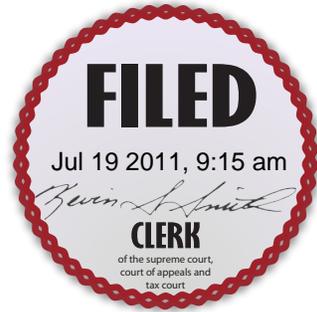


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE PATERNITY)
OF A.W.G.,)
)
J.B. (Mother),)
)
Appellant-Petitioner,)
)
vs.)
)
H.G. (Father),)
)
Appellee-Respondent.)

No. 49A02-1011-JP-1378

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-9904-JP-598

July 19, 2011

MEMORANDUM DECISION—NOT FOR PUBLICATION

BRADFORD, Judge.

Appellant-Petitioner J.B., who is Mother to A.W.G., appeals the trial court's support order requiring Appellee-Respondent H.G., A.W.G.'s father, to pay what Mother claims to be an inadequate portion of A.W.G.'s post-secondary expenses. In addition, Mother challenges the trial court's denial of her petition to find H.G. in contempt of court and her request for attorney's fees. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On September 1, 1998, the trial court modified custody of Mother's and Father's three children, including A.W.G., from Mother to Father. On January 6, 2003, the parties entered into an agreement to modify custody of their children, with Father retaining custody of A.W.G. and Mother receiving custody of the parties' seventeen-year-old child, H.G. The parties further agreed that neither would pay support for the other's child. An additional term of the agreement was that Father would pay Mother \$1,000 in child support in four equal payments due February 5, March 5, April 5, and May 5, all in 2003.

On August 7, 2009, Mother, seeking custody of A.W.G., filed an Emergency Verified Petition for Temporary Custody and Petition to Modify Custody And Request For Immediate Hearing. Following an October 9, 2009 hearing, on July 9, 2010, the trial court awarded full custody of A.W.G. to Mother and ordered counsel to submit Child Support Obligation Worksheets ("CSOW").

On August 18, 2010, Mother filed her Combined Verified Petition for Contribution To Educational Expenses, Motion for Rule to Show Cause, Request for Contempt Citation, And Request for Immediate Hearing alleging that Father had failed to pay the \$1,000 in child

support provided for in the 2003 agreement. Mother's petition additionally alleged that A.W.G. would be enrolled at Tennessee State University as of August 21, 2010. Mother requested that the court find Father in contempt, order him to pay a share of A.W.G.'s educational expenses, and award attorney's fees. Mother requested attorney's fees to serve as a sanction for Father's contempt.

At the October 22, 2010 hearing on the matter, Mother asked that Father pay \$11,890.49 of A.W.G.'s college expenses at Tennessee State. A.W.G. was already contributing \$12,229 through loans and grants, leaving a balance of \$14,081. As of the date of the hearing, Mother was unemployed, and her CSOW indicated her weekly gross income to be \$290. Father's income was approximately \$1500 per week. Father testified at the hearing that he was willing to contribute toward A.W.G.'s educational expenses by paying one third of the expenses, so long as the expenses—including tuition, room and board, administrative fees, and book expenses—were based upon in-state fees for Indiana students.¹ Father believed \$6000 was a reasonable amount. Also at the hearing, the trial court took judicial notice that tuition at Ball State University at the time was \$3620 per semester, which the trial court contrasted with the \$9332 cost of Tennessee State.

On October 28, 2010, the trial court issued an order requiring Father to pay Mother the \$1000 he was ordered to pay in 2003. The trial court further ordered Father to pay one third

¹ Father testified that he was a disabled veteran and that his status would help pay A.W.G.'s tuition, so long as it was in-state tuition.

of the costs of A.W.G.'s college tuition, or \$2440 per school year, based upon the \$3660² per-semester rate of in-state expenses at Ball State University. This sum did not include fees for room and board. The trial court additionally ordered Father to pay one third of the costs of books and fees up to \$1000 per year. The trial court denied Mother's request for attorney's fees, ordering that each party pay his or her own fees.

On November 22, 2010, Mother moved for leave to submit newly discovered evidence regarding relative costs of Ball State University and Tennessee State University. Mother's evidence demonstrated that tuition and fees, including room and board, at Ball State totaled \$18,700. Tuition and fees at Tennessee State totaled at least \$23,992. The trial court granted Mother's motion, supplementing the record accordingly. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Mother claims that the trial court abused its discretion by ordering Father to make only a minimal contribution to educational expenses, by not finding Father in contempt for his failure to pay the \$1000 in child support, and by declining to award her attorney's fees.

Initially we note that Father did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing arguments for him, and we apply a less stringent standard of review with respect to showings of reversible error. *Zoller v. Zoller*, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). That is, we may reverse if the appellant

² There is no explanation in the record for the discrepancy between the \$3620 judicially-noticed cost, and the \$3660 cost upon which the support order was based.

establishes *prima facie* error, which is an error at first sight, on first appearance, or on the face of it. *Id.*

I. Educational Expenses³

In reviewing orders for apportionment of college expenses, we do not weigh the evidence or determine credibility, but consider only evidence and reasonable inferences favorable to the judgment. *Warner v. Warner*, 725 N.E.2d 975, 978 (Ind. Ct. App. 2000). We will affirm the trial court unless its order is clearly erroneous. *Id.* The decision is clearly erroneous if it is clearly against the logic and effect of the facts and circumstances which were before the trial court. *Id.*

Pursuant to Indiana Code section 31-16-6-2 (2010), the trial court has authority and discretion to award post-secondary educational expenses and to determine the amount of such an award. *See Warner*, 725 N.E.2d at 978 (citing Ind. Child Supp. G. 6 Commentary). The court should consider post-secondary education to be a group effort and should weigh the ability of each parent to contribute to payment of the expense as well as the ability of the student to pay some part. *Id.* The trial court must determine what constitutes educational expenses, and the guidelines state that these will generally include tuition, books, lab fees,

³ Mother's precise challenge is somewhat difficult to ascertain. Mother's Standard of Review section includes various apparent arguments, but Subsection A of her argument has argument in its heading only. The section of Mother's brief devoted to the contempt issue, deemed another Subsection A, includes paragraphs copied verbatim from the Facts section which do not relate to the contempt issue. In addition, the second and final page of the order attached to the Appellant's Brief is, in fact, the second and final page of an earlier order which is not the subject of the instant appeal. These problems have greatly complicated our review of the instant case.

supplies, student activity fees, and the like. *Id.* Room and board are also included when the student lives away from the custodial parent during the school year. *Id.*

Furthermore, a “rough proportionality” has been required in the apportionment of college expenses between parents and children. *Id.* A requirement of rough proportionality is not a requirement of precise parity, but deviations from rough proportionality require a finding that such an apportionment would be unjust. *Id.* Absent such specific findings, we have found that an apportionment of college expenses which was not roughly proportionate to parental resources was clearly erroneous. *Id.*

This court has rejected a bright-line rule that would limit children to educational support commensurate with in-state, state-supported colleges. *See Hinesley-Petry v. Petry*, 894 N.E.2d 277, 281 (Ind. Ct. App. 2008) (citing *Rohn v. Thuma*, 408 N.E.2d 578, 582-83 (Ind. Ct. App. 1980)), *reh’g denied, trans. denied*. Rather, this court has held that these cases are more properly determined on a case-by-case basis, with the trial court balancing the advantages of the more expensive college in relation to the needs and abilities of the child with the increased hardship on the parent. *Id.*

Here, the trial court ordered Father to pay only one third of the cost of A.W.G.’s college education, presumably apportioning the other two thirds to Mother and A.W.G. Yet there was no dispute at the hearing that there was a great disparity in Mother’s and Father’s incomes. Father earned approximately \$1500 per week, and Mother, who was unemployed, earned less than \$300. This does not satisfy the rough proportionality test. To the extent the trial court determined that college expenses should not be roughly proportionate to parental

resources, it was required to enter specific findings to that effect, which it did not. This is clear error. *See Warner*, 725 N.E.2d at 978.

Further, while Father only wished to contribute one third of the expenses, he testified that he was willing to contribute \$6000 to A.W.G.'s education, including for room and board. Yet Father's contribution as ordered by the trial court amounts to \$2440, plus \$1000 for books and fees, for a total of only \$3440 per year. It appears that the trial court's calculations were based upon tuition and certain fees, but did not include the substantial cost of room and board, which Father indicated he was willing to pay and which the Guidelines include as an expense. Given Father's willingness to pay at least \$6000, and given his relative ability to pay, we simply see no basis in the record for the trial court's ordering him to pay, at most, \$3440.

Accordingly, we reverse and remand to the trial court to recalculate Father's post-secondary education contribution for A.W.G. To the extent the trial court's support order is not roughly proportionate to the parties' relative resources, it must justify the order with specific findings. The trial court is within its discretion to base its calculations upon in-state expenses at Ball State, but these expenses should be the comprehensive \$18,700, which includes room and board, unless specific findings justify a different basis.

II. Contempt

Mother additionally claims that the trial court abused its discretion by not finding Father in contempt for failing to pay the \$1000 he was ordered to pay in 2003. To be held in contempt, a party must have willfully disobeyed a court order. *Hamilton v. Hamilton*, 914

N.E.2d 747, 755 (Ind. 2009). The determination of whether a party is in contempt is a matter left to the discretion of the trial court. *Id.* We will reverse a trial court's contempt determination only if there is no evidence or inferences drawn therefrom to support it. *See id.*

Here, Father did not dispute that he had failed to pay the \$1000 ordered pursuant to the parties' agreement in 2003. Father stated at the hearing, however, that after he was ordered to pay Mother the \$1000, Mother had asked the court to "throw [the order] out" because she believed she had made a mistake in entering into the agreement upon which the order was based. Tr. p. 32. Father further claimed that he had believed the court had taken the matter under advisement. Father conceded at the hearing that the court apparently had not taken the matter under advisement and that he still owed Mother \$1000. The trial court was within its discretion to credit Father's justification as a good-faith basis for his failure to pay. We find no abuse of discretion.

III. Attorney's Fees

Mother also challenges the trial court's denial of her request for attorney's fees. Indiana Code section 31-15-10-1(a) (2010) grants a trial court the authority to order a party to pay the other party's reasonable attorney's fees. *Walters v. Walters*, 901 N.E.2d 508, 515 (Ind. Ct. App. 2009) When determining whether to award attorney fees, a trial court "'must consider such factors as the resources of the parties, the relative earning ability of the parties, and other factors, which bear on the reasonableness of the award.'" *Id.* (quoting *Bertholet v. Bertholet*, 725 N.E.2d 487, 501 (Ind. Ct. App. 2000) (emphasis in original)). We will review

a trial court's award of attorney's fees for an abuse of discretion. *Id.* Moreover, a trial court is not required to give reasons for its determination. *Id.*

Mother's and Father's resources and relative earning abilities would have been relevant factors in the determination of attorney's fees in this case. Yet, as addressed in Part I, above, the trial court apparently failed to consider the disparate financial circumstances of the parties. Nevertheless, Mother's petition for attorney's fees arose out of her unsuccessful request that Father be held in contempt for his failure to pay \$1000. The trial court was well within its discretion to decline to award attorney's fees as a sanction for an ultimately unsuccessful contempt claim.

The judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded with instructions.

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