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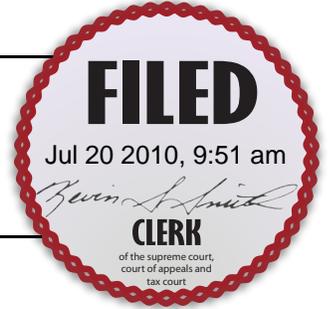
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**IN THE
COURT OF APPEALS OF INDIANA**



ANDREW HIRSTY,)
)
Appellant-Petitioner,)
)
vs.)
)
KATHY HIRSTY,)
)
Appellee-Respondent.)

No. 02A03-1002-DR-55

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Charles F. Pratt, Judge
The Honorable Thomas P. Boyer, Magistrate
Cause No. 02D07-0404-DR-171

July 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Andrew Hirsty (Father) appeals the trial court's determination with respect to the amount of the child support to be paid by his ex-wife, Kathy Hirsty (Mother). Father presents the following restated issue for review: Did the trial court err in failing to impute income to Mother?

We affirm.

Mother and Father were married on March 28, 1983. On April 20, 2004, Father filed a petition for dissolution. Four children were born to the marriage. By the time of the final hearing in this case, only two of the children were under the age of eighteen, with the youngest being sixteen years old at the time. The marriage was terminated via a Partial Decree of Dissolution of Marriage on June 29, 2007. The partial decree addressed, among other things, the issues of custody, parenting time, and child support. Mother was ordered to pay \$225.00 in weekly child support, with a subsequent adjustment to be made reducing the payment to \$177.00 per week when one of the children went away to college. Mother was also ordered to provide medical insurance for the children through her employer.

Mother was a teacher employed by the Fort Wayne Community Schools. In March 2009, the principal at her school believed that Mother was acting erratically and she was tested for alcohol, which yielded a positive result. Disciplinary proceedings were instituted against Mother, with the employer's ultimate goal being termination. Mother was represented throughout the disciplinary proceedings by Steve Brace, who was the UniServe Director for the Fort Wayne Education Association. Ultimately, Brace advised Mother to resign because that would make it more likely, and perhaps indeed even *possible*, that she

might be able to resume her teaching career some day if she chose to do so. Moreover, because she resigned and was not terminated, Mother was able to negotiate an extension of her pay through April 1, 2009, as well as an extension of her health insurance benefits. Mother resigned from her teaching position effective March 17, 2009. On April 1, Mother was hospitalized for five days suffering from anxiety and depression. After she was discharged, she was under the care of a psychiatrist until her health insurance benefits expired. The record reflects that as of the time of the filing of this appeal, Mother had been unable to secure full-time employment. She was working part-time for \$7.00 per hour and living on savings accounts.

On June 5, 2009, Mother filed a petition to modify the amount of her weekly child support obligation and to terminate her obligation to provide medical insurance for the children. Following a hearing, the trial court granted Mother's petition. The court found that Mother's "potential weekly gross income for purposes of calculating child support is Two Hundred Ninety Dollars (\$290.00)." *Appellant's Appendix* at 46. After plugging that figure into the child support worksheet along with other relevant amounts, the court determined that Mother's child support obligation would be reduced to \$46.00 per week. The court also terminated her obligation to provide medical insurance for the lone remaining unemancipated child. Father appeals the modification order.

Father frames his challenge to the modification order thus: "[T]he trial court erred by failing to impute the proper amount of potential income to [M]other, thereby significantly reducing her child support obligation, in light of the trial court's finding that [M]other

resigned from her position as a teacher.” *Appellant’s Brief* at 1. Put another way, Father contends that, because she resigned, Mother was voluntarily underemployed and therefore the trial court should have used the income she received as a teacher in calculating the amount of her child support obligation.

Child support modifications are governed by Ind. Code Ann. § 31-16-8-1 (West, Westlaw through 2009 1st Special Sess.), which provides that a court may modify a child support order upon a showing (1) of changed circumstances so substantial and continuing as to make the terms unreasonable, or (2) that a party has been ordered to pay an amount in child support that differs by more than twenty percent from the amount that would be ordered by applying the Indiana Child Support Guidelines. The trial court in the instant case did not specify which subsection it relied upon in modifying the order, but for purposes of our analysis, it does not matter. Clearly, Mother’s pre-resignation income differed by more than twenty percent from her post-resignation income. Moreover, if credited, her reduction in income was substantial and would render payment of her initial support obligation unreasonable.

When reviewing a modification order, we are mindful of the deference with which we regard trial courts in family law matters:

Whether the standard of review is phrased as “abuse of discretion” or “clear error,” this deference is a reflection, first and foremost, that the trial judge is in the best position to judge the facts, to get a feel for the family dynamics, to get a sense of the parents and their relationship to their children—the kind of qualities that appellate courts would be in a difficult position to assess. Secondly, appeals that change the results below are especially disruptive in the family law setting. And third, the particularly high degree of discretion

afforded trial courts in the family law setting is likely also attributable in part to the “fluid” standards for deciding issues in family law cases that prevailed for many years.

The third of these reasons has largely fallen by the wayside as the Legislature and [the Supreme] Court have promulgated a series of statutes, rules, and guidelines--standards that bring consistency and predictability to the many family law decisions. But, the importance of first-person observation and avoiding disruption remain compelling reasons for deference.

We recognize of course that trial courts must exercise judgment, particularly as to credibility of witness, and we defer to that judgment because the trial court views the evidence firsthand and we review a cold documentary record. Thus, to the extent credibility or inferences are to be drawn, we give the trial court’s conclusions substantial weight. But to the extent a ruling is based on an error of law or is not supported by the evidence, it is reversible, and the trial court has no discretion to reach the wrong result.

MacLafferty v. MacLafferty, 829 N.E.2d 938, 940-41 (Ind. 2005) (internal citations and footnote omitted).

In this case, Father challenges the trial court’s determination that Mother’s teacher’s salary should not be imputed to her in calculating her child support obligation. The amount of that salary is undisputed, but the question whether it should be imputed to Mother in this case is, “at minimum, a mixed question of law and fact. To the extent it is a question of law, it is the duty of the appellate court to give it de novo review--and doing so promotes the values of consistency, predictability, and enunciation of standards that curb arbitrariness.” *Id.* at 941.

Father’s argument centers upon the application of Guideline 3 of the Indiana Child Support Rules and Guidelines. Comment (A)(3) of Guideline 3 provides: “If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income.” The Comment further provides that the amount of

potential income to be used is determined by considering “the obligor’s potential and probable earnings level based on the obligor’s work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community.” *Id.* For our purposes in this case, we are mindful that imputing income based upon a determination of potential income is done to “discourage a parent from taking a lower paying job to avoid the payment of significant support[.]” *Meredith v. Meredith*, 854 N.E.2d 942, 947 (Ind. Ct. App. 2006) (quoting Child Supp. G. 3, cmt. 2(c)).

We conclude that the record supports the trial court’s implicit determination that Mother is not voluntarily underemployed. Father’s argument on this point essentially is that Mother became unemployed because she voluntarily resigned from her teaching position and then secured employment that paid significantly less than her former teaching position. Implicit in his reasoning is the contention that Mother could have continued in her employment with Fort Wayne Community Schools. In support, Father points out that Mother submitted to a chemical test after the one that yielded a positive result, and the results of the second test were “inconsistent” with the first test. *Appellant’s Appendix* at 56. He also points out that Mother denied having consumed alcohol on the day in question. Clearly, these facts would have supported Mother’s defense in the termination proceeding – *i.e.*, the claim that she was not under the influence of alcohol while at school. We note, however, that there was substantial countervailing evidence.

Brace, who had much experience in personnel matters and was familiar with the facts of this case, was of the opinion that termination was likely. So much so that he advised

Mother to resign before she was terminated, in order to gain a few extra weeks' worth of compensation and to leave open the possibility of a return to the teaching profession in the future. Given his position and experience, his opinion was entitled to significant weight. We note also the positive test referred to above, which our review of the record reveals was a .105 BAC test reading. The record also contains statements submitted by five co-workers who worked with Mother and observed her behavior on the day in question. They described her variously as "unusually loud", "very loud", "very unsteady on her feet", exhibiting "slow" and "slurred" speech, "she smelled like mouthwash or alcohol", "she could not hold a conversation because she kept losing her train of thought", and "her general demeanor did not seem stable". *The Exhibit Volume*.¹ In reviewing these materials, it is clear to us that the case for termination against Mother was compelling.

Although technically Mother consciously chose to resign from her position at the school, and going back a step further, consciously chose to be under the influence of alcohol while at school which ultimately prompted the resignation, we must consider these facts in the context of several recent Indiana Supreme court decisions regarding voluntary underemployment. The Court has made it clear that a parent's voluntary conduct must be undertaken with the intent to reduce income to avoid a child support obligation. *Clark v. Clark*, 902 N.E.2d 813, 813 (Ind. 2009); *Lambert v. Lambert*, 861N.E.2d 1176, 1180 (Ind. 2007). There is no evidence Mother's decisions were made in order to reduce her income

¹ This volume contains well in excess of two hundred pages, none of which are numbered.

and therefore her support obligation. In fact, the decisions she made after disciplinary proceedings were initiated against her seem to have been made with the intent of ultimately minimizing the impact of her action on her future income.

Comment 2(c) of Guideline 3 provides that “a great deal of discretion will have to be used” in deciding whether to include potential income in calculating a child support obligation. Reviewing the evidence set out above, the trial court essentially determined that Mother’s “voluntary” resignation was anything but that, and that had she not resigned, she would likely have been terminated for cause in short order, thereby foreclosing any chance of teaching in the future and forfeiting several weeks’ worth of benefits. The trial court obviously concluded that Mother’s decision to resign was the lesser of two evils, and in any event did not represent a decision “to take a lower-paying job to avoid the payment of significant support.” *Id.* Therefore, imputing her teaching income to Mother in determining her child support obligation would not further the purpose of discouraging her or any other parent from taking a lower paying job in order to avoid paying significant support. *See Meredith v. Meredith*, 854 N.E.2d 942. In the end, the trial court determined that Mother’s actual income at the time of the hearing was a realistic reflection of her current earning potential, and that she was no longer able to teach and earn a teacher’s salary. In other words, the trial court determined that Mother was not voluntarily underemployed. As explained above, we conclude that this determination was not erroneous.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.