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**IN THE
COURT OF APPEALS OF INDIANA**

JEFFREY W. BRINKMAN,
Appellant-Respondent,

vs.

LISA A. BRINKMAN,
Appellee-Petitioner.

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No. 32A04-1008-DR-512

APPEAL FROM THE HENDRICKS SUPERIOR COURT NO. 1
The Honorable Robert W. Freese, Judge
Cause No. 32D01-0009-DR-127

May 10, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, Jeffrey W. Brinkman (Jeffrey), appeals the trial court's award of child support, prejudgment interest, and value of a retirement fund to Appellee-Petitioner, Lisa Ann Brinkman (Lisa).

We affirm in part and reverse in part.

ISSUES

Jeffrey raises four issues on appeal, which we restate as the following:

- (1) Whether the trial court miscalculated the date of the eldest son's 21st birthday;
- (2) Whether the trial court trial court erred when it failed to modify his child support obligation pursuant to Indiana Code section 31-16-8-1;
- (3) Whether the trial court abused its discretion when it ordered him to pay Lisa \$6,436.50 in prejudgment interest; and
- (4) Whether the trial court erred when it ordered him to pay Lisa \$6,000 for the value of the Ryder 401(k) Plan.

FACTS AND PROCEDURAL HISTORY

Jeffrey and Lisa were married on September 20, 1980. During the course of their marriage, they had two children: J.B., born June 16, 1983, and K.B., born July 10, 1986. Jeffrey and Lisa were divorced on May 22, 2001. Pursuant to the divorce decree, Lisa and Jeffrey shared joint legal custody of the children, while Lisa was granted physical custody of K.B. and Jeffrey was granted physical custody of J.B. Jeffrey was ordered to pay child support in the amount of \$56.00 until "said children are emancipated or reach the age of

twenty-one (21) years or until further Order of the [c]ourt....” (Appellant’s App. p. 57). Additionally, the decree stated that the amount of child support “shall be modified upon the emancipation of [J.B.]” (Appellant’s App. p. 19).

Pursuant to the divorce decree, Jeffrey was to transfer \$6,000 to Lisa’s IRA, or, “at her option, to be segregated in her name in an existing plan. [Lisa] shall notify [Jeffrey] of her election concerning the account into which said sums are to be transferred within seven days after the date of this Decree.” (Appellant’s App. p. 60).

On August 8, 2001, Lisa filed a petition to modify custody, and on March 6, 2002, the trial court entered an order granting custody of J.B. to Lisa. The trial court also increased Jeffrey’s child support obligation from \$56.00 to \$144.00 in gross and found him to be \$792.00 in arrears. Without a modification issued by the trial court, Jeffrey began reducing child support payments to \$80.00 per week from August 19, 2002 through January 16, 2004. Then, from January 20, 2004 through July 7, 2006, Jeffrey reduced his payments to \$60.00 per week.

On October 19, 2009, Jeffrey filed a petition for contempt citation for failure to pay the mortgage on the family house that Lisa retained in the divorce. On January 14, 2010, Lisa filed a verified motion to show cause, determine arrearage and reduce to a judgment, and to setoff child support from a state income tax refund. In her motion, she stated that Jeffrey was in arrears in his payment of child support from August 2002 to July 2007 when he began reducing his child support obligation. She also requested interest of 1.5% on the delinquent child support.

A hearing was held on June 8, 2010. On July 13, 2010, the trial court issued its findings of fact and conclusions of law. In it, the trial court found, in pertinent part:

17. Pursuant to [c]ourt [o]rder of March 6, 2002, [Jeffrey] was ordered to pay [Lisa] child support in the amount of [\$144.00] each week.

18. Pursuant to the [c]ourt order of March 6, 2002, the [c]ourt determined that [Jeffrey] was in arrears in his child support obligation in the amount of [\$792.00].

19. The [c]ourt order of March 6, 2002 did not delineate the amount of support owed for each individual child.

21. [Jeffrey] did not file a Petition to Modify or a Petition to Emancipate subsequent to the [c]ourt [o]rder of March 6, 2002.

22. The eldest child, [J.B.], turned [21] years of age on June 16, 2005.

25. [K.B.] resided with [Lisa] and was incapable of supporting herself through her [21st] birthday.

26. From the date of the [c]ourt order of March 6, 2002 through July 10, 2007, [Jeffrey] owed [Lisa] [\$40,032.00] in child support.

27. From the date of the [c]ourt [o]rder of March 6, 2002 through July 10, 2007, [Jeffrey] paid [Lisa] [\$14,912.00] in child support.

28. As of June 10, 2010, [Jeffrey's] arrearage was an amount of \$25,912.00.

29. Interest on the arrearage from July 10, 2007 to June 10, 2010 is \$6,436.50.

33. From March 6, 2002 through July 10, 2007, [Lisa's] gross income was approximately [\$634.00] per week.

35. Pursuant to the above stated numbers, had [Jeffrey] attempted to modify support after emancipation of the eldest child, [Jeffrey's] child support obligation to [Lisa] would likely have been [\$123.00] each week for the youngest child, [K.B.], which was less than a twenty percent (20%) change from the support amount of [\$144.00] each week.

36. Pursuant to the Dissolution Decree and Judgment, [Jeffrey] was ordered to transfer [\$6,000.00] from his Ryder 401(k) Plan to [Lisa].

37. [Jeffrey] failed to transfer the above-mentioned [\$6,000.00] and subsequently liquidated said account for his own use.

44. Pursuant to *Whited v. Whited*, 859 N.E.2d 657, [Jeffrey's] support order is an "in gross" support order.

50. Pursuant to I.C. [§] 31-16-8-1, even if [Jeffrey] had filed a Petition to Modify [] after the eldest child was emancipated and prior to the emancipation of the youngest child, [Jeffrey] would not have been entitled to a modification of child support due to the fact that there would not have been a twenty percent (20%) change in the amount of support owed.

(Appellant's App. pp. 11-15).

In total, the trial court found that Jeffrey owed Lisa \$25,912 arrearage in child support, plus interest on the arrearage from July 10, 2007 to June 10, 2010, which was \$6,436.50. After totaling the arrearage owed from the March 6, 2002 order, support due from March 2002 to July 2007, the interest from the unpaid support, the attorney fees to collect support, and the Ryder 401(k) distribution, the trial court found that Jeffrey owed Lisa \$39,652. The trial court also found that Lisa owed Jeffrey \$19,652 from the default on the mortgage, and as a result, the court offset the amounts and ordered Jeffrey to pay Lisa

\$20,000 and entered the amount as a judgment against Jeffrey accruing interest at the statutory rate of 8% per annum.

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

DISCUSSION AND DECISION

I. Standard of Review

When a trial court enters findings of fact and conclusions of law pursuant to Indiana Trial Rule 53(A), we apply a two-tiered standard of review. First, we determine whether the evidence supports the findings, and second, whether the findings support the judgment. *Smith v. Smith*, 938 N.E.2d 857, 860 (Ind. Ct. App. 2010). In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. *Id.* We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. *Id.* Those appealing the trial court's judgment must establish that the findings are clearly erroneous. *Id.* Findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. However, we do not defer to conclusions of law and evaluate them *de novo*. *Id.*

II. J.B.'s Birthday

First, Jeffrey argues that the trial court erred when it found that J.B. turned 21 years old on June 16, 2005. We agree. In the divorce decree, J.B.'s birthday is listed as June 16, 1983, which would make his 21st birthday on June 16, 2004, not 2005. However, Jeffrey has failed to demonstrate how he has been harmed by such error and we will not reverse the trial

court's judgment for errors that do not "affect the substantial rights of the parties." Ind. Appellate Rule 66(A).

Jeffrey was ordered to pay \$144 per week in child support for both children, until "said children are emancipated or reach the age of twenty-one (21) years or until further Order of the [c]ourt...." (Appellant's App. p. 57). This is known as an "in gross" support order. An in gross support order refers to a situation where a parent is ordered to pay a specified sum of undivided support for more than one child. *Sutton v. Stutton*, 773 N.E.2d 289, 297 (Ind. Ct. App. 2002). Under this type of order, the parent must pay the total support amount until the support payments are modified by court order or all of the children are either emancipated or reach the age of twenty-one years old. *Id.*

Based on the record, Jeffrey never attempted to modify the March 6, 2002 support order, nor was the youngest child, K.B., emancipated by court order. Thus, Jeffrey was obligated to pay child support until K.B. turned twenty-one years old, which occurred on July 10, 2007 and was irrespective of when J.B. turned twenty-one. As such, it was harmless error.

III. *Child Support*¹

Next, Jeffrey argues that the trial court erred when it failed to modify his child support obligation pursuant to Indiana Code section 31-16-8-1. Specifically, Jeffrey argues two points—first, he contends that the trial court incorrectly calculated Lisa’s gross income, and as such, he should have been entitled to a retroactive modification. Second, his support payments should have been decreased after J.B. moved out of Lisa’s house in 2003.

Our supreme court affirmed the long-standing rule that, in general, “after support obligations have accrued, a court may not retroactively reduce or eliminate such obligations.”

Whited v. Whited, 859 N.E.2d 657, 661 (Ind. 2007). Moreover, where, as here,

a court enters an order in gross, that obligation similarly continues until the order is modified and/or set aside, or *all* the children are emancipated, or *all* of the children reach the age of twenty-one. We have prohibited retroactive modification even where one of the several children subject to the order in gross died.

Id. (emphasis in original). Therefore, “subject to two narrow exceptions, court orders for child support remain effective until a court changes them.” *Id.* at 662. Our supreme court then explained that retroactive modification is permitted *only* when:

¹ Jeffrey also argues that the trial court erred when it applied I.C. § 31-16-8-1, because “[t]he statute does not require a 20% deviation if the substantial change/unreasonable standard is met.” (Appellant’s Br. p. 8). As a matter of law, the trial court’s application of I.C. § 31-16-8-1 is incorrect. The statute is written disjunctively to require a parent to show either – but not both – a 20-percent deviation from the Guidelines amount or a substantial and continuing change in circumstances making the existing terms of support unreasonable. *See* I.C. § 31-16-8-1. Here, the trial court’s dissolution decree stated Jeffrey’s child support obligation “shall be modified upon the emancipation of [J.B.]” (Appellant’s App. p. 19). Thus, the trial court’s prior order implied that J.B.’s emancipation would amount to a substantial and continuing change in circumstances warranting modification of Jeffrey’s support obligation, and it was therefore unnecessary for him to show a 20% deviation from the Guidelines.

(1) the parties have agreed to and carried out an alternative method of payment which substantially complies with the spirit of the decree, or (2) the obligated parent takes the child into his or her home, assumes custody, provides necessities, and exercises parental control for such a period of time that a permanent change of custody is exercised.

Id.

Jeffrey argues that the trial court erred when it found Lisa's weekly gross income from March 6, 2002 through July 10, 2007 to be \$634 per week, or \$32,968 a year. Specifically, he argues that the record indicates that between the years of 2006 to 2009, Lisa's gross income averaged roughly \$46,000 a year.²

Pursuant to the divorce decree, the trial court found Lisa's gross income to be "\$634.00 per week, representing 41% of the total income." (Appellant's App. p. 57). While the record does not provide Lisa's income from 2002 to 2003, it is clear that from 2004 on, Lisa's gross income increased. Lisa's interrogatory responses show that her gross income ranged anywhere from \$40,000 to \$51,000. Additionally, during the hearing, Lisa testified that since 2004, she had been earning \$50,000 a year.

Nevertheless, the evidence reveals that Jeffrey began unilaterally reducing the amount of child support over the years without a court order. Even if the trial court miscalculated

² Lisa's income is listed as follows:

	Gross	Net
2009	\$46,163.00	\$30,112.00
2008	\$50,451.00	\$32,883.00
2007	\$47,288.00	\$34,193.00
2006	\$51,973.00	\$37,169.00
2005	\$44,210.00	\$32,243.00
2004	\$40,328.00	\$29,536.00

(Appellant's App. pp. 64-65).

Lisa's gross income, that mistake does not relieve Jeffrey of his obligation to file a petition to modify child support pursuant to Indiana Code section 31-16-8-1 if he believed that modification was warranted. A parent subject to a support order must make payments in accordance with that order until the court modifies or sets aside the order. *Whited*, 859 N.E.2d at 661. As such, Jeffrey cannot now be entitled to a retroactive modification.

The same is true for J.B.'s emancipation. Just as Jeffrey failed to modify child support, he also failed to file a petition to emancipate J.B. Jeffrey even acknowledges this fact in his testimony:

TRIAL COURT: Did you file a petition to modify the child support after [J.B.] moved out?

JEFFREY: No, I thought it was automatic.

(Transcript p. 17). Because J.B. was never emancipated by the trial court, Jeffrey's support obligation continued until K.B.'s 21st birthday. As such, the trial court did not err when it failed to modify Jeffrey's support obligation.

IV. Prejudgment Interest

Jeffrey also argues that the trial court abused its discretion when it determined that he owed Lisa \$6,436.50 in prejudgment interest. He first argues that Lisa filed her contempt petition regarding child support only in response to his petition for unpaid mortgage obligations. Second, he contends that any reduction in child support payments was "based on his good faith belief that he could reduce his support obligation" pursuant to their divorce decree. (Appellant's Br. p. 12).

Interest on child support orders is governed by I.C. § 31-16-12-2, which provides that:

The court may, upon a request by the person or agency entitled to receive child support payments, order interest charges of not more than one and one-half percent (1½%) per month to be paid on any delinquent child support payment.

The person or agency may apply for interest if support payments are not made in accordance with the support order. Accrued interest charges may be collected in the same manner as support payments under [I.C. §] 31-16-9.

“Damages that are the subject of a good faith dispute cannot allow for an award of prejudgment interest.” *Whited*, 859 N.E.2d at 664. We review decisions regarding award of prejudgment interest under an abuse of discretion standard. *Id.*

Jeffrey directs us to *Whited*, where the mother, who had custody of the couple’s three children, moved out of state with the children. *Id.* at 659. However, the children frequently visited their father for extended periods of time and at one point, one of the children moved back to Indiana and lived with the father. *Id.* During the times when the children were staying with their father, he started proportionally reducing his support payments. *Id.* Nearly eleven years after the father’s last child support payment, the mother moved to determine arrearage and to enforce child support obligation. *Id.* at 660. With respect to the trial court’s award of prejudgment interest despite the mother’s delay in raising the issue of arrearage, our supreme court stated that “the court may properly consider the delay when making the discretionary decision whether to award prejudgment interest.” *Id.* at 664. Part of the consideration could include the mother’s “acquiescence in [father’s] reductions on her delay in seeking enforcement.” *Id.* Our supreme court denied the mother’s request for

prejudgment interest and went on to hold that the father's arrearage was accumulated in good faith and that the mother was only entitled to arrearage for two years. *Id.* at 665.

Here, on January 14, 2010, Lisa requested interest of 1.5% on the delinquent child support in her verified motion to determine arrearage. Jeffrey stipulated that he was in arrears in child support payments from March 6, 2002 until July 10, 2007 in the amount of \$25,912. Based on this, the trial court found that the interest Jeffrey owed on the arrearage from July 2007 to July 2010 totaled \$6,436.50.

Unlike the *Whited* case, Lisa's action was within the statutory period to enforce a support obligation. Indiana Code section 34-11-2-10 states that "[a]n action to enforce a child support obligation must be commenced no later than ten (10) years after: (1) the eighteenth birthday of the child; or (2) the emancipation of the child; whichever occurs first." Because neither party moved to emancipate their children, we look at when the children turned 18. J.B., the oldest child, turned 18 in 2001 and K.B. turned 18 in 2004. Despite Jeffrey's argument that Lisa filed her motion in response to his petition for unpaid mortgage, her motion was within the 10 year statutory period.

Furthermore, Jeffrey did not reduce his child support obligation in good faith. In *Whited*, the father began reducing his child support obligation when the children were staying with him for extended periods of time. Here, Jeffrey testified that he began paying less in child support because he had other bills and obligations. He admitted that he had never received a court order because he believed that when J.B. had moved out of Lisa's house for a brief period of time in 2003, support was automatically reduced. He also stated that he

believed Lisa has “misrepresented the amount that she had made before in court proceedings.” (Tr. p. 26). His explanations do not appear to be in good faith, and as such, the trial court did not abuse its discretion when it awarded Lisa prejudgment interest.

V. *Ryder 401(k) Plan*

Finally, Jeffrey contends that the trial court erred when it ordered him to pay \$6,000 to Lisa for the value of his Ryder 401(k) Plan. He argues that the transfer was barred by the doctrine of laches.

The doctrine of laches is an equitable doctrine that is comprised of three elements: (1) inexcusable delay in asserting a right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party. *Wyatt v. Wheeler*, 936 N.E.2d 232, 237 (Ind. Ct. App. 2010). Mere inconvenience is insufficient to establish prejudice. *Id.*

In support of his argument, Jeffrey asserts that Lisa unreasonably delayed in asserting her claim to the \$6000, as she only raised the issue after the litigation in this matter resumed in 2009 and in response to his petition for the unpaid mortgage. Second, Jeffrey argues that Lisa did not notify him of her intent to pursue the portion of his retirement account, and as a result, she has acquiesced to his non-payment. Finally, he argues that he relied on her acquiescence and would be extremely prejudiced if ordered to pay her \$6,000. We agree.

In the divorce decree, the trial court ordered Jeffrey to transfer \$6,000 into her IRA or, “at her option, to be segregated in her name in an existing plan.” (Appellant’s App. p. 60). This election was to be completed within seven days of the date of the divorce decree;

however, there is no evidence in the record that Lisa made a claim within the seven days as required. In fact, Lisa testified during the hearing that she told Jeffrey she did not have an interest in the retirement fund:

JEFFREY'S COUNSEL: [] Did you say to your ex-husband that you did not want the retirement account funds?

LISA: I did that based on the fact that he would be paying the child support as agreed upon and in kind of a good faith type of thing.

JEFFREY'S COUNSEL: And did he? He testified that he talked to you and said, where's the paperwork and he said that you said, I don't want the retirement after the divorce. Is that a fair statement?

LISA: My recollection of it and his recollection are different. I believe it was done here in court or after a court hearing that we talked out in the...

JEFFREY'S COUNSEL: Regardless where it occurred, is it a fair statement that [] basically, that he asked you about the paperwork and you said, you didn't want the retirement account?

LISA: Correct.

(Tr. p. 47). Lisa cannot now come forward and assert a claim to the fund, as there was an inexcusable delay in asserting her right; there was a knowing acquiescence when she told Jeffrey that did not have an interest in the fund; and Jeffrey would be prejudiced based on the fact that the account no longer exists. Thus, Jeffrey's defense of laches prevails.

CONCLUSION

Based on the foregoing, we conclude that the trial court's miscalculation of J.B.'s 21st birthday was harmless error; the trial court did not err when it failed to modify Jeffrey's child support obligation; the award of prejudgment interest was not an abuse of discretion; and that

the trial court erred when it ordered Jeffrey to pay Lisa \$6,000 for the value of his retirement fund.

Affirmed in part, reversed in part.

ROBB, C.J., and BROWN, J., concur.