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**IN THE
COURT OF APPEALS OF INDIANA**

BRENT TURNER,)
)
Appellant-Respondent,)
)
vs.) No. 30A01-1102-DR-61
)
JODY (TURNER) BRUCE,)
)
Appellee-Petitioner.)
)

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable Jack Tandy, Special Judge
Cause No. 30C01-9607-DR-216

September 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Brent Turner (“Father”) appeals the trial court’s order finding his son partially emancipated, holding Father in contempt for non-payment of child support and ordering him to pay attorney’s fees to Jody (Turner) Bruce (“Mother”). Father argues that because his son was eighteen years old, had not attended or been enrolled in a secondary school or post-secondary educational institution in the past four months, and was capable of supporting himself, Father’s child support obligation should have been terminated pursuant to Indiana Code section 31-16-6-6(a)(3). Father also contends that the trial court erred by finding him in contempt and by ordering him to pay attorney’s fees to Mother. We affirm in part and reverse in part.

Facts and Procedural History

Mother and Father divorced in 1997. Mother was awarded custody of the parties’ only child, B.T. Father was ordered to pay child support in the amount of \$129 per week. In 2007, Father’s support obligation was increased to \$141 per week.

In December 2010, when B.T. was eighteen years old, Father filed a petition to emancipate B.T. and calculate his child support arrearage. In January 2011, Mother filed a response and citation for contempt, alleging that Father was in contempt for non-payment of child support. A hearing was held on the issues of emancipation and contempt.

At the hearing, B.T. testified that he graduated from high school in May 2010 and that after graduation he obtained employment at CNR Racing working forty hours per week and earning \$9.00 per hour. B.T. also testified that had he continued working for

CNR, he would have been eligible for health insurance and retirement benefits. B.T. stated that he quit CNR voluntarily after working there for a few weeks. When asked why he quit, B.T. stated that full-time employment interfered with his weekend racing hobby, saying, “it got into my racing schedule. . . . I have to prepare the car for the weekend.” Tr. p. 15. B.T. also testified that after leaving CNR, he worked part-time as a snow plower and that he looked for other jobs but was not hired because he had expressed plans to join the armed forces. B.T. stated that he planned to enlist but did not have a “set date” for doing so. *Id.* at 17.

Father argued that B.T. was “fully capable of supporting himself even though he chooses not to do so at this point in time” and asked the court to terminate his financial obligation to B.T. *Id.* at 6. Father also asked that the emancipation date be the date of filing: December 10, 2010. In response, Mother argued that Father’s support obligation should continue until B.T. made a decision about enlisting.

On the issues of contempt and attorney’s fees, the parties stipulated that Father owed \$1386 in past due child support and \$341.72 for other expenses. Father argued that he should not be held in contempt for the support owed because six of the nine missed payments were the result of a period of financial hardship he experienced in 2009. Father also argued that contempt was inappropriate because he had continued to pay child support while the emancipation petition was pending. Finally, Father asked that he not be required to pay Mother’s attorney’s fees because the parties had made an attempt to resolve the issues, though they were ultimately unsuccessful. Mother contended that

attorney's fees were appropriate because Father had been reluctant to agree to the amount of child support owed, and that as a result, the support "issue was forced." Tr. p. 8.

The trial court ruled that B.T. was partially emancipated under Indiana Code section 31-16-6-6(a)(3), stating, "he has the ability to work but does not have the ability to support himself entirely." Appellant's App. p. 13. The court reduced Father's support obligation to \$70 per week, and ordered Father to pay an additional \$70 per week toward the support arrearage. The court also found Father in contempt for non-payment of child support and ordered him to pay \$300 of Mother's attorney's fees. Father now appeals.

Discussion and Decision

At the outset we note that Mother did not file an appellee's brief. Under that circumstance, we do not undertake to develop the appellee's arguments. *Branham v. Varble*, No. 62S01-1103-SC-141, 2011 WL 3808103, at *2 (Ind. Aug. 30, 2011). Rather, we will reverse upon an appellant's prima facie showing of reversible error. *Id.*

On appeal, Father contends that the trial court erred by concluding that B.T. was partially emancipated, finding Father in contempt, and directing him to pay attorney's fees to Mother.

I. Termination of Child Support Obligation

We first address Father's claim that the trial court erred by finding that B.T. was partially emancipated. Regarding the termination of child support and emancipation of a child, Indiana Code section 31-16-6-6 provides as follows:

- (a) The duty to support a child under this chapter ceases when the child becomes twenty-one (21) years of age unless any of the following conditions occurs:

(1) The child is emancipated before becoming twenty-one (21) years of age. In this case the child support, except for the educational needs outlined in section 2(a)(1) of this chapter, terminates at the time of emancipation, although an order for educational needs may continue in effect until further order of the court.

(2) The child is incapacitated. In this case the child support continues during the incapacity or until further order of the court.

(3) The child:

(A) is at least eighteen (18) years of age;

(B) has not attended a secondary or postsecondary school for the prior four (4) months and is not enrolled in a secondary or postsecondary school; and

(C) is or is capable of supporting himself or herself through employment.

In this case the child support terminates upon the court's finding that the conditions prescribed in this subdivision exist. However, if the court finds that the conditions set forth in clauses (A) through (C) are met but that the child is only partially supporting or is capable of only partially supporting himself or herself, the court may order that support be modified instead of terminated.

(b) For purposes of determining if a child is emancipated under subsection (a)(1), if the court finds that the child:

(1) has joined the United States armed services;

(2) has married; or

(3) is not under the care or control of:

(A) either parent; or

(B) an individual or agency approved by the court;

the court shall find the child emancipated and terminate the child support.

Father argues that the trial court erred by finding B.T. to be partially emancipated pursuant to subsection (a)(3) of the statute. We agree.

In recent cases, our courts have clarified that subsection (a)(3) does not concern the emancipation of a child; rather, it identifies circumstances in which a parent's obligation to pay child support may terminate. Whether a court should find a child "emancipated" is an entirely separate inquiry. *Carpenter v. Carpenter*, 891 N.E.2d 587, 593 (Ind. Ct. App. 2008); *see also Borders v. Noel*, 800 N.E.2d 586, 591 (Ind. Ct. App. 2003) (recognizing that subsection (a)(3) is an "alternative basis" to emancipation for terminating child support).

Review of the trial court's findings, the transcript, and Father's arguments on appeal concerning whether B.T. should be "emancipated" under subsection (a)(3) lead us to believe the distinction between subsections (a)(1) and (a)(3) may not have been wholly recognized by the court and Father below and on appeal. However, we need not dwell on this issue as we conclude the trial court erred by finding that B.T. could not support himself entirely.

As previously stated, B.T. was eighteen years old at the time Father petitioned to terminate his child support obligation. Having already graduated high school, B.T. had not attended or been enrolled in a post-secondary institution in the past four months. Regarding B.T.'s ability to support himself, we note that subsection (a)(3) clearly requires only that a child be *capable* of supporting himself, not that the child actually be supporting himself. *Carpenter*, 891 N.E.2d at 595.

Therefore the evidence relevant to our inquiry is as follows: B.T. was able to secure full-time employment at \$9.00 per hour with the opportunity for health insurance and retirement benefits. B.T. voluntarily left this position to pursue his weekend hobby of racing cars. While voluntarily leaving a job may be relevant to whether an individual is actually supporting himself, it does not have bearing on whether an individual is *capable* of supporting himself. *Id.* There is nothing in the record that indicates B.T. cannot obtain another full-time position if he so desires. While he contends that he has been unable to find employment because he expressed interest in joining the armed forces, we note that when B.T. makes a decision regarding his intent to enlist, this situation will be immediately resolved. Further, there is no evidence that B.T. has any physical or mental ailments that would interfere with his ability to support himself. B.T. has no dependents, and there is no evidence that he has any significant debts or other bills. We therefore find that B.T. is capable of supporting himself entirely.

We reiterate that we do not find B.T. to be emancipated; rather, we find that Father's obligation to pay child support should be terminated under Indiana Code section 31-16-6-6(a)(3). While the support termination petition was pending, Father continued to pay child support in the amount of \$141 per week. After the trial court found B.T. partially emancipated, Father made weekly child support payments of \$70. We have determined that B.T.'s status at the time of filing satisfied subsection (a)(3) and that Father's support obligation should have been terminated. We reverse and remand with instructions that the trial court terminate Father's child support obligation and determine the amount of credit Father is owed.

II. Contempt

Father next argues that the trial court erred by finding him in contempt for non-payment of child support. He claims the evidence presented did not support a finding that he “willfully disobeyed” the trial court as defined by our indirect contempt statute, Indiana Code section 34-47-3-1.

In addressing Father’s challenge to the trial court’s contempt finding, we set forth the provisions of our indirect contempt statute:

A person who is guilty of any willful disobedience of any process, or any order lawfully issued:

- (1) by any court of record, or by the proper officer of the court;
- (2) under the authority of law, or the direction of the court; and
- (3) after the process or order has been served upon the person; is guilty of an indirect contempt of the court that issued the process or order.

Ind. Code § 34-47-3-1. The party in contempt bears the burden of demonstrating that his acts were not “willful.” *Williamson v. Creamer*, 722 N.E.2d 863, 865 (Ind. Ct. App. 2000). However, with respect to non-payment of child support, our supreme court has held that “contempt is not appropriate unless the parent has the ability to pay the support due.” *Pettit v. Pettit*, 626 N.E.2d 444, 448 (Ind. 1993).

Because a determination as to whether a party is in contempt is within the discretion of the trial court, we will reverse a trial court’s finding only if “it is against the logic and effect of the evidence before it or is contrary to law.” *Mosser v. Mosser*, 729 N.E.2d 197, 199 (Ind. Ct. App. 2000). When reviewing a contempt order, we do not reweigh the evidence or judge the witnesses’ credibility and will uphold the order unless

the record provides us with a “firm and definite belief a mistake has been made by the trial court.” *Piercey v. Piercey*, 727 N.E.2d 26, 31-32 (Ind. Ct. App. 2000).

Father argues that the contempt finding was inappropriate because there was “absolutely no evidence regarding Father’s ability to pay and absolutely no evidence that Father’s failure to pay was willful.” Appellant’s Br. p. 14. We disagree.

Father bore the burden of establishing that his failure to pay was not willful. Father failed to make nine child support payments, for a total of \$1386 in child support arrearage. He argues that his failure to pay was not willful because six of the nine payments at issue were missed during a period of financial hardship. Even if we were to accept Father’s argument and assume his non-payment during this time period was not willful, Father fails to offer any explanation for the remaining missed support payments. We conclude that Father did not prove that his failure to pay was not willful.¹

As we have stated, a finding of contempt is not appropriate unless the parent has the ability to pay the support due. Though the trial court made no finding regarding Father’s ability to pay, we conclude that the record contains sufficient evidence of Father’s ability to make the outstanding child support payments. Father has been employed as an Indiana State Trooper with a base pay of \$52,499, and the opportunity to work some overtime hours. He is a member of the Indiana National Guard and receives compensation for time spent at guard drill duty. We also note that the hearing to address

¹ After arguing that his failure to pay was not willful, Father draws our attention to the fact that he continued to pay child support while his petition to terminate support was pending. It was Father’s duty to pay child support unless and until a modification or termination of that obligation was ordered. While Father correctly notes that a ruling in his favor would entitle him to a credit, his decision to abide by a court order does not influence our review of the contempt finding.

the issues of termination of child support and contempt, no witness testified to any reason why Father would be unable to pay the amount owed. We conclude that Father had the ability to pay the support due and acted willfully in failing to make the payments at issue. The trial court did not err by holding Father in contempt.

III. Attorney's Fees

Finally, we address Father's argument that the trial court erred by ordering him to pay \$300 in attorney's fees to Mother. He argues that there was no evidence supporting an award of attorney's fees.

However, we have already affirmed the trial court's holding that Father is in contempt. Once a party is found in contempt, the trial court has inherent authority to award attorney's fees as compensation for damages resulting from the other party's contemptuous actions. *Topolski v. Topolski*, 742 N.E.2d 991, 996 (Ind. Ct. App. 2001), *reh'g denied*. Such authority includes the award of attorney's fees expended by a party to enforce a child support order. *Id.* Because Father was found in contempt, the trial court did not err by awarding attorney's fees to Mother.

Affirmed in part and reversed in part.

FRIEDLANDER, J., and DARDEN, J., concur.