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IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE MARRIAGE OF:	)	
	)	
TERRI L. MOZINGO,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 24A04-1011-DR-677
	)	
TIMOTHY PURSIFULL,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0403-DR-101

June 8, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Terri Mozingo ("Mother") appeals the trial court's child support entered in favor of Timothy Pursifull ("Father"). We reverse and remand.

Issue

The sole issue is whether the trial court erroneously imposed a retroactive child support obligation upon Mother.

Facts

Mother and Father were married and had two children during their marriage. In the parties' dissolution action that became final on May 16, 2006, Mother was awarded primary physical custody of the children.

On September 17, 2009, Father filed a petition to modify child custody so that he would be the children's primary physical custodian. This petition also sought to hold Mother in contempt and collect attorney fees from Mother, but it mentioned nothing about child support. The trial court held a hearing on this petition on April 6, 2010. During the hearing, Father requested that if custody was modified that Mother be ordered to pay child support. At the conclusion of the hearing, the trial court modified custody of the children and named Father primary physical custodian, effective April 9, 2010. It also stated that it was going to schedule another hearing at a later date to consider child support issues.

This second hearing was held on July 8, 2010. At the conclusion of the hearing, the trial court stated that Mother's support obligation would be $65 per week. The trial

court then requested that Father's attorney prepare a written order reflecting the trial court's ruling. The order Father's attorney prepared, and which the trial court signed, stated that Mother's $65 per week support obligation was effective September 17, 2009.

Mother filed a motion to correct error, contending that her support obligation should be effective on either April 9 or 16, 2010. After the trial court did not rule on this motion and it was deemed denied, Mother initiated this appeal.

Analysis

The only matter Mother challenges on appeal is the effective date of her child support obligation. We first note that Father has not filed a brief. When an appellee does not file a brief, an appellant may prevail by establishing a prima facie case of error. Estate of Wilson v. Steward, 937 N.E.2d 826, 828 (Ind. Ct. App. 2010). Prima facie error is error at first sight, on first appearance, or on the face of it. Id. The prima facie error rule relieves this court of the burden of controverting arguments for reversal, which is a duty that rests with the appellee. Id.

Generally, a trial court has discretion to make a modification of child support relate back to the date a request to modify is filed, or any date thereafter. Quinn v. Threlkel, 858 N.E.2d 665, 674 (Ind. Ct. App. 2006). Consequently, courts ordinarily may not make a modification of support effective before the request to modify is filed. Drwecki v. Drwecki, 782 N.E.2d 440, 447-48 (Ind. Ct. App. 2003); see also Ind. Code § 31-16-16-6. There are two limited instances in which retroactive modification of child support may be permitted: (1) the parties have agreed to and carried out an alternative

method of payment that substantially complies with the spirit of the original support 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. Whited v. Whited, 859 N.E.2d 657, 662 (Ind. 2007).

We find nothing in the record to indicate that Father explicitly requested any modification of Mother's support before he orally requested such modification at the April 6, 2010 hearing.[1] Nor is there any evidence that either of the two exceptions to the prohibition against retroactive modification would apply here. That is, there is no evidence of an alternative payment arrangement by the parties, and Mother, not Father, had actual custody, care, and control of the children up until the effective date of the trial court's order modifying custody, or until April 9, 2010. We also observe that during the July 8, 2010 hearing regarding child support, Father did not request and the trial court gave no indication that it was considering making Mother's child support obligation retroactive and, therefore, Mother had no opportunity to object to such an outcome.

Even if Father's request to modify custody, filed on September 17, 2009, could be construed as an implicit request to modify Mother's support obligation as well, there is no basis for imposing a child support obligation upon Mother as of that date. The actual modification of custody, as noted, did not take effect until April 9, 2010. The record

[1] Mother asserts in her brief that the trial court sua sponte modified her support obligation. Our review of the transcript of the April 6, 2010 hearing reveals that Father expressly requested that Mother be ordered to pay support if custody was modified. See Tr., April 6, 2010 hearing, pp. 15-16. Mother never objected to this request, nor to the parties' subsequent litigation of the issue.

indicates that Mother in fact did retain custody of the children until that date. There are limited instances in which a custodial parent may be ordered to pay child support to a noncustodial parent. See Grant v. Hager, 868 N.E.2d 801, 804 (Ind. 2007). However, there is a presumption that a custodial parent should not pay support to a noncustodial parent, which may be rebutted based on evidence regarding the parents' respective incomes and parenting time arrangements; additionally, the trial court must make an express written finding justifying the payment. Id. Here, there is no evidence and no express finding that would justify requiring Mother to make child support payments to Father for a time period when she was the children's primary physical custodian.

We conclude Mother has made out a prima facie case that the trial court abused its discretion in making her child support obligation effective September 17, 2009. On appeal, Mother requests that her obligation be effective either July 29, 2010, the date of the child support order, or April 9, 2010. We note that in her motion to correct error, Mother requested that the support obligation be effective either April 9 or 16, 2010; in actuality, the relevant date would appear to be April 9, 2010, which was when the modification of custody took effect. "A party generally waives appellate review of an issue or argument unless the party raised that issue or argument before the trial court." GKC Indiana Theatres, Inc. v. Elk Retail Investors, LLC, 764 N.E.2d 647, 652 (Ind. Ct. App. 2002). Mother has waived any argument that the effective date of her support obligation should be July 29, 2010; instead, the date must be April 9, 2010.

Conclusion

We reverse the trial court's support order to the extent its effective date is September 17, 2009, and remand with instructions for the trial court to enter all necessary orders to reflect that the effective date should be April 9, 2010.

Reversed and remanded.

RILEY, J., and DARDEN, J., concur.