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FILED
Jun 08 2011, 9:47 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

TROY L. McMURTRY,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 82A01-1008-DR-485
	)	
SABRINA L. McMURTRY,	)	
a/k/a SABRINA L. ZEIDLER,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable David K. Kiely, Judge
Cause No. 82D04-0710-DR-953

June 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Respondent Troy McMurtry ("Father") appeals the trial court's order granting Appellee-Petitioner Sabrina McMurtry's ("Mother") petition to modify the pre-existing parenting time schedule, calculating Father's child support obligation, and denying Father's request for attorney's fees. On appeal, Mother argues that Father's appeal is frivolous and, as a result, she should be entitled to appellate attorney's fees. Upon review, we conclude that the trial court did not abuse its discretion in modifying the pre-existing parenting time schedule, calculating Father's child support obligation, and denying Father's request for attorney's fees. We further conclude that Father's appeal is not frivolous, and, accordingly, deny Mother's request for appellate attorney's fees. We affirm.

FACTS AND PROCEDURAL HISTORY

Mother and Father are the parents of C.A.McM. and C.R.McM. ("the children"). Mother and Father were previously married but divorced on April 20, 2006. The parties lived in Kentucky at the time of their divorce, but have both subsequently moved to Indiana. On September 26, 2007, the Kentucky court transferred jurisdiction over the matter to Indiana.

The parties filed numerous petitions for holiday parenting time and seeking to modify the existing parenting time schedule between December 12, 2007, and April 9, 2009. The trial court appointed a Court Appointed Special Advocate ("CASA") to represent the children's best interests. On June 30, 2009, Mother filed a Verified Petition to Modify and Petition for Order in Aid of Judgment seeking to modify the parties' existing parenting time schedule. In this petition, Mother requested that the trial court reapportion Father's mid-

week overnight parenting time to nights that would not be as disruptive for the children. On December 2, 2009, the parties appeared before the trial court, at which time the court instructed the parties and their respective spouses to discuss any pending matters or information from the CASA's report with the children. The trial court further ordered the parties to cooperate fully with the children's counseling. Father filed a Verified Petition to Modify Custody, Parenting Time and Child Support on December 10, 2009.

The trial court conducted a hearing on the parties' pending petitions on April 16, 2010. During this hearing, the trial court heard testimony from the parties, the CASA, and the children's counselor, Jeff Stucke. The trial court determined that modification of the pre-existing parenting time agreement was in the children's best interests. In calculating Father's child support obligation, the trial court imputed $26,199.50 in income to Mother. The trial court also determined that the parties should be responsible for their own attorney's fees. This appeal follows.

DISCUSSION AND DECISION

I. Modification of Parenting Time Schedule

The first issue is whether the trial court abused its discretion by granting Mother's petition to modify the pre-existing parenting time schedule. Specifically, Father contends that the trial court abused its discretion in modifying the pre-existing parenting time schedule that was issued by the Kentucky divorce court because the modification was not in the children's best interests.

In all parenting time controversies, courts are required to give foremost consideration to the best interests of the children. *Finnerty v. Clutter*, 917 N.E.2d 154, 155 (Ind. Ct. App. 2009), *trans. denied*. In reviewing a trial court's resolution of a parenting time dispute, we reverse only when the trial court manifestly abused its discretion. *Id*. If there is a rational basis for the trial court's determination, then no abuse of discretion will be found. *Id*. Further, we may not reweigh the evidence or judge the credibility of the witnesses. *Id*.

In the instant matter, Stucke, a licensed mental health counselor working with the children, testified that "there seems to be a lot of discontinuity" in the pre-existing parenting time schedule in terms of the children "going back and forth and back and forth and back and forth." Tr. p. 113. Stucke opined that more continuity would be better for the children, and that the structure of the parenting time, *i.e.*, the particular night of the week, was not overly important so long as the children know they will be spending adequate time with both Mother and Father. Stucke further opined that modification of the pre-existing parenting time schedule would be in the best interests of the children so long as the children did not feel any backlash relating to the modified schedule from Mother or Father. In light of Stucke's testimony, we conclude that the trial court's determination that a modification of the pre-existing parenting time schedule was in the children's best interests was supported by a rational basis, and, as a result, the trial court did not abuse its discretion in modifying the pre-existing schedule. *See Finnerty*, 917 N.E.2d at 155. Father's challenge to the trial court's order modifying the pre-existing parenting time schedule is, in effect, an invitation to reweigh the evidence, which again, we may not do. *See id*.

II. Child Support Obligation

Father next contends that the trial court abused its discretion by failing to impute income to Mother consistent with her earning capabilities and her household resources. "The income shares model set forth in the Indiana Child Support Guidelines apportions the cost of children between the parents according to their means, and is based on the premise that children should receive the same portion of parental income after a dissolution that they would have received if the family remained intact." *In re Marriage of Turner v. Turner*, 785 N.E.2d 259, 263 (Ind. Ct. App. 2003).

> A calculation of child support is presumed valid. We review a trial court's decision to award child support for an abuse of discretion. An abuse of discretion occurs if the trial court's decision is clearly against the logic and the effect of the facts and circumstances before the court or if the court has misinterpreted the law.

Thompson v. Thompson, 811 N.E.2d 888, 924 (Ind. Ct. App. 2004) (citations omitted).

A. Mother's Earning Capability

Father argues that the trial court abused its discretion by failing to impute income to Mother consistent with her earning capabilities. A court can consider many factors in determining whether someone is underemployed, including a conscious decision to reduce income to avoid a higher child support obligation. *In re Turner*, 785 N.E.2d at 265. The commentary to the guidelines provides that in deciding to attribute potential income to an underemployed parent, the trial court, which is afforded a great deal of discretion, should consider the following:

> When a parent has some history of working and is capable of entering the work force, but voluntarily fails or refuses to work or to be employed in a capacity in

> keeping with his or her capabilities, such a parent's potential income should be determined to be a part of the gross income of that parent. The amount to be attributed as potential income in such a case would be the amount that the evidence demonstrates he or she was capable of earning in the past.

In re Turner, 785 N.E.2d at 266 (quoting Commentary, Ind. Child Supp. G. 3).

Here, Mother fully acknowledged that she was not working full-time by choice, and requested that the trial court impute income equal to her highest earnings prior to her remarrying and the birth of her son. The trial court agreed and imputed income of $26,199.50 to Mother. Father argues, however, that the trial court abused its discretion in this regard because Mother works at least part-time as a marketing manager for the company owned by her current husband. Thus, Father argues that rather than impute $26,199.50 to Mother, the trial court should have imputed at least $35,000 to Mother, which Father claims represents the average part-time salary that marketing managers earn in the Evansville area. Father did not present any evidence that part-time marketing managers working a similar number of hours for Mother's current husband's company earn $35,000 per year, but rather relied on general salary statistics from a website called mysalary.com.

In contrast, the $26,199.50 that the trial court imputed to Mother represents the salary Mother earned when she last worked outside the home and can be verified by Mother's tax documents. Because the amount attributed to Mother equals the amount that the evidence demonstrates that she was capable of earning in the recent past, we conclude that the trial court's order is not clearly against the logic and effect of the facts and circumstances of the instant matter, and thus, the trial court's order does not constitute an abuse of discretion. *See id.*; *Thompson*, 811 N.E.2d at 924.

B. Mother's Household Resources

Father also argues that the trial court abused its discretion in failing to impute income to mother consistent with her household resources. Father specifically challenges the trial court's determination that Mother's current husband's income and assets are not relevant to the parties' obligation to support their own children. The commentary to the Indiana Child Support Guidelines provides, in pertinent part:

> Whether or not income should be imputed to a parent whose living expenses have been substantially reduced due to financial resources other than the parent's own earning capabilities is also a fact sensitive situation requiring careful consideration of the evidence in each case.… The marriage of a parent to a spouse with sufficient affluence to obviate the necessity for the parent to work may give rise to a situation where either potential income or imputed income or both should be considered in arriving at gross income.

Ind. Child Support Guideline 3(A)(2) Commentary 2(d).

In support, Father relies on *Gilpin v. Gilpin*, 664 N.E.2d 766 (Ind. Ct. App. 1996), in which this court concluded that the trial court improperly failed to consider the fact that mother's subsequent spouse contributed $1200 toward her monthly expenses of $2400, where those expenses included "mortgage payments on a house which she owned prior to her remarriage." 664 N.E.2d at 767. The Indiana Supreme Court cited *Gilpin* in *Glass v. Oeder*, 716 N.E.2d 413 (Ind. 1999), where it noted that the contribution of a subsequent spouse to a parent's home "presumably frees up money for the support of [his or] her children and is a proper fact that may be considered in calculating [his or] her income." 716 N.E.2d at 417. However, in *Carmichael v. Siegel*, 754 N.E.2d 619 (Ind. Ct. App. 2001), this court concluded that "when a trial court chooses to impute income to a parent based upon expenses paid by

his or her current spouse, there should be some consideration of the parent's historical expenses before remarriage and how much of *those* expenses have now been assumed by the current spouse." 754 N.E.2d at 631 (emphasis in original).

In the instant matter, Father asserts that Mother's current monthly household expenses of approximately $12,700.00 are paid by Mother's current husband. Father, however, does not allege what portion of her current expenses equal her monthly expenses prior to remarriage, and does not provide any specific argument or evidence relating to Mother's monthly expenses prior to her remarriage. As a result, we conclude that Father has failed to show that the trial court abused its discretion in this regard.

III. Children's Counseling Expenses

Father also challenges the trial court's determination that the parties equally share the costs of the children's counseling with Stucke. Under the Guidelines, the trial court has the discretion to determine who should bear responsibility for the children's psychological expenses. *See Eppler v. Eppler*, 837 N.E.2d 167, 176 (Ind. Ct. App. 2005), *trans. denied*. Father claims that he should not be responsible for any portion of the fees related to the children's counseling sessions because counseling was only necessary as a result of Mother's actions. However, no such determination was made by the trial court. Stucke testified that the children were responding well to counseling and that both Mother and Father actively participated in sessions when necessary. Thus, we are not convinced that the trial court abused its discretion in ordering that Mother and Father share the children's counseling expenses.

IV. Father's Request for Attorney's Fees

Father additionally contends that the trial court abused its discretion in denying his request for attorney's fees. Indiana Code section 31-15-10-1 provides:

> (a) The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after the entry of judgment.
> (b) The court may order the amount to be paid directly to the attorney, who may enforce the order in the attorney's own name.

See Thompson, 811 N.E.2d at 927.

> We review a trial court's decision to award attorney fees in connection with a dissolution decree for an abuse of discretion. When making such an award, the trial court must consider the resources of the parties, their economic conditions, the ability of the parties to engage in gainful employment, to earn adequate income, and other factors that are pertinent to the reasonableness of the award. Consideration of these factors further the legislative purpose behind the award of attorney fees, which is to provide access to an attorney to a party in a dissolution proceeding who would not otherwise be able to afford one.
>
> Misconduct that results in further litigation expenses may be properly taken into account in the trial court's decision to award attorney fees. The trial court need not give its reasons for its decision to award attorney fees.

Id. at 927-28 (citations and quotation omitted).

Father argues that he should be awarded attorney's fees because Mother failed to timely respond to Father's discovery requests relating to Mother's income, and "egregious[ly] … separated her income taxes from her current husband's to hide his contribution to the household." Appellant's Br. p. 28. Father, however, has failed to show that Mother's untimely response or failure to include her current husband's financial information was done in bad faith. The record indicates that Mother was never found in contempt of any discovery

orders, and Father has not alleged that he should be entitled to fees because he would not otherwise have access to an attorney or would not otherwise be able to afford one. The trial court was familiar with the parties' financial situations and determined that each party should be responsible for his or her own attorney's fees. Father has failed to convince us that the trial court abused its discretion in this regard.

V. Mother's Request for Appellate Attorney's Fees

In the conclusion of her Appellee's Brief, Mother requests this court to impose appellate attorney's fees, or, alternatively, remand the case to the trial court to determine if she is entitled to appellate attorney's fees for the appeal at bar. Br. of Appellee pp. 28-29. In support of this claim, Mother asserts that Father's appeal is frivolous because it is "nothing more than a lengthy impermissible invitation to reweigh the evidence and rejudge credibility of witnesses." Appellee's Br. p. 28.

Indiana Code section 31-15-10-1 provides that attorney's fees may be awarded for proceedings occurring after the entry of final judgment, including proceedings on appeal. *Thompson*, 811 N.E.2d at 929. The trial court retains jurisdiction to award appellate attorney's fees even after the perfection of the appeal. *Id.* However, "[a]ppellate sanctions are an extreme measure and 'should not be imposed to punish lack of merit unless an appellant's contentions and argument are utterly devoid of all plausibility.'" *Posey v. Lafayette Bank and Trust Co.*, 583 N.E.2d 149, 154 (Ind. Ct. App. 1991), *trans. denied*.

Upon review, we conclude that although Father's appellate claims were not ultimately successful, we cannot say that his claims were utterly devoid of all plausibility. Therefore,

we deny Mother's request for attorney's fees.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.