiming the trial court incorrectly calculated the child support he owed by failing to take into account that the child support modification was ordered retroactive to the date of his petition to modify.

We affirm and remand.

Mother and Father's marriage was dissolved on December 27, 2004. Mother was awarded custody of the parties' three children: A.C., born June 21, 1991; J.C., born December 5, 1993; and Je.C., born March 31, 1995. At the time of entry of the dissolution decree, Father agreed to pay bi-weekly child support of \$728.72. In addition, Father was entitled to claim the oldest child as an exemption for federal and state income tax reporting purposes, and Mother was entitled to claim the youngest child as an exemption for federal and state income tax reporting purposes each year. The parties alternated claiming the exemption for the middle child, with Father claiming the middle child in even-numbered years and Mother claiming the middle child in odd-numbered years.¹ On August 13, 2007,

¹ The manner in which the parties divided the tax dependency exemption was set forth in the property settlement agreement that was incorporated into the dissolution decree.

the trial court entered an order reducing Father's child support obligation to \$250.00 per week beginning on March 2, 2007. In addition, Father was to contribute as part of his support obligation twenty percent of his overtime wages, bonuses, and all other income other than base pay.

The amounts of Father's prior child support obligations were based on his employment at Subaru of Indiana, where he worked for over ten years earning on average \$55,000 to \$59,000 per year. On January 23, 2008, Father terminated his employment with Subaru. At that time, Father, his current wife, and their nine-month-old child moved to Overton Park, Kansas, where Father's current wife obtained a position at Kansas University. Prior to and upon his move to Kansas, Father attempted to find employment equal to what he had at Subaru, submitting ten to twelve different job applications. Father's employment opportunities were limited by the fact that Father is a blue-collar laborer and he has a prior felony conviction. Father eventually obtained employment earning \$12.00 per hour, but he was terminated from that job after four days when his employer learned of his prior felony conviction. Thereafter, Father obtained employment at a rate of \$9.00 per hour. Father worked at this job for three weeks. Because child care expenses for Father and his current wife's child were nearly equal to his income, Father and his current wife decided that Father would stay home and provide child care for their infant daughter, thereby saving them the \$287.00 per week child care expense.

On March 14, 2008, Father filed a petition for modification of his child support, requesting that his child support be calculated based on an imputed income of \$9.00 per hour.

The trial court held a hearing on the matter of child support on April 3, 2008 and on May 8, 2008. On June 9, 2008, the trial court entered an order reducing Father's child support obligation to \$69.48 per week retroactive to the date Father filed his petition for modification. The trial court's calculation of Father's reduced child support obligation is based on imputed income to Father of \$9.00 per hour.

1.

Mother argues that the trial court abused its discretion in modifying Father's child support obligation for his three teenage children from \$250.00 per week plus twenty percent of irregular income to \$69.48 per week. We will reverse a decision regarding modification of child support only where it is clearly against the logic and effect of the facts and circumstances that were before the trial court. *Carter v. Dayhuff*, 829 N.E.2d 560 (Ind. Ct. App. 2005). We do not reweigh the evidence or judge the credibility of the witnesses upon review; rather, we consider only the evidence most favorable to the judgment and the reasonable inferences to be drawn therefrom. *Id.*

Modification of child support is governed by Ind. Code Ann. § 31-16-8-1 (West, Premise through 2008 2nd Regular Sess.) and provides that modification may be made:

- (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 filed.

The party seeking modification has the burden to show changed circumstances that justify a modification of support. *Abouhalkah v. Sharps*, 795 N.E.2d 488 (Ind. Ct. App. 2003).

Mother's arguments challenge the trial court's decision to impute income to Father of only \$9.00 per hour. Specifically, Mother argues that the trial court should have found Father to be voluntarily underemployed and should have imputed income to him in an amount equal to what Father earned while employed at Subaru. Mother also argues that the trial court should have taken into account that Father's new wife provides for Father and that Father's unilateral actions financially benefit himself and his current spouse to the expense of his three teenage children from his previous marriage.

The Child Support Guidelines provide that if a parent is voluntarily underemployed, the trial court must calculate child support by determining the parent's potential income. Ind. Child Support Guideline 3(A)(3). Potential income is to be determined upon the basis of "employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community." *Id.* The Guidelines caution, however, that the trial court must employ "a great deal of discretion" in its determination of the amount of income to impute to a parent. Ind. Child Supp. G. 3, cmt. 2c. Trial courts must keep in mind that "child support orders cannot be used to 'force parents to work to their full economic potential or make their career decisions based strictly upon the size of potential paychecks.'" *Abouhalkah v. Sharps*, 795 N.E.2d at 491 (quoting *In re Paternity of E.M.P.*, 722 N.E.2d 349, 351-52 (Ind. Ct. App. 2000)).

One purpose for including potential income is to “discourage a parent from taking a lower paying job to avoid the payment of significant support.” Child Supp. G. 3(A), cmt. 2c. Here, Father sought a modification of his child support obligation because of changed circumstances, i.e., his current wife obtained new employment in a different state where Father has been unable to obtain employment equivalent to what Father earned previously. Telling is the fact that Father is currently unemployed, but nevertheless voluntarily requested that the trial court impute income to him of \$9.00 per hour. This figure is based on what Father demonstrated he is capable of earning given his capabilities, occupational qualifications, and prevailing job opportunities where he now lives. The trial court did not abuse its discretion in determining that Father’s current earning capacity is \$9.00 per hour.

Mother also argues that the trial court should have considered the fact that Father’s current wife is supporting him² and that his unilateral decision to be a stay-at-home parent for his infant child serves to benefit Father and his current wife to the detriment of his three children from his prior marriage. Mother thus argues that the trial court should have imputed additional income to Father to reflect these considerations. We recognize that imputing income to a parent also serves to “fairly allocate the support obligation when one parent remarries and, because of the income of the new spouse, chooses not to be employed.” Child Supp. G. 3(A), cmt. 2c. Here, however, Father’s choice to be unemployed is not based upon his current wife’s income, as she does not have sufficient affluence to obviate the need for Father to work. *See* Child Supp. G. 3(A), cmt. 2d. Rather it is based on his inability to

² Father testified that his current wife earns \$65,000 per year.

secure employment at a level high enough to provide for his infant daughter as well as his three children from his prior marriage. The trial court did not abuse its discretion in not imputing additional income to Father based on his current wife's earning capacity.

In summary, Father did not leave his employment at Subaru to avoid his support obligation, but rather, because his current wife obtained employment in another state. Prior to and upon his move, Father sought employment similar to his job at Subaru. Father is a blue-collar laborer with a prior felony conviction; thus, his employment opportunities are limited. After moving, Father obtained employment earning \$12 per hour. This employment was terminated after only four days because his employer learned of Father's prior felony conviction. Father then obtained employment earning \$9 per hour. The wage Father earned at this second job barely exceeded the cost of childcare for Father and his current wife's infant daughter. Father and his current wife decided that Father would stay home and provide for their daughter. In seeking modification of his child support obligation with respect to his three older children, Father asked the court to impute income to him of \$9 per hour. Under the circumstances, we find no abuse of discretion in the trial court's determination to impute income to Father of only \$9.00 per hour.

2.

Mother argues that the trial court's decision to not amend the provision for income tax dependency exemptions in light of the fact that Father has no taxable income was in error. Mother, however, did not request that the trial court reallocate the tax dependency exemptions, nor did she present evidence as to the tax consequences to either parent of

transferring the exemption or how transferring the exemption would benefit the minor children. With no request for reallocation of the tax dependency exemptions and no evidence presented to the court upon which to base such a ruling, Mother cannot complain that the trial court abused its discretion in not making the adjustments Mother believes to be warranted.

3.

Father cross-appeals, asserting that the trial court incorrectly calculated the child support he owed by failing to take into account that the child support modification was retroactive to the filing of his petition to modify on March 14, 2008.³ In paragraph 8 of the trial court's order, the trial court modified Father's child support obligation to \$69.48 per week, commencing on March 14, 2008. In paragraph 14, the trial court calculated the amount of Father's child support due from January 4, 2008 through April 25, 2008 as being \$5196.26. In actuality, the support owed by Father for that time period totals \$2986.36 (i.e., \$250 per week times 10 weeks plus \$69.48 per week times 7 weeks).⁴ Therefore, Father has overpaid his child support in the amount of \$3350.47.⁵ After offsetting medical expenses the trial court determined that Father owed Mother in the amount of \$2264.93, the net result is

³ Mother did not file a reply brief challenging Father's argument in this regard. Where an appellant fails to file a response to a cross-appeal, the cross-appellant may prevail if its brief presents a prima facie case of error. *Triplett v. USX Corp.*, 893 N.E.2d 1107 (Ind. Ct. App. 2008), *trans. denied*. Prima facie error is "error at first sight, on first appearance, or on the face of it." *Sand Creek Country Club, Ltd. V. CSC Architects, Inc.*, 582 N.E.2d 872, 876 (Ind. Ct. App. 1991).

⁴ We are hard-pressed to understand how the trial court calculated Father's support obligation due from January 4, 2008 through April 25, 2008 as being \$5196.26. There is no finding in the trial court's order that indicates the trial court included irregular income.

⁵ From March 16, 2007 through April 25, 2008, Father paid \$18,722.89 in child support. Child support due from March 2007 through December 2007 was calculated as \$12,386.06, the difference being \$6336.83. Subtracting from this amount Father's child support due from January 4, 2008 through April 25, 2008 of \$2986.36 results in a finding that Father overpaid his child support by \$3350.47.

that Mother owes Father \$1085.54. Father has established prima facie error. We therefore remand to the trial court to correct its order accordingly.

Judgment affirmed and remanded.

MAY, J., and BRADFORD, J., concur