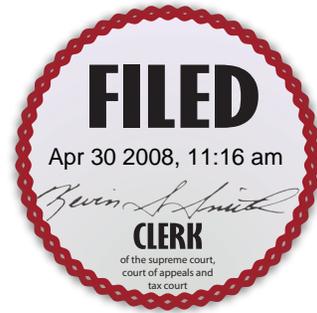


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

DAVID W. STONE IV
Stone Law Office & Legal Research
Anderson, Indiana

JOE F. WATSON
Tipton, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN RE MARRIAGE OF:)
DONALD L. SMITH,)
)
Appellant-Respondent,)
)
vs.)
)
BETH (SMITH) DIAL,)
)
Appellee-Petitioner.)

No. 80A04-0801-CV-8

APPEAL FROM THE TIPTON CIRCUIT COURT
The Honorable Thomas R. Lett, Judge
Cause No. 80C01-0301-DR-15

April 30, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Donald Smith (“Father”) filed a petition to correct child support in Tipton Circuit Court in which he alleged that he should receive credit against his child support arrearage for the retroactive Social Security disability payment Beth Dial (“Mother”) and his minor son received in March 2006. The trial court concluded that Father’s current child support obligation is offset by the Social Security disability payments currently received by Mother, but that Father was not entitled to credit against his support arrearage for the Social Security disability payment. The court also concluded that parties never agreed that Father’s child support obligation should be permanently modified to \$40 per week. Father appeals and argues that the parties agreed to modification of child support in 2004, and therefore, he is entitled to credit against his support arrearage for the 2006 Social Security disability payment. We affirm.

Facts and Procedural History

Mother’s and Father’s marriage was dissolved in 2003, and Father was ordered to pay \$70 per week in child support for the parties’ minor child. Father’s child support obligation was later increased to \$82 per week. On December 23, 2003, Father’s attorney sent a letter to Mother’s attorney, which stated:

[Father] is physically unable to work at this time and will be undergoing back surgery on January 15, 2004, resulting in his inability to meet his Court Ordered obligation regarding child support all of which he has explained to [Mother].

[Mother] and [Father] have agreed . . . that [Father] shall pay [Mother] \$40.00 per week child support commencing December 29, 2003, and continuing during the period of recovery until [Father] is released by his doctor to go back to work full time at which time [Father] shall starting [sic] paying \$82.00 per week child support.

If you will acknowledge the above to be an agreement you and I can take care of preparing and filing the necessary Court papers.

Appellant's App. p. 10.

Mother signed the letter on January 8, 2004. The letter was not filed with the trial court until August 9, 2004. The chronological case summary entry on that date states, "Agreement of parties as to payment of Support by father during his illness filed. Approved and copies ordered sent to attorneys and parties of record." Id. at 2.

On January 19, 2007, Father filed a "Petition to Correct Support." In the petition, Father stated that he was declared disabled by the Social Security Administration on September 15, 2003. Father alleged that Mother and their son received a retroactive payment from the Social Security Administration in the amount of \$8532 in March 2006. He also alleged that from March through July 2006, Mother and son received \$372 per month from Social Security, from August 2006 through January 2007, they received \$744 per month, and in December 2006 and January 2007, they received \$485.40 from his disability check. Father then alleged that because they will continue "to receive such sizable amounts of funds from the Social Security Administration this Court's Order of support to be paid by [Father] should be terminated" retroactive to January 8, 2004. Id. at 11.

On March 1, 2007, the trial court found that "the agreement of the parties as to payment of support by father during his disability, which agreement was filed and approved on August 9, 2004, modified and reduced father's support obligation to \$40 per week. Such modification was effective retroactively, as of the December 24, 2003, date shown on the face of the agreement." Id. at 29.

Mother then filed a motion to reconsider and motion to correct error. Mother requested that the court reconsider its ruling because Father failed to file a proper petition to modify support until January 19, 2007, child support worksheets were never filed with the court, and Mother “agreed only to a short variation in payment method . . . not to a modification of the total obligation owed.” Id. at 31. On May 7, 2007, the trial court granted Mother’s motion to correct error after concluding that the parties only agreed that “Mother would accept a partial payment of \$40 during Father’s disability.” Id. at 7. The court also scheduled a hearing to determine the amount of Father’s arrearage.

After the hearing, the court concluded that Father is in arrearage in his child support obligation in the amount of \$6203.50. The court determined that Father “is not entitled to credit towards his support arrearage for the lump sum [disability benefits] payment due to the fact that it was prior to the filing of the Petition to Correct Support.” Id. at 8. The court also adopted “the agreement of the parties that the Respondent’s current child support obligation of \$82 per week is offset by the SSI disability payments currently received by [Mother].” Id. Father filed a motion to correct error, which the trial court denied on October 10, 2007. This appeal ensued.

Standard of Review

Mother failed to file an appellate brief. When an appellee fails to submit a brief, we will not “undertake the burden of developing arguments for the appellee.” Painter v. Painter, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). Therefore, we apply a less stringent standard of review with respect to showings of reversible error, and we may reverse the trial court’s decision if the appellant can establish prima facie error. Id. In this context,

prima facie error is defined as “at first sight, on first appearance, or on the face of it.” Id. (citations omitted).

I. Child Support Modification

“[A] parent subject to a support order must make payments in accordance with that order until the court modifies and/or sets aside the order. As a result, informal agreements between parents are generally not effective until a motion for modification is filed.” Whited v. Whited, 859 N.E.2d 657, 661 (Ind. 2007). In this case, Father did not file a motion to modify his support obligation until January 19, 2007.

Despite that fact, Father argues that the parties agreed to a modification of \$40 per week in 2003, and the trial court improperly modified the parties’ agreement when it refused to reduce his child support obligation.¹ Father relies on the December 23, 2003 letter, in which the parties agreed that Father would pay Mother \$40 per week until Father was released by his doctor to return to work “at which time” Father would resume paying \$82 per week for child support. Appellant’s App. p. 10.

Contrary to Father’s argument, the letter clearly reflects the parties’ intent that Father’s reduction in child support would be limited to his period of recovery for back surgery. Mother did not agree to a permanent modification of child support. As the trial court concluded, the December 23, 2003 letter “did not constitute a modification of Father’s child support obligation, but merely reflected an agreement that the Mother would accept a partial payment of \$40 during Father’s disability.” Id. at 7. Moreover,

¹ We reject Father’s argument that the “trial court lacked jurisdiction to revoke its approval of the agreed entry under the guise of construing the agreement of the parents.” Br. of Appellant at 7. See Fackler v. Powell, 839 N.E.2d 165, 167 (Ind. 2005) (“[A] court that issues a dissolution decree retains exclusive and continuing responsibility for any future modifications and related matters concerning the care, custody, control, and support of any minor children”).

the CCS entry filed by Father, which was inexplicably filed eight months after the parties reached the agreement, supports this conclusion: “Agreement of the parties as to payment of [s]upport by [F]ather during his illness filed.” Id. at 2. Accordingly, the trial court did not err when it concluded that the parties did not agree to modify Father’s child support obligation, but only agreed to a temporary reduction of Father’s support obligation in the December 23, 2003 letter.

II. Social Security Payment

Father also argues that the trial court erred when it determined that Father was not entitled to credit against his support arrearage for the Social Security disability payment Mother and son received in March 2006 in the amount of \$8532. “[A] disabled parent is entitled to have Social Security disability benefits paid to a child because of that parent’s disability credited against their support obligations.” Brown v. Brown, 849 N.E.2d 610, 614 (Ind. 2006). Therefore, “a disabled parent with respect to whom Social Security disability benefits are paid to the parent’s child is entitled to petition the court for modification of the parent’s child support to reflect a credit for the amount of the payments. *The credit takes effect as of the date of the petition.*” Id. (emphasis added).

Father did not file the petition to modify his child support due to disability until January 19, 2007. Therefore, the trial court correctly concluded that Father was not entitled to credit against his support arrearage for the March 2006 retroactive Social Security disability payment. See id. at 615 (“[L]ump-sum payments of retroactive Social Security disability benefits to children cannot be credited against child support arrearages

that are accumulated before the noncustodial parent has filed a petition to modify based on the disability.”). Id. at 615.

Conclusion

The trial court did not err when it concluded that the parties never agreed to a permanent modification of Father’s child support obligation. Consequently, the trial court correctly determined that Father was not entitled to credit against his support arrearage for the retroactive Social Security disability payment Mother and son received in March 2006.

Affirmed.

MAY, J., and VAIDIK, J., concur.