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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID WAYNE BRAY,)

Appellant-Respondent,)

vs.)

No. 39A01-1010-DR-528

LINDA SUE OBERHOLTZER,)

Appellee-Petitioner.)

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable Fred H. Hoying, Special Judge
Cause No. 39C10-9101-DR-6

May 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-respondent David Wayne Bray (“Father”) appeals the trial court’s order finding him in contempt of court for refusing to make child support payments to appellee-petitioner Linda Sue Oberholtzer (“Mother”). We reverse and remand.

Issues

Bray raises several issues on appeal, but we find one dispositive: whether the trial court abused its discretion by finding Father in contempt for refusing to make payments for the support and maintenance of his son who is twenty-one years old.

Facts and Procedural History

Mother and Father’s marriage was dissolved on March 22, 1991. It produced two children, K.B. and J.B. The dissolution decree awarded Mother physical custody of the children, and provided that Father would pay \$54.00 per week per child in child support.

On September 30, 2003, the parties modified the terms of their child support arrangement. The resulting order directed Father to pay \$71.00 per week “for the support and maintenance of the minor child of the parties, [J.B.]”¹ App. 9-10. The parties did not subsequently modify this order, and Father paid the required sums more or less on schedule.

In the Fall of 2007, J.B. enrolled in the University of Southern Indiana, and has remained enrolled as of the date of the commencement of this action. J.B. turned twenty-one years old on March 3, 2010, and on March 8, 2010, Father made his last child support payment. Mother has never petitioned the dissolution court for an educational support order.

¹ The parties’ eldest child, K.B., was emancipated as a result of the order.

After the child support payments stopped, Mother called Father asking for payment, but Father informed her that because J.B. was twenty-one years old, he would no longer pay child support. On April 15, 2010, Mother filed a motion to show cause as to why Father should not be held in contempt, and on May 17, 2010, Father filed a motion to dismiss which also requested attorney fees. The trial court held a hearing on September 28, 2010 and issued an order on October 5, 2010 denying Father's motion to dismiss, finding him in contempt of court for failure to pay child support, concluding his arrearage was \$2,059, and ordering that he pay that amount to purge himself of contempt. Father now appeals.

Discussion and Decision

Standard of Review

Indirect contempt is the willful disobedience of any lawfully entered court order of which the offender has notice. MacIntosh v. MacIntosh, 749 N.E.2d 626, 629 (Ind. Ct. App. 2001), trans. denied. Whether a person is in contempt of a court order is a matter left to the trial court's discretion. Id. We will reverse the trial court's finding of contempt only where an abuse of discretion has been shown, which occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it or is contrary to law. Id. When we review a contempt order, we neither reweigh the evidence nor judge the credibility of witnesses. Id. However, we review questions of law de novo. Hamilton v. Hamilton, 914 N.E.2d 747, 750 (Ind. 2009).

Finding of Contempt and Child Support Arrearage

Father asserts that the trial court erred when it found him in contempt for failure to

pay child support for J.B. Specifically, he maintains that his child support obligations have concluded because J.B. is twenty-one years old, and that he has no other duty to pay because Mother did not petition the court for an order seeking support for post-secondary educational expenses and the parties' prior child support agreement did not contemplate additional payments for education expenses. We agree.

Typically, a parent's duty to pay child support ends when the child reaches twenty-one years old unless certain exceptions apply.² Ind. Code § 31-16-6-6; Gilbert v. Gilbert, 777 N.E.2d 785, 790 (Ind. Ct. App. 2002). However, a parent may still have an obligation to support his child's post-secondary education past the child's twenty-first birthday if the trial court enters an order for education support. I.C. § 31-16-6-6(a)(1) ("The duty to support a child under this chapter ceases when the child becomes twenty-one (21) years of age...although an order for educational needs may continue in effect until further order of the court"); see also Martin v. Martin, 495 N.E.2d 523, 525 (Ind. 1986) (interpreting I.C. § 31-1-11.5-12 (a predecessor to I.C. 31-16-6-6) and stating "[the statute] clearly allows educational support to continue notwithstanding emancipation before age 21"). "The purpose of an educational support order is to permit the trial court to address the educational needs of a child even after the child has turned twenty-one." Carson v. Carson, 875 N.E.2d 484, 486 (Ind. Ct. App. 2007).

A party seeking an educational support order must petition the court before the child is

² The exceptions are: (1) the child is emancipated before becoming twenty-one years of age; (2) the child is incapacitated; or (3) the child is at least eighteen years old, has not attended a secondary school or postsecondary school for the prior four months and is not enrolled in a secondary school or postsecondary education institution, and is or is capable of supporting himself or herself through employment. I.C. § 31-16-6-6. None of these exceptions applies here.

emancipated or reaches twenty-one years old. Martin, 495 N.E.2d at 525. Trial courts cannot issue an order for educational needs for the first time when petitioned after the child's emancipation. Donegan v. Donegan, 586 N.E.2d 844, 846 (Ind. 1992) *clarified on reh'g*, 605 N.E.2d 132 (Ind. 1992). An order for educational needs may only "continue" past emancipation or age twenty-one. I.C. § 31-16-6-6; Martin, 495 N.E. 2d at 425. If a party does not petition for education support prior to the child's emancipation or turning twenty-one years old, the trial court is permitted to further address the child's education needs only if a prior support order "expressly" addressed educational needs. Martin, 495 N.E.2d at 425 ("[w]here educational needs are expressly included in a support order enacted prior to a child's emancipation or attaining age 21, the trial court is authorized to continue to address such educational needs").

Mother concedes that she did not petition the court for an educational support order prior to J.B.'s twenty-first birthday and that no such order was ever entered. Both the dissolution decree and the subsequent child support modification order are silent as to the payment of educational expenses. The modification order only states that Bray will pay \$71.00 per week for the "support and maintenance" of J.B. App. 9. This phrase connotes child support, which ends when the child reaches twenty-one years of age. Because J.B. has turned twenty-one years old, Father is no longer obligated to pay child support. Consequently, the trial court abused its discretion when it found Father in contempt and ordered that he pay child support beyond J.B.'s twenty-first birthday.

Attorney Fees

Father also contends that the trial court erred when it denied his request for attorney fees to defend against Mother's motion to show cause. Trial courts have discretion to award attorney fees in actions to collect child support. I.C. § 31-16-11-1; McGuire v. McGuire, 880 N.E.2d 297, 303 (Ind. Ct. App. 2008). "In assessing attorney fees, the trial court may consider such factors as the resources of the parties, the relative earning ability of the parties, and other factors that bear on the reasonableness of the award." Id. (quoting Sutton v. Sutton, 773 N.E.2d 289, 298 (Ind. Ct. App. 2002)). The trial court may also consider whether misconduct by one party caused the opposing party to incur additional costs. Id. Because the trial court ruled against Father on the issue of contempt, Father was not afforded the opportunity to fully litigate his request for attorney fees. In light of our decision today, we remand the issue to the trial court to hear evidence and consider whether attorney fees are warranted in this case, and, if so, in what amount.

Conclusion

The trial court abused its discretion when it found Father in contempt and ordered that he pay child support beyond J.B.'s twenty-first birthday. Accordingly, we reverse its decision and remand with instructions to vacate the order of October 5, 2010, and to hold a hearing on whether Father is entitled to an award of attorney fees.

Reversed and remanded.

FRIEDLANDER, J., and BROWN, J., concur.