



## STATEMENT OF THE CASE

Kirk R. Bristol appeals the trial court's judgment and subsequent denial of his motion to correct error in favor of Latasha Bristol.

We affirm the trial court's judgment and deny Latasha's request for appellate attorney's fees.

## ISSUES

1. Whether the trial court erred as a matter of law by finding Kirk in indirect contempt of the dissolution decree.
2. Whether the trial court erred as a matter of law in modifying support as a remedy for contempt.
3. Whether the trial court erred as a matter of law in its award of post-secondary support.
4. Whether an award of appellate attorney's fees is warranted.

## FACTS

Kirk and Latasha were married on April 14, 1990. Four children were born of the marriage: Kyle, born July 11, 1990; Alexander, born March 2, 1992; B.B., born October 8, 1995; and V.B., born January 7, 1999.

On November 1, 2005, Latasha filed a petition to dissolve the marriage. On March 15, 2006, Kirk and Latasha entered into a "Final Separation and Property Settlement." Both parties were represented by counsel. The trial court adopted the parties' agreement and incorporated it into its March 22, 2006 dissolution decree. The

dissolution decree awarded custody of the children to Latasha and ordered Kirk to pay child support. Kirk had moved to California by this time, while Latasha remained in Monroe County, Indiana to continue her studies in audiology. The dissolution decree, adopting and incorporating the parties' agreed settlement, noted that Latasha was a student at Indiana University and that Kirk had agreed to assist her in completing her education by transferring IRA assets to Latasha. The dissolution decree further noted that during the marriage, "Latasha interrupted her schooling for the birth of their children and to relocate with Kirk for his employment." (Latasha's App. 3).

The dissolution decree listed the parties' weekly gross income for child support purposes as \$1,538.46 for Kirk and \$206.00 for Latasha. The latter figure was imputed income at minimum wage.

The dissolution decree also provided the following, in pertinent part, as adopted and incorporated from the parties' agreed settlement:

**5. Child Support:**

Beginning with the 2005 tax returns, Kirk shall provide Latasha with a copy of his tax returns and copies of all supporting income documentation each year to verify whether or not he has received irregular income.

Beginning with March 13, 2006, any irregular income received by Kirk shall be reported to Latasha within fourteen (14) days of receipt thereof. Pursuant to the attached child support worksheet, Kirk shall pay directly to Latasha a sum equal to twenty-nine percent (29%) of his total gross irregular income on or before 14 days of the receipt of said irregular income.

Latasha currently is not employed full time and is searching for employment. At such time as Latasha becomes employed and incurs work related daycare expenses, support shall be immediately recalculated taking Latasha's income and actual work related daycare expenses into consideration.

Beginning with the 2006 tax returns, Kirk and Latasha shall exchange state and federal tax returns and W-2 forms or other documentation of income earned each year on or before April 15<sup>th</sup> . . . to determine if a modification of support is appropriate and to verify any irregular income.

(Kirk's App. 11-12).

The dissolution decree further provided the following, in pertinent part, as adopted and incorporated from the parties' agreed settlement:

**8. Post Secondary Educational Expenses for the Children:** Each child shall apply for any and all grants and scholarships available. Each child shall be responsible for one-third (1/3) of his or her post secondary education expenses to an in-state or state supported [sic] school or university. The remaining two-thirds (2/3) shall be prorated between the parties in accordance with his or her percentage of the total gross income. Based on the current worksheet, each child shall pay 33%, Kirk shall pay 59%, and Latasha shall pay 8% of post secondary educational expenses.

Each child shall be expected to be a full time student and to remain in good academic standing. Each child shall provide both parents with a copy of his or her grade transcripts and expenses thereof.

Post Secondary Educational Expenses shall be defined as tuition, room and board, books and fees for a period of four (4) years for undergraduate classes only.

(Kirk's App. 12-13).

In the years after the dissolution of the marriage, Latasha and her attorney asked Kirk on a number of occasions to provide the income information required by the

dissolution decree; however, Kirk did not comply with these requests. On March 10, 2009, Latasha filed her “Motion and Affidavit For Rule To Show Cause In Re Contempt and Motion For Attorney Fees.” (Latasha’s App. 16). Latasha’s motion included a claim that Kirk “has not provided proof of his income.” *Id.* The motion also stated the need for a hearing concerning post-graduate educational expenses. *Id.* Finally, the motion requested an award of attorney’s fees. *Id.* at 17.

A few months after the filing of the contempt motion, Kirk provided Latasha with income information for 2006, 2007, and 2008. On March 21, 2010, Kirk provided his 2009 W-2 to Latasha. The information showed that Kirk’s base pay, originally set at \$79,976.00 per year, had risen as follows: \$82,078.96 for 2007; \$84,706.56 for 2008; and \$87,079.88 for 2009. The income information showed that Kirk had irregular income of \$9,559.00 in 2007; \$6,333.00 in 2008; and \$5,013.00 in 2009. Twenty-nine percent of this irregular income, the amount due Latasha under the dissolution decree, amounted to \$2,772.11 for 2007; \$1,836.57 for 2008; and \$1,453.77 for 2009. During these years, Latasha, who received teaching stipends as a graduate student, did not earn even as much as the imputed minimum wage.

Kyle graduated with honors from Bloomington High School South and was accepted at Rose Hulman Institute of Technology (“Rose Hulman”) as an engineering student. As of the summer before Kyle’s freshman year, the cost of attending Rose Hulman was \$49,801. Kyle received sufficient academic grants and scholarships that the

remaining expense for him to attend his freshman year was \$8,801.00. Kirk refused to pay his pro rata share of Kyle's expenses because he believed that the dissolution decree obligated him to pay only for expenses at a state-supported school. Accordingly, Kyle had to obtain student loans to cover the shortfall for his freshman year.

Alexander graduated with honors from Bloomington High School South in or shortly before June 2010 and was accepted at Butler University. The cost of attending Butler for Alexander's first year was \$43,588.00. Alexander received a number of scholarships and grants.

The trial court held hearings on the motion for contempt and the post-secondary educational expenses on July 30, 2009, and June 15, 2010. The trial court then issued findings and conclusions, which in pertinent part, state:

**1. Father's Failure to Provide Tax and Income Documentation**

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- 1.2 By agreement of the parties, the Decree of Marriage Dissolution, issued on March 22, 2006, provides as follows: "Beginning with the [2005] tax returns, Kirk shall provide Latasha with a copy of his tax returns and copies of all supporting income documentation each year to verify whether or not he has received irregular income."
- 1.3 Father failed to provide tax or income documentation in 2006 through successive years to Mother in a timely manner. Mother and Mother's counsel made repeated requests for this information.
- 1.4 Father was aware of the court order to provide the tax and income documentation to Mother.

1.5 Father contends that he did not provide Mother with this tax and income documentation because she did not “exchange” her income information with him.

\* \* \* \*

1.8 The Court order was unambiguous that Father was to provide his tax and income documentation to Mother. Father willfully violated that order and is in civil contempt of this Court. Father’s explanation to the Court that he was not obligated to provide the tax and income documentation because Mother failed to “exchange” her own information is unconvincing.

1.9 Father’s delay in providing the tax and income documentation required Mother to expend funds for attorney fees and prevented Mother and the children from claiming and receiving child support that accurately reflected Father’s income. Father should pay Mother’s attorney fees.

1.10 The remedy for Father’s contempt, and to redress the damage to the children and to Mother, is to recalculate child support upon Father’s accurate income information for the years 2007, 2008, and 2009.

**2. Recalculation of Child Support and Irregular Income for Contested Years of 2007, 2008, and 2009**

2.1 At the time of the dissolution of marriage, the parents entered into an agreement to ensure that the children would receive child support that reflected Father’s true and complete income. As noted in earlier findings, the agreement required the parents to exchange tax and income documentation each year so that any irregular income would be known. Father agreed to pay child support based on his salary, and further agreed to pay an additional 29% of any irregular income. Father failed to provide Mother with the tax or income documentation in a timely manner.

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#### 4. Post-Secondary Expenses

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4.4 At the June 15, 2010 hearing, testimony was presented that Kyle has performed well at Rose-Hulman, obtaining grades of A's and B's, and has retained his grants and scholarships at Rose-Hulman for the school year of 2010-2011. The only unpaid portion of his post-secondary costs for the academic year of 2010-2011 will be \$7,494. Mother indicated her agreement to be responsible for 50% of those costs . . . . Mother and Father would each be responsible for \$3,747.

4.5 Testimony was presented regarding post-secondary education for Alex, who desires to attend Butler beginning in the fall of 2010. Alex graduated from Bloomington South High School with honors. Alex obtained . . . grants and scholarships from Butler, and the remaining cost is \$14,304. Mother indicated her agreement to be responsible for 50% of those costs . . . . Mother and Father would each contribute \$7,152.

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4.7 Father claims that he should not be responsible for the cost of Rose-Hulman or Butler, because Kyle and Alex could have attended a state school in California for much less. Alternatively, he argued that the boys could have received "free ride" scholarships or paid less at Indiana state-supported schools.

4.8 Mother's counsel contended in argument that the annual cost for an Indiana state-supported school is \$22,000. Father's Exhibit P is a summary of costs from Indiana state-supported universities compiled by the Indiana Youth Institute. According to Exhibit P, it appears the cost for tuition, books, room and board and other basic necessities at Indiana State University is \$14,889, IU is \$15,000, and Purdue University is \$17,000.

4.9 The Court, having considered these findings, concludes that the remaining cost (after deducting scholarship and grant awards) of the post-secondary education of Kyle and Alex at the in-state schools of their choosing (Rose-Hulman and Butler, respectively), are not

inconsistent with the cost of an Indiana state-supported school. This is particularly true considering that Mother has agreed to pay one-half of this cost beginning in the academic year of 2010-2011, rather than the income shares percentages agreed to in the dissolution decree. Further, these in-state universities (Rose-Hulman and Butler) are appropriate to the abilities of the boys, and the boys each earned in excess of \$35,000 in scholarships and grants to attend these specific schools. Allowing the boys to attend Rose-Hulman and Butler is consistent with the ruling in *Borth v. Borth*, [806 N.E.2d 866 (Ind. Ct. App. 2004)]. In *Borth*, the Indiana Court of Appeals held that the trial court was authorized to modify the parents' settlement agreement regarding post-secondary expenses for their child, allowing the child to attend Baylor University rather than a state-supported university.

(Kirk's App. 18-19; 22-24).

On September 14, 2010, Kirk filed a motion to correct error, wherein he challenged both the evidentiary and legal conclusions of the court. On December 22, 2010, the trial court denied the motion.

### DECISION

Kirk requested and the trial court issued findings of fact and conclusions of law. Generally, when a trial court makes such findings and conclusions at a party's request, our standard of review is two-tiered: we will determine whether the evidence supports the findings and then whether the findings support the judgment. *Carpenter v. Carpenter*, 891 N.E.2d 587, 592 (Ind. Ct. App. 2008). We will not set aside the findings or judgment unless they are clearly erroneous. *Id.* Here, however, Kirk alleges that the trial court erred as a matter of law. Although we defer substantially to the findings of fact, we do

not defer to the questions of law; rather, we evaluate questions of law de novo. *Harris v. Harris*, 800 N.E.2d 930, 935 (Ind. Ct. App. 2003), *trans. denied*.

1. Propriety of Trial Court's Contempt Determination

Kirk contends that the dissolution decree adopting and incorporating his agreement with Latasha is ambiguous. Kirk's primary argument is that the agreed entry prepared while both he and Latasha were represented by attorneys, and adopted and incorporated into the dissolution decree, left him with a reasonable belief that he did not have to provide financial information unless Latasha exchanged such information with him. Kirk maintains that he cannot be held in contempt for failing to comply with an ambiguous decree.

Indirect contempt is the "willful disobedience of any lawfully entered court order of which the offender had notice." *Hanson v. Spolnik*, 685 N.E.2d 71, 82 (Ind. Ct. App. 1997), *trans. denied*. Where a party fails to follow a court order, that party bears the burden of showing that the violation was not willful. *Emery v. Sautter*, 788 N.E.2d 856, 859 (Ind. Ct. App. 2003), *trans. denied*. "The order must have been so clear and certain that there could be no question as to what the party must do, or not do, and so there could be no question regarding whether the order is violated." *Phillips v. Delks*, 880 N.E.2d 713, 717-18 (Ind. Ct. App. 2008) (citing *City of Gary v. Major*, 822 N.E.2d 165, 170 (Ind. 2005)). A party may not be held in contempt for failing to comply with an ambiguous or indefinite order. *Id.* Civil contempt is for the benefit of the party who has

been injured or damaged by the failure of another to conform to a court order issued for the private benefit of the aggrieved party. *Cowart v. White*, 711 N.E.2d 523, 530 (Ind. 1999).

In a dissolution of marriage action, the parties are free to draft their own agreements. *Bernel v. Bernel*, 930 N.E.2d 673, 681 (Ind. Ct. App. 2010), *trans. denied*. Such agreements are contractual in nature and become binding upon the parties when the dissolution court adopts and incorporates the agreement into the dissolution decree. *Id.* When interpreting these agreements, we apply the general rules applicable to the construction of contracts. *Id.* That is, unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning. *Id.* Clear and unambiguous terms in the contract are deemed conclusive, and when they are present, we will not construe the contract or look to extrinsic evidence but will merely apply the contractual provisions. *Id.* Terms are not ambiguous merely because the parties disagree as to the proper interpretation of those terms. *Id.*

Here, the trial court looked at the two provisions of the agreed settlement adopted and incorporated into the dissolution decree and determined that the provisions were not ambiguous. Again, these provisions provide:

[1] Beginning with the 2005 tax returns, Kirk shall provide Latasha with a copy of his tax returns and copies of all supporting income documentation each year to verify whether or not he has received irregular income.

[2] Beginning with the 2006 tax returns, Kirk and Latasha shall exchange state and federal returns and W-2 forms or other documentation of income

earned each year on or before April 15<sup>th</sup> . . . to determine if a modification of support is appropriate and to verify any irregular income.

(Kirk's App. 11-12).

Kirk, Latasha, and their respective attorneys agreed to these provisions, and while only the latter provision requires Latasha to provide financial information, both unequivocally require Kirk to provide financial information. Contrary to Kirk's present argument that the second provision is ambiguous and renders the first provision ambiguous, we see straightforward provisions that require Kirk to provide certain financial information to Latasha. Latasha's failure to provide her information required under the second provision does not create an ambiguity; instead, it invites the filing of a cross-motion for contempt. Ignoring the decree was not an acceptable substitute.

We conclude that the provisions unambiguously require Kirk to provide his financial information. We further conclude that his failure to do so warrants the trial court's contempt determination.

## 2. Propriety of the Trial Court's Damages Award

Kirk's contention on this issue is two-pronged. First, Kirk argues that the trial court was limited to compelling him to provide the information, which he did before the contempt hearing. Second, Kirk argues that the trial court's damages award is, in effect, an improper modification of his support obligation.

In support of Kirk's first contention, he cites *Thompson v. Thompson*, 458 N.E.2d 298, 300-01 (Ind. Ct. App. 1984). In *Thompson*, the former husband failed to provide

insurance, pay the mortgage, or pay support and maintenance as required by the dissolution decree. The trial court held him in contempt and modified the dissolution decree to provide that the former wife should receive “additional assets” that were formerly awarded to the husband. *Id.* at 299. On review, we noted that “the only proper goal of a civil contempt proceeding such as this is to protect the rights, under the original court order, of those it was meant to benefit.” *Id.* at 300. We also noted that the trial court’s order modifying its original decree “bears little relation to the purpose of a civil contempt proceeding-enforcement of the trial court’s original order” and that “[f]aced with similar facts, our supreme court has held that the trial court in a contempt proceeding has no authority to modify the dissolution decree it was called upon to enforce.” *Id.* We accordingly held that the trial court exceeded its contempt powers in shifting the parties’ remaining marital assets to the former wife.

*Thompson*, however, does not prohibit the trial court’s action in the present case. Indeed, immediately after the *Thompson* court stated the “proper goal” of a civil contempt proceeding, it held that “one held in contempt for failing to pay support should be ordered to pay the total arrearage and given an opportunity to purge himself of contempt by paying the amount owed.” *Id.* at 300. Thus, the trial court in the present case did not err in doing more than compelling Kirk to provide the requisite financial evidence.

In support of his second contention, Kirk cites *Becker v. Becker*, 902 N.E.2d 818, 819 (Ind. 2009) and related cases for the proposition that a modification of an existing child support obligation may not take effect on a date earlier than the date on which the petition to modify is filed.<sup>1</sup> Kirk emphasizes that there are only two exceptions to this “general” prohibition: “(1) when both parties have agreed to an alternate payment scheme following the spirit of the original decree; or (2) when the obligated parent takes the child into [his or her] home and assumes full custody.” Kirk’s Br. at 12 (citing *Becker*, 902 N.E.2d at 818 n.4). Kirk emphasizes that neither of these exceptions is applicable in this case.

“A trial court’s inherent civil contempt power is both coercive and remedial in nature.” *Mitchell v. Mitchell*, 785 N.E.2d 1194, 1199 (Ind. Ct. App. 2003). In exercising its contempt power to achieve remedial results, the trial court should fashion a remedy that compensates the aggrieved party. *Id.* Once a party is found to be in contempt, monetary damages are permitted to compensate the other party for injuries incurred as a result of the contempt. *Meade v. Levett*, 671 N.E.2d 1172, 1181 (Ind. Ct. App. 1996).

The evidence reveals that prior to filing the rule to show cause, Latasha and her attorney initiated numerous contacts with Kirk to request that he comply with the dissolution decree by providing his income documentation. Kirk refused to provide

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<sup>1</sup> We note that both *Becker* and the companion case of *Clark v. Clark*, 902 N.E.2d 813 (Ind. 2009), involve the issue of whether retroactive diminution of an existing child support order is proper where the contemnor is incarcerated.

Latasha with said information about his income, thereby preventing Latasha from knowing how much his pay had increased. Because of his refusal, Latasha could not petition for adjustment of child support based on the undisclosed increase. Latasha and the children were injured by Kirk's noncompliance in an amount clearly equal to the increased child support that Latasha would have received in a petition to modify. In essence, the trial court awarded Latasha and the children compensatory damages that were calculated in a logical and appropriate manner—it awarded damages based on what Kirk would have owed but for his refusal to comply with the agreed upon dissolution decree. Indeed, the trial court stated that its award was intended “to redress the damage to the children and to [Latasha] . . . based upon [Kirk's] accurate income information for the years 2007, 2008, and 2009.” (Kirk's App. 19). More importantly, the trial court did not modify the language of the existing dissolution decree but instead enforced it. The trial court did not err as a matter of law in crafting its remedy.

### 3. Propriety of the Trial Court's Post-Secondary Education Determination

Kirk contends that the trial court erred as a matter of law in requiring him to pay a share of Kyle's and Alex's post-secondary education expenses at Rose Hulman and Butler. Specifically, he argues that “[a] parent may not be ordered to provide college expenses of a private school when the original order requires sharing the expenses of an ‘in-state or state supported [sic] school or university.’” Kirk's Br. at 12-13.

An agreement incorporated into a dissolution decree is treated as a contract and interpreted according to the rules of contract construction. *Rodriquez v. Rodriquez*, 818 N.E.2d 993, 995-96 (Ind. Ct. App. 2004), *trans. denied*. When interpreting a contract, we apply the four corners rule, which requires “that as to any matter expressly covered in the written contract, the provisions therein, if unambiguous, determine the terms of the contract.” *DLZ Indiana, LLC v. Greene Cnty.*, 902 N.E.2d 323, 327 (Ind. Ct. App. 2009). “Words used in a contract are to be given their usual and common meaning unless, from the contract and the subject matter thereof, it is clear that some other meaning was intended.” *Id.* If the language of the contract is unambiguous and the intent of the parties is discernible from the written contract, the court must give effect to the terms of the contract. *Id.* at 327-28.

Here, Kirk and Latasha, who were represented by attorneys, entered into an agreed entry that was adopted and incorporated into the dissolution decree and became an order of the trial court. The pertinent phrase states that Kirk, Latasha, and the particular child going to college shall be responsible for percentages of “post secondary educational expenses to an in-state or state supported [sic] school or university.” (Latasha’s App. 10) (emphasis added). The usual and common meaning of “or” is disjunctive, connecting alternatives. American Heritage College Dictionary 977 (4<sup>th</sup> ed. 2002). There is no basis, on the face of the document, for treating “in-state” as synonymous with a “state-supported” school or university. “In-state” limits the children’s choices to Indiana

colleges and universities, and the schools chosen by Kyle and Alex are Indiana post-secondary institutions. Accordingly, the trial court did not err as a matter of law in requiring Kirk to pay a percentage of the post-secondary expenses for his sons' attendance at Rose Hulman and Butler.

Furthermore, even if Kirk is correct in his reading of the agreement as adopted and incorporated into the dissolution decree, Kirk cannot show any harm. Kirk characterizes the issue as whether the annual educational expenses of the private schools are the equivalent to those of state-supported colleges or universities. However, Kirk misapprehends the issue, which is whether his attempt to limit his contribution under the dissolution decree has been frustrated by the trial court's current order.

In the first hearing, conducted on July 30, 2009, Latasha presented evidence from Indiana University's Office of Admissions that the cost of in-state tuition and fees for the 2009-10 school year ranged from \$19,334.00 to \$21,943. In the subsequent June 15, 2010 hearing, Kirk presented evidence from the Indiana Youth Institute that the estimated cost for an in-state student would be \$15,000 at Indiana University and \$17,000 at Purdue University. Under the dissolution decree, if both sons attended Indiana University, Kirk's obligation would, at the very least, be \$11,800.00 per school year, a sum that is

\$901.00 more than the \$10,899.00 that he is required to pay under the trial court's current order. Kirk has shown no reversible error.<sup>2</sup>

4. Award of Appellate Attorney's Fees

Latasha contends that an award of appellate attorney's fees is warranted in this case; however, her attorney does not develop an argument in support of such an award.

Indiana Code section 31-15-10-1 provides that attorney's fees may be awarded for proceedings occurring after the entry of final judgment, including proceedings on appeal. *Thompson v. Thompson*, 811 N.E.2d 888, 929 (Ind. Ct. App. 2004). The trial court retains jurisdiction to award appellate attorney's fees even after the perfection of the appeal. *Id.* Appellate attorney's fees, however, should not be awarded unless the appeal is frivolous or in bad faith. Ind. Appellate Rule 66(E). Furthermore, "[a]ppellate sanctions are an extreme measure and 'should not be imposed to punish lack of merit unless an appellant's contentions and argument are utterly devoid of all plausibility.'" *Posey v. Lafayette Bank and Trust Co.*, 583 N.E.2d 149, 154 (Ind. Ct. App. 1991), *trans. denied.*

Although Kirk's appellate claims were not ultimately successful, we cannot say that his claims were frivolous, made in bad faith, or utterly devoid of all plausibility. Therefore, we deny Latasha's request for appellate attorney's fees.

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<sup>2</sup> Kirk mentions but does not develop an argument pertaining to the issues of partial abatement of child support and payment of trial attorney's fees. He does not include these subjects in his statement of issues or make a cogent argument or cite pertinent legal authorities thereon. Kirk has therefore waived the issues for review. *See Vanderburgh v. Vanderburgh*, 916 N.E.2d 723, 730 (Ind. Ct. App. 2009).

Judgment affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.