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**IN THE
COURT OF APPEALS OF INDIANA**



MARK RECTOR BRYAN,)
)
Appellant-Petitioner,)
)
vs.)
)
TAMMY ANN BRYAN,)
)
Appellee-Respondent.)

No. 82A01-1008-DR-416

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable J. Douglas Knight, Judge
Cause No. 82D04-0901-DR-74

June 14, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Mark Rector Bryan (Father) appeals the trial court's calculation of child support, claiming that it imputed an improper amount of weekly gross income to him. More specifically, Father contends that the findings of fact and conclusions of law regarding the amount of imputed income were inconsistent. Thus, Father argues that the child support order must be set aside.

Appellee-respondent Tammy Ann Bryan (Mother) cross-appeals, claiming that the trial court should have imputed a substantially higher amount of income to Father. Concluding that the trial court did not err in calculating Father's child support obligation, we affirm.

FACTS

Mother and Father produced seven children during their thirty-year marriage. At the time of the dissolution decree on January 13, 2010, three of the children were minors. Mother was granted primary custody of J., age eight, and N., age seventeen. Father had primary physical custody of Je., age sixteen. T., who was nineteen years old, also lived with Father while attending college.

At the time of the dissolution, Mother and Father agreed that neither one of them would pay child support in light of the "equal division of assets (which had been the income of the parties) and the shared custody arrangements." Appellant's App. p. A27.

Mother and Father were self-employed commercial and residential real estate property owners and landlords during the marriage. Although Mother and Father agreed to divide the properties equally, their respective financial conditions had deteriorated

prior to the commencement of the dissolution proceedings. As a result, they were compelled to sell some of their properties.

On November 24, 2009, the parties entered into a partial settlement agreement that provided for the division of some of their rental properties and for the sale of others. The sales proceeds were to be applied toward their respective debts. The remaining properties were divided according to the terms of the final decree in January 2010, with certain properties assigned to either Mother or Father. Others were retained by them as joint owners, and some were to be sold jointly.

On April 12, 2010, Mother requested the trial court to calculate the parties' child support obligations. Father remarried in 2010 and moved to Florida. T. moved in with an older brother and Je. resided with Mother. Thus, none of the children were living with Father.

The evidence showed that Mother had not sold any of her properties after the divorce. Instead, she maintained them as rental properties. While some tenants paid, others did not. As a result, Mother's income was somewhat variable.

Father had sold many of the properties that he received in the dissolution. The sales generated approximately \$500,000 in net income. The evidence established, among other things, that Father sold a piece of property that was appraised at \$80,000 for \$40,000 to his new wife. Father was not employed and he transferred his assets to his wife. Following a hearing on July 23, 2010, the trial court issued the following:

CHILD SUPPORT

5. The dearth of credible and reliable information concerning the gross income of both parties renders a child support calculation virtually impossible.

6. Neither party has satisfactorily complied with the May 5, 2010, order of this court designed to provide this court with essential and necessary information to fashion an appropriate child support order.

7. Neither party has provided this court with credible and reliable information concerning the gross income of the parties.

8. The court attributes a gross weekly income to each party in the amount of \$4,000.00 per month, or \$930.00 per week.

9. The Mother provides health insurance for the children in her custody at a cost of \$78.69 per week.

...

ORDER

...

12. The Father shall pay child support through the Clerk of this court in the amount of \$246.00 per week commencing August 6, 2010, plus one-half of all hospital, medical, pharmaceutical and optical expense not covered by Insurance, after the Mother has paid her %6 (sic) of such expenses per year as noted on the attached Child Support Obligation Worksheet. The Father shall pay the annual child support handling fee to the Clerk of this court when assessed.

Appellant's App. p. A13. Father now appeals.

DISCUSSION AND DECISION

Father contends that the order must be set aside because the evidence does not support the trial court's calculation of the parties' weekly gross incomes for child support purposes. In other words, Father maintains that because the trial court found that there

was a dearth of credible and reliable information regarding the parties' incomes, the child support order was erroneous.

I. Standard of Review

In this case, the trial court entered findings of fact and conclusions of law sua sponte. The specific findings control only as to the issues they cover, while a general judgment standard applies to any issue upon which the court has not found. Scoleri v. Scoleri, 766 N.E.2d 1211, 1215 (Ind. Ct. App. 2002). We first determine whether the evidence in the record supports the special findings, and then whether those findings are adequate to support the judgment. Van Schoyck v. Van Schoyck, 661 N.E.2d 1, 5 (Ind. Ct. App. 1996). A judgment will be reversed only when it is shown to be clearly erroneous. Id. For findings to be clearly erroneous, the record must lack probative evidence or reasonable inferences from the evidence to support them. Scoleri, 766 N.E.2d at 1215.

In general, child support modification may be made only:

- (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
- (2) upon a showing that:
 - (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
 - (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

Ind. Code § 31-16-8-1.

We afford considerable deference to the findings of the trial court in family law matters, including findings of “changed circumstances” within the meaning of Indiana Code section 31-16-8-1. MacLafferty v. MacLafferty, 829 N.E.2d 938, 940 (Ind. 2005). Moreover, we will not judge the credibility of witnesses or reweigh the evidence. Rather, we consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom. Scoleri, 766 N.E.2d at 1215.

II. Father’s Claims

As noted above, Father argues that the amount of weekly gross income that was attributed to the parties was not supported by the evidence and the child support order must be set aside. Father argues that it is impossible to reconcile the amount of the parties’ incomes that the trial court imputed with its findings that there was a “dearth of credible and reliable information concerning the gross income of the parties” and “[n]either party has provided this court with credible and reliable information concerning the gross income of the parties.” Appellant’s Br. p. 13.

Pursuant to Indiana Code section 31-16-6-1, the trial court may order either or both parents to pay any amount reasonable for child support after considering all relevant factors, including (1) the financial resources of the custodial parent; (2) the standard of living the child would have enjoyed if (A) the marriage had not been dissolved; (3) the physical and mental condition of the children involved including their educational needs; and (4) the financial resources and needs of the non-custodial parent. The trial court

enjoys wide discretion in imputing income to the child support obligor to ensure that the support obligation is not evaded. Glover v. Torrence, 723 N.E.2d 939, 942 (Ind. Ct. App. 2000).

In this case, the trial court was faced with a challenging situation where both parties have traditionally been self employed. The trial court enjoys broad discretion in imputing income to the child support obligor to ensure that he does not evade his support obligation. Deviation from the Child Support Guidelines (Guidelines) is proper if strict application would be unreasonable, unjust, or simply inappropriate. Garrod v. Garrod, 655 N.E.2d 336, 338 (Ind. 1995).

In general, to determine whether potential income should be imputed, the trial court should review the obligor's work history, occupational qualifications, prevailing job opportunities, and earning levels in the community. Gilpin v. Gilpin, 664 N.E.2d 766, 767 (Ind. Ct. App. 1996). However, calculating gross income for those who are self-employed presents unique problems and calls for a careful review of expenses. Young v. Young, 891 N.E.2d 1045, 1048-49 (Ind. 2008). In estimating what the future income of the parents will be, the trial court must consider the totality of the circumstances. Perri v. Perri, 682 N.E.2d 579, 581 (Ind. Ct. App. 1997).

The Guidelines define weekly gross income as

actual weekly gross income of the parent if employed to full capacity, potential income if unemployed or underemployed, and imputed income based upon "in-kind" benefits. Weekly gross income of each parent includes income from any source, except as excluded below, and includes,

but is not limited to, income from salaries, wages, commissions, bonuses, overtime, partnership distributions, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workmen's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, prizes, and alimony or maintenance received from other marriages.

Child Supp. G. 3(A)(1) (emphasis added). The phrase "actual income" has also been interpreted to mean existing income currently received by a parent and available for his or her immediate use. Scoleri, 766 N.E.2d at 1217.

Also relevant is the definition of the Guidelines's definition of gross income from self-employment:

2. Self-Employment, Business Expenses, In-Kind Payments and Related Issues. Weekly Gross Income from self-employment, operation of a business, rent, and royalties is defined as gross receipts minus ordinary and necessary expenses. In general, these types of income and expenses from self-employment or operation of a business should be carefully reviewed to restrict the deductions to reasonable out-of-pocket expenditures necessary to produce income. These expenditures may include a reasonable yearly deduction for necessary capital expenditures. Weekly Gross Income from self-employment may differ from a determination of business income for tax purposes.

Child Supp. G. 3(A)(2).

Here, Father argues that only rental income should be used for purposes of calculating support, even though he voluntarily and intentionally sold his property to rid himself of his prior income. As noted above, Father received over \$500,000 from selling numerous properties that are currently protected from creditors who have liens on the unsold properties. And he transferred those assets to his new wife. Tr. p. 23, 51.

Father presented no bank statements that reflected the income or what became of it, because he placed the funds in his new wife's name. Father claimed that he was repaying a loan of \$430,000 from his wife that was made during the preceding nineteen months when he was not paying mortgages on the properties in foreclosure.

As noted above, the trial court entered a specific finding attributing gross income to each party in the amount of \$4000 per month, or \$930 per week. The evidence establishes that both parties had been self-employed during the marriage and managed their real estate rental business. They experienced a significant downturn in their financial circumstances before the divorce. Tr. p. 200-10, 250. A receiver had been appointed during the pendency of the proceeding, and the parties' respective financial conditions deteriorated further after the divorce became final. Id. at 200-11, 218. The circumstances necessitated the liquidation of many of the Father's rental properties. Moreover, he incurred substantial debt. Id. at 51, 67, 249-50.

However, the record also establishes that Father gave the proceeds from the sale of his properties to his wife, and he continued to rent the remaining three properties. And while Father received substantial proceeds from the sale of his properties, he provided no bank statements reflecting this income or what became of it.¹ Rather, Father alleged that he was repaying the substantial loan instead of applying that amount to his alleged debt. Id. at 55-56.

¹ In April 2010, Father received \$11,800 for the sale of one property, \$32,800 for a second property, and \$133,588 for another. No deposits of that income are reflected in Father's discovery responses when he was to have provided all bank statements for that period. Tr. p. 48-49.

At some point, Father sold real property to his wife that had been appraised at \$80,000, for \$40,000. Id. at 49. Although Father initially claimed that he did not “recall” where those funds were deposited, he later changed his testimony indicating that he had given all of the money to his wife. Id. at 51. In fact, approximately \$400,000 is held in his wife’s name and that amount is protected from Father’s creditors. Id. at 200. Moreover, it was established that Father has chosen to remain unemployed, and he has left himself only three income-producing properties. Id. at 83. Father’s new wife pays nearly all of the expenses, and she purchased a new house in the Florida Keys for about \$500,000 just prior to their marriage. Id. at 78, 82.

It is apparent to us that Father is claiming that the trial court could not enter a judgment of child support because he gave his assets away to his new wife, who is his sole means of support, and no records exist about his income. We will not entertain that notion. Indeed, Father’s own testimony established that he had sold the properties and is living a certain lifestyle, from which the trial court could impute income. That said, we conclude that the trial court properly deviated from the Guidelines because Father has an ability to pay beyond his income, as evidenced by his new wife’s payment of the majority of the expenses, his enhanced net worth following his sale of the properties, and his lifestyle. Father did not introduce any evidence at trial to dispute his expenditures or net worth. As a result, the trial court’s imputation of potential income to Father to ensure that he satisfies his child support obligation was proper. Garrod, 655 N.E.2d at 336.

III. Cross Appeal

Mother cross-appeals, claiming that while it was appropriate to impute income to Father, the evidence supports a higher obligation than what the trial court ordered. Mother contends that Father's lifestyle, expenditures, and the available funds from the sale of the properties "do not justify so low an income." Appellant's Br. p. 19.

As noted above, the trial court was confronted with the particularly difficult task of calculating Mother and Father's potential income in light of their self-employment. Again, when determining the parties' future income, the trial court considers the totality of the circumstances. Perri, 682 N.E.2d at 581.

Although Mother claims that Father failed to offer sufficient evidence for the trial court to verify that Father's expenses were "ordinary and necessary" and should be deducted from gross income, the trial court is vested with discretion in making the appropriate adjustments to gross income. Cox v. Cox, 580 N.E.2d 344, 351 (Ind. Ct. App. 1991). And we grant deference to our trial judges in family law matters. Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). The trial court considers all of the financial factors, including net worth, access to credit, and available financial flexibility. Zakrowski v. Zakrowski, 594 N.E.2d 821, 824 (Ind. Ct. App. 1992). We will neither reweigh the evidence nor assess witness credibility, and will consider only the evidence that directly or by inference supports the trial court's judgment. In re Guardianship of B.H., 770 N.E.2d 283, 288 (Ind. 2002).

Mother first suggests that one of the Exhibits

imputes to the Father his \$4,000.00 per month rental income and one fourth of his home sales from the prior year, or \$178,568.00 annual income. This is significantly less than the Father testified he has “borrowed” from his new Wife in the preceding year to fund his then lifestyle, and this was before his move to a house in the Florida Keys.

Appellee’s Br. p. 20. Mother then asserts that

there is no evidence of financial circumstances causing the Father’s “cash out,” other than the hiding of assets from lien holders under the various foreclosures and providing an argument for an artificially low child support order. The Father should not be permitted a windfall in the child support arena for intentionally divesting himself of income and assets which could be used to support his children. He made himself judgment proof by placing all his assets in his Wife’s name, and left his ex-wife to shoulder the financial burden not only of the liens against all her real estate due to foreclosures, but to support the children with no help from him.

Id. at 21-22.

In both instances, Mother’s claims are based on speculation and evidence that is not favorable to the judgment. The record demonstrates that the trial court heard the evidence and evaluated the parties’ total financial circumstances in deciding what Mother and Father’s future income will be. It then issued a child support order within the bounds of the evidence that was presented. As a result, we reject Mother’s contentions on cross-appeal, and we decline to set aside the child support order.

The judgment of the trial court is affirmed.²

MAY, J., and BRADFORD, J., concur.

² We deny Mother’s request for an award of appellate attorney’s fees.