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IN THE
COURT OF APPEALS OF INDIANA

ROY YOUNG, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 40A01-0810-CV-503
	)	
TERESA D. BAYNES,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Ted R. Todd, Special Judge
Cause No. 40C01-9611-DR-254

May 1, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Roy Young, Jr. (Father), appeals the trial court's Order emancipating his nineteen-year-old son, R.Y., and modifying his support obligations upward for his seventeen-year-old daughter and thirteen-year-old son.

We reverse and remand.

ISSUES

Father raises two issues, which we restate as follows:

(1) Whether the trial court abused its discretion by imputing income to him; and

(2) Whether the trial court erred by emancipating R.Y. when there was undisputed evidence that Father provided financial support to him.

FACTS AND PROCEDURAL HISTORY

Father and Theresa D. Baynes (Mother) have three children from their former marriage, a thirteen-year-old son, a seventeen-year-old daughter, and nineteen-year-old R.Y. Mother lives in Pennsylvania and, as of early 2008, had custody of their seventeen-year-old daughter only. On May 30, 2008, Mother filed a Verified Motion for Emergency Order on Permanent Modification of Custody and Child Support. She amended that motion on June 13, 2008. The motion alleged that R.Y. wished to be free from the protection and control of his parents, has sufficient money to support himself, has lived on his own for the past year, is employed, has not been enrolled in school for over four months, has not been dependant on parents for over six months, and has shown he is capable of supporting himself through his employment. Mother's motion also requested custody of the thirteen-year-old son.

On August 29, 2008, the trial court conducted an evidentiary hearing. Only a small portion of the hearing was dedicated to the development of evidence regarding R.Y.'s emancipation. R.Y. did not attend the hearing. Mother testified that she thought R.Y. was self supporting because he had not been in his dad's home for a while. He had lived in other houses that his dad owned or stayed with his grandparents instead. Mother also knew that he had worked for a while as a pizza delivery person, worked at a department store for a while, and worked for his dad between jobs. Father testified that R.Y. currently lived in a trailer which Father owned. Father paid for R.Y.'s utilities, truck insurance, cell phone bill, and "provide[d] him with groceries and some pocket cash." (Transcript p. 64). In exchange, the nineteen-year-old performed "some chores every now and then." (Tr. p. 64). As far as Father's current work situation, he testified that he did auctions and ran a scratch and dent appliance business. However, no evidence was introduced regarding Father's earnings or his financial situation.

On September 16, 2008, the trial court issued its Order. With respect to R.Y., the trial court found that he:

> 1) Has shown he is capable of supporting himself through his employment;
> 2) Has not been dependant on either parent for more than six (6) months;
> 3) Has been gainfully employed;
> 4) Has lived on his own during the last year; and,
> 5) Has exhibited that he wishes to be free from parental control and protection.

(Appellant's App. p. 7). Based on these findings, the trial court ordered R.Y. to have been emancipated prior to Mother filing her motion, and therefore, Mother's support obligations for R.Y. should be abated as of June 13, 2008.

The trial court also determined that:

> Father [is] chronically underemployed, of his own choosing, and [the court] ascribes to him the hourly wage of $10 per hour times 40 hours per week for a weekly income of $400. [] Father does not have work related child care expenses and he is not providing health care coverage for [the seventeen-year-old daughter] or [the thirteen-year-old son]. [] Father is not paying child support for any other child.

(Appellant's App. p. 8). The trial court ordered Father to pay child support in the amount of $88.84 per week. Further, Father was ordered to pay one-half of secondary school expenses and a proportional amount of educational expenses at a post-secondary education institution for the seventeen-year-old daughter and thirteen-year-old son.

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

DISCUSSION AND DECISION

We first note that Mother did not file an Appellee's Brief. When an Appellee does not submit a brief, an appellant may prevail by demonstrating *prima facie* error. *Brower Corp. v. Brattain*, 792 N.E.2d 75, 77 (Ind. Ct. App. 2003). In this context, "prima facie" means "at first sight, on first appearance, or on the face of it." *Id*. (quoting *Village of College Corner v. Town of West College Corner*, 766 N.E.2d 742, 745 (Ind. Ct. App. 2002)). Therefore, we will not develop arguments for Mother.

I. *Modification of Support*

Father argues that the trial court abused its discretion when modifying support. Specifically, Father contends the record is void of any evidence upon which supported the trial court's act of imputing income to him.

A trial court's ruling on a petition to modify support is reviewed for an abuse of discretion. *In re Paternity of A.M.C.*, 758 N.E.2d 536, 539 (Ind. Ct. App. 2001). An abuse of discretion occurs when the trial court's decision is clearly against the logic an effect of the facts and circumstances before it. *Haley v. Haley*, 771 N.E.2d 743, 747 (Ind. Ct. App. 2002). We will not judge the credibility of the witnesses or reweigh the evidence. *Id*. We will consider only the evidence most favorable to the trial court's judgment. *Id*.

Father asserts that the trial court erred when it imputed income of $400 per week to him because there was no evidence in the record to support the determination that he was voluntarily underemployed. Pursuant to Indiana Child Support Guideline 3(A)(3):

> If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community. If there is no work history and no higher education or vocational training, it is suggested that weekly gross income be set at least at the federal minimum wage level.

The trial court has discretion to impute potential income to a parent if it is convinced the parent's underemployment "has been contrived for the sole purpose of evading support obligations." *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 950 (Ind. Ct. App. 2006) (quoting Child Supp. G. 3, cmt. 2c). However, here, the only evidence directly regarding Father's employment at the modification hearing was as follows:

[Father's Attorney]:	How are you employed?
[Father]:	I'm self-employed.

[Father's Attorney]:	And what is the nature of your endeavors, your financial endeavors?
[Father]:	I do uh . . . auctions, and I also have a uh . . . appliance business, a scratch and dent.

(Tr. p. 63). Mother did not elicit any evidence that would tend to show Father's work history beyond the above, his financial situation, or any evidence whatsoever that he had attempted to evade support obligations. We fail to see how the trial court could have determined from this evidence that Father was "chronically underemployed" and that imputing $400 per week for purposes of child support obligations was necessary. As such, the trial court abused its discretion when it imputed income to Father, and we must remand for a recalculation of his income based upon proper evidence.

II. *Emancipation of R.Y.*

Father also contends that the trial court erred by ordering R.Y. be emancipated. "What constitutes emancipation is a question of law, while whether emancipation has occurred is a question of fact. Emancipation cannot be presumed, but must be established by competent evidence by the party seeking emancipation." *Dunson v. Dunson*, 769 N.E.2d 1120, 1123 (Ind. 2002) (citations omitted). Where, as here, the trial court has made findings pursuant to its authority under Ind. Trial Rule 52, we cannot set aside the trial court's judgment unless it is "clearly erroneous." *Id*. In reviewing findings pursuant to T.R. 52, "we first determine whether the evidence supports the findings and then whether the findings support the judgment." *K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453, 457 (Ind. 2009). A judgment

is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment. *Id*.

During the hearing, the following evidence was presented regarding R.Y.:

[Mother's Attorney]:	[] How old is [R.Y.]?
[Mother]:	[R.Y.] is 19 now.
[Mother's Attorney]:	Where does [R.Y.] live now?
[Mother]:	To tell you the truth, I don't know. The last I heard he was living at. . . on his . . . his dad has a shop. I don't even know what the business is and there's a trailer sitting behind it, and that's what I've heard that that's where he lives right now.
[Mother's Attorney]:	Has [R.Y.] finished high school?
[Mother]:	He ended up quitting. He has . . . he has a GED.
[Mother's Attorney]:	How long has he been out of high school?
[Mother]:	A couple of years.
[Mother's Attorney]:	To your knowledge, is he taking any kind of classes through post-secondary education of any kind?
[Mother]:	No.
[Mother's Attorney]:	To your knowledge, has he been self-supportive?
[Mother]:	Yes.
	. . .
[Mother's Attorney]:	How has he supported himself?
[Mother]:	Uh . . . one time he worked at Pizza Hut for a while. He was delivery. Then another time he

worked at Sears. He worked actually inside, and he delivered appliances too. There's been times from . . . in between jobs where he goes back to work for his dad.

[Mother's Attorney]: During that time, have you supported [R.Y.] at all since his . . .?

[Mother]: Over the last couple of years?

[Mother's Attorney]: Since his seventeenth birthday?

[Mother]: Uh . . . I mean I've bought him clothes and different things, came out and visited. I've bought him stuff for his apartment and things like that. I can't really give him money.

[Mother's Attorney]: Why is that?

[Mother]: Uh . . . I guess he does some drugs and drinks. I'm kind of scared to give him money.

[Mother's Attorney]: When you say you've brought him some clothes and things and things for his apartment . . . .

[Mother]: Uh-huh.

[Mother's Attorney]: Where was his apartment?

[Mother]: Uh . . . I have the address written down. It's in North Vernon. He lived on one side of a house that had an apartment on the side.

[Mother's Attorney]: Did his dad live in the other side?

[Mother]: No.

[Mother's Attorney]: And this was an apartment that he maintained himself?

[Mother]: Yes, as far as I know. He told me that it's actually his dad's house. He rents to own it to the

	resident on the other side and that he paid the people that lived on the other side to live there.
[Mother's Attorney]:	So he was renting from the people that were buying the house?
[Mother]:	Yes.
	. . .
[Mother's Attorney]:	Oh, and let me ask you a question about uh . . . [R.Y.] first. Do you believe that [R.Y.] is self-sustaining, that he's on his own now and has been for a while?
[Mother]:	Yes, uh-huh.
[Mother's Attorney]:	And upon what do you base that?
[Mother]:	Well, there's been a couple of visits I came out and actually stayed with him in his apartment. I've talked to him on the phone and, you know, he hasn't even . . . before he was out on his own, he actually stayed with his grandma and grandpa for almost two years. So he hasn't been in his dad's home for a while.
	. . .
[Father's Attorney]:	How old is [R.Y.] now?
[Father]:	[R.Y.] is nineteen.
[Father's Attorney]:	And where . . . where is [R.Y.] living?
[Father]:	[R.Y.] lives in a house trailer provided by . . . by me.
[Father's Attorney]:	Okay. So you have a house trailer that you provided him with?
[Father]:	Exactly.

[Father's Attorney]: Is he working?

[Father]: No.

[Father's Attorney]: Do you provide him with monies?

[Father]: Yes, I do.

[Father's Attorney]: Approximately how much?

[Father]: It varies. I pay his utilities. I pay his truck insurance. I pay his cell phone which is in his mother's name.

[Father's Attorney]: The cell phone is in his mother's name?

[Father]: It's in his mother's name. They were getting ready to . . . they were going to shut it off on him about . . . about four months ago, and I've been paying it ever[] since.

. . .

I provide him with groceries and some pocket cash, you know. It's an undetermined amount. I throw him a little money here and a little money there to keep him going. And then he . . . and he'd come out and do some chores every now and then, but he's . . . he's never equal to what . . .

. . .

[Father's Attorney]: Now your son [R.Y.].

[Father]: Yes.

[Father's Attorney]: You said that he spent a period of time out in Pennsylvania. Is that correct?

[Father]: Yes, he went there for about a month.

[Father's Attorney]: Okay.

[Father]:	Yes, and stayed with my brother.
[Father's Attorney]:	Stayed with your brother. And then he came back here?
[Father]:	Yes.
[Father's Attorney]:	Since he came back from Pennsylvania, when would that have been?
[Father]:	Oh, I don't know exact dates. I . . . don't know. I don't know exact dates on it. He was eighteen when he went out there.
	. . .
	Yeah, it was after he was eighteen. That's all I . . .it would have been after May of . . . of last[] year.
	. . .
[Father's Attorney]:	Where are the places that he's lived?
[Father]:	At home.
[Father's Attorney]:	Where else?
[Father]:	An apartment in a . . . in another home of ours.
[Father's Attorney]:	Okay. And where is that located?
[Father]:	It's in Jennings County, North Vernon. The old Helen Schmidt home.
	. . .
	Then the people decided to take the whole house over, and he could . . . you know, he couldn't afford to pay rent. So he went into another place that we have, and that's . . . and it's . . .

[Father's Attorney]:	And during this time, was he employed?
[Father]:	He had a job with Pizza Hut for probably about two weeks, and he blew his car up, one that I purchased, another one that I purchased for him. Then he worked at Sears for probably about the same amount of time.
[Father's Attorney]:	If I recall correctly, you said something to the effect very similar to what you just said, "another vehicle that I bought for him." Do you think very highly of [R.Y.'s] work habits?
[Father]:	While he's with me helping me out and stuff, you couldn't ask for a better guy. [R.Y.] doesn't seem to want much. He's happy with a fishing pole and a thing of bait. That's [R.Y.] He's pretty laid back and . . .
[Father's Attorney]:	And how old is he?
[Father]:	[R.Y.'s] getting ready to turn twenty years old, and I ride him all [the] time. His grandpa rides him all the time and . . . and uh . . . he out-smarts us is what he does. Of course, we allow it a lot, but . . . and that's not good. I'm not saying that's good, but he does have good work ethics when he works, and . . . and . . . but he's never had a . . . a real job.

(Tr. pp. 20-23, 26, 63-64, 94-97).

As we stated above, the trial court found that R.Y.:

1) Has shown he is capable of supporting himself through his employment;
2) Has not been dependant on either parent for more than six (6) months;
3) Has been gainfully employed;
4) Has lived on his own during the last year; and,
5) Has exhibited that he wishes to be free from parental control and protection.

(Appellant's App. p. 7). Altogether, the evidence does not support all of the findings the trial court made. For example, Father's uncontroverted testimony demonstrates that R.Y. has been largely dependent upon Father for most of his livelihood.

Further, these findings by the trial court do not specifically track the language of the emancipation statute. Indiana Code section 31-16-6-6 provides four classifications that would support the emancipation of a child under the age of twenty-one. Father contends, and we agree, that only two of those classifications could possibly apply R.Y., Indiana Code subsection 31-16-6-6(a)(1) in conjunction with subsection (b)(3), or subsection (a)(3), which read as follows:

> (a) The duty to support a child under this chapter ceases when the child becomes twenty-one (21) years of age unless any of the following conditions occurs:
>
> > (1) The child is emancipated before becoming twenty-one (21) years of age. In this case the child support, except for the educational needs outlined in section 2(a)(1) of this chapter, terminates at the time of emancipation, although an order for educational needs may continue in effect until further order of the court.
> >
> > . . .
> >
> > (3) The child:
> >
> > > (A) is at least eighteen (18) years of age;
> > >
> > > (B) has not attended a secondary school or postsecondary educational institution for the prior four (4) months and is not enrolled in a secondary school or postsecondary educational institution; and
> > >
> > > (C) is or is capable of supporting himself or herself through employment.

> In this case the child support terminates upon the court's finding that the conditions prescribed in this subdivision exist. However, if the court finds that the conditions set forth in clauses (A) through (C) are met but that the child is only partially supporting or is capable of only partially supporting himself or herself, the court may order that support be modified instead of terminated.
>
> (b) for purposes of determining if a child is emancipated under subsection (a)(1), if the court finds that the child:
>
> . . .
>
> (3) is not under the care or control of:
>
> (A) either parent; or
>
> (B) an individual or agency approved by the court;
>
> The court shall find the child emancipated and terminate the child support.

Beginning with an analysis of whether emancipation of R.Y. was proper under Indiana Code subsection 31-16-6-6(a)(1) in conjunction with subsection (b)(3), we note that "[i]n order to prove that a child is not under the care or control of either parent, our supreme court has found that the child must (1) initiate the action putting himself . . . outside the parents' control and (2) in fact be self-supporting." *Butrum v. Roman*, 803 N.E.2d 1139, 1146 (Ind. Ct. App. 2004), *reh'g denied, trans. denied* (citing *Dunson*, 769 N.E.2d at 1120). In *Butrum*, H.R., while saving money for college, lived with her boyfriend in a rent free apartment that her boyfriend's family provided and received some financial support from her parents. *Id*. at 1142. Based on this evidence, we concluded that H.R. was not in fact self-supporting as required by subsection (b)(3). *Id*. at 1146-147. Likewise, here, it is uncontroverted that R.Y. has been receiving a considerable amount of support from Father, and, therefore, has not been in fact self-supporting. As such, the trial court could not declare R.Y. emancipated

pursuant to subsections (a)(1) and (b)(3), and we need not consider whether R.Y. initiated the action putting himself outside of his parents control.

Under subsection (a)(3), in order to declare the child emancipated, the court need only find that the child is "capable of supporting himself" if he is eighteen and has not attended school in over four months and is not enrolled in school. We acknowledged in *Butrum* that the standard "capable of supporting himself" contained in subsection (a)(3) is a lesser burden than the "in fact be self-supporting" standard required pursuant to the judicial interpretation of subsection (b)(3). *Id*. at 1146. Here, the trial court was presented with evidence that R.Y. could be a good worker when he chose to work, and had previously worked two jobs outside of working for his Father, one as a pizza delivery person, and another at a department store. However, Mother presented no evidence as to how many hours per week R.Y. had worked at these jobs or what his rate of pay was. Nor did she controvert Father's testimony that R.Y. had worked only a couple of weeks at each job. The only evidence explaining why either of these jobs terminated was Father's testimony that R.Y. "blew his car up" and could no longer deliver pizzas. (Tr. p. 96). Furthermore, Mother did not controvert any of the evidence of substantial support provided to R.Y. by Father. For these reasons we conclude that Mother failed to submit competent evidence establishing that R.Y. was capable of supporting himself, and, therefore, the trial court's determination that R.Y. was emancipated was clear error. *See Willard v. Peak*, 834 N.E.2d 220, 224 (Ind. Ct. App. 2005) (finding error

where the trial court declared Appellee's nineteen-year-old daughter emancipated despite evidence of her poor work history and substantial support being provided by her mother).

CONCLUSION[1]

Based on the foregoing, we conclude that Father has demonstrated *prima facie* error on the part of the trial court, first by abusing its discretion when imputing $400 per week of income to him, and then by declaring R.Y. to be emancipated.

Reversed and remanded.

KIRSCH, J., and MATHIAS, J., concur.

[1] Having reviewed the exhibits submitted with the Record of this Appeal, we have noticed that the exhibits are comprised of personal information, such as school records, of Mother and Father's minor children. For this reason, we sua sponte Order the "Exhibits Volume" and "Exhibits of Appellant" to be sealed and marked "Not-For-Public Access" pursuant to Ind. Administrative Rule 9(G)(1)(c).