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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE PATERNITY OF A.G.L.	)	
	)	
N.H.,	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 64A03-1103-JP-124
	)	
M.M.,	)	
Appellee-Respondent.	)	

APPEAL FROM THE PORTER JUVENILE COURT
The Honorable Mary R. Harper, Judge
The Honorable Edward J. Nemeth, Magistrate
Cause No. 64C01-1003-JP-313

October 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

N.H. ("Father") appeals the denial of a motion to correct error challenging a child support order for the benefit of A.G.L., his child with M.M. ("Mother"). We affirm.

Issues

Father presents four issues for review: whether the trial court should have granted relief upon his motion to correct error because the trial court had abused its discretion:

I. in determining Father's income available for child support;
II. in determining Mother's income available for child support;
III. in modifying child support retroactively; and
IV. in ordering Father to pay a portion of Mother's attorney's fees.

Facts and Procedural History

Father and Mother are the parents of A.G.L., born September 20, 2002. Mother has physical custody of A.G.L. Father, who lives in Ohio, has parenting time of one weekend per month and four weeks in the summer. In 2006, Father was ordered to pay child support of $62.00 per week. On August 31, 2009, Mother petitioned to modify child support.

On December 9, 2010, the parties appeared for a hearing and offered evidence concerning the amount of gross income upon which each parent's obligation of child support should be calculated. Mother, a college graduate and new mother of twins, testified that she was then unemployed. Father, a chiropractor, testified that he performed chiropractic services as part of an entity known as Optimum Health Chiropractic, LLC ("Optimum"). Father's wife, also a chiropractor, had incorporated Optimum prior to the marriage. However, joint tax returns filed after the marriage indicated equal ownership. Father testified that the reporting of joint ownership was in error.

At the conclusion of the hearing, the trial court imputed minimum wage income to Mother, determined Father to be one-half owner of the chiropractic business, and calculated child support accordingly. Father's weekly child support obligation for A.G.L. was modified to $148.36. He was also ordered to pay a portion of Mother's attorney's fees. Father filed a motion to correct error, alleging newly discovered evidence consisting of recently amended business tax returns showing his wife as the sole owner of Optimum. The motion to correct error was denied. Father now appeals.

Discussion and Decision

Standard of Review

A trial court is vested with broad discretion to determine whether it will grant or deny a motion to correct error. Williamson v. Williamson, 825 N.E.2d 33, 44 (Ind. Ct. App. 2005). Furthermore, decisions regarding child support generally fall within the sound discretion of the trial court. Quinn v. Threlkel, 858 N.E.2d 665, 670 (Ind. Ct. App. 2006). An abuse of discretion occurs if the trial court's decision was against the logic and effect of the facts and circumstances before the court or if the court has misapplied the law. Walker v. Kelley, 819 N.E.2d 832, 836 (Ind. Ct. App. 2004).

We note that Mother has failed to file an appellee's brief.[1] When the appellee fails to submit a brief, we need not undertake the appellee's burden of responding to arguments that are advanced for reversal by the appellant. Hamiter v. Torrence, 717 N.E.2d 1249, 1252 (Ind. Ct. App. 1999). Rather, we may reverse the trial court if the appellant makes a prima

[1] Mother's attorney entered an appearance but submitted a "Notice of Decision Not to File an Appellee Brief."

facie case of error. Id. "Prima facie" is defined as "at first sight, on first appearance, or on the face of it." Id. Still, we are obligated to correctly apply the law to the facts in the record in order to determine whether reversal is required. Mikel v. Johnston, 907 N.E.2d 547, 550 n.3 (Ind. Ct. App. 2009).

Father's Income Available for Child Support

The trial court determined that Father's weekly gross income for child support purposes is $1,116.33. The gross income of $58,048.50 annually was derived by taking Optimum's ordinary business income for tax purposes, adding back $5,883 for depreciation, $13,246 for non-dividend distributions to shareholders, $31,093 for shareholder loan repayment and $4,308 for tax-exempt interest, and then attributing one-half to Father. Father challenges both the finding that he is one-half owner of Optimum and the trial court's adjustments to taxable income. Finally, he asserts that he should have been allowed a deduction from gross income to reflect his student loan payments.

On motion to correct error, Father claimed to have "newly discovered evidence" that he was a salaried employee and not a partial owner of Optimum. At the outset, we observe that "motions predicated upon newly discovered material evidence are viewed with disfavor." Scales v. Scales, 891 N.E.2d 1116, 1120 (Ind. Ct. App. 2008). Newly discovered evidence is "material evidence … which, with reasonable diligence, could not have been discovered and produced at trial." Ind. Trial Rule 59(A)(1). Father could have prevailed upon his claim of newly discovered evidence on motion to correct error only if he demonstrated: that the evidence could not have been discovered and produced at trial with reasonable diligence; that

the evidence is material, relevant, and not merely cumulative or impeaching; that the evidence is not incompetent; that he exercised due diligence to discover the evidence in time for the final hearing; that the evidence is worthy of credit; and, that the evidence raises the strong presumption that a different result would have been reached upon retrial. Scales, 891 N.E.2d at 1120. Father's newly discovered evidence consisted of amended tax returns. Presumably, if Father's prior tax returns were erroneous, this error could have been detected and corrected during the protracted discovery process in this case. The post-hearing amendment does not satisfy the requisite criteria for newly discovered evidence.

Nonetheless, Father urges this Court to order recalculation of child support upon concluding that his income consists solely of employee wage income of $36,000 annually and thus his gross weekly income for child support purposes is $692. A trial court's calculation of child support is presumptively valid and we will reverse a trial court's decision in child support matters only if it is clearly erroneous or contrary to law. Young v. Young, 891 N.E.2d 1045, 1047 (Ind. 2008) (citing Ind. Trial Rule 52(A)). A decision is clearly erroneous if it is clearly against the logic and effect of the facts and circumstances that were before the trial court. Id.

Father testified that he, like his wife, offered full-time chiropractic services at the Optimum premises. Mother offered documentary evidence that Father was a one-half owner of Optimum. The trial court specifically found Father's testimony denying any ownership interest to be lacking in credibility. However, Father complains that this finding is "against the manifest weight of the evidence." Appellant's Brief at 9. We will not reweigh the

evidence or assess witness credibility. Hardebeck v. Hardebeck, 917 N.E.2d 694, 698 (Ind. Ct. App. 2009). The attribution of one-half the Optimum income to Father is not clearly erroneous.

Father also claims that each of the adjustments to taxable business income is improper. First, he argues that a remand for recalculation of child support is required because the trial court disallowed business depreciation without finding that it had been overly accelerated for the purpose of favorable tax treatment.

Calculating gross income for the self-employed presents unique problems and calls for careful review of expenses. Young, 891 N.E.2d at 1048 (citing Child Supp. G. 3(A) cmt. 2(a)). Pursuant to Guideline 3(A)(2):

> Weekly Gross Income from self-employment [or] operation of a business ... 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.

The corresponding commentary further provides that "[w]hile income tax returns may be helpful in arriving at weekly gross income for a self-employed person, the deductions allowed by the Guidelines may differ significantly from those allowed for tax purposes." Child Supp. G. 3(A) cmt. 2(a).

Trial courts are vested with discretion to determine which business expenses are deductible for calculating the child support obligation of self-employed persons, but the court must engage in a careful review of the facts and circumstances present. Young, 891 N.E.2d

at 1049. Although the adjusted gross income from a party's tax return is "a useful point of reference," the trial court must evaluate the specific deductions taken to arrive at that figure. Id.

In considering depreciation, the trial court has broad discretion, but "should have as a goal … to measure a reasonable yearly deduction for necessary capital expenditures." Glass v. Oeder, 716 N.E.2d 413, 417 (Ind. 1999). Here, the trial court disallowed all the depreciation claimed on the Optimum business return. Had evidence been presented as to a reasonable yearly deduction for necessary capital expenditures, the trial court may well have allowed some amount, up to $2,941 (Father's one-half of the total depreciation for tax purposes).

Nonetheless, even assuming that error was made, it was not egregious. Assuming that $2,941 was erroneously included in Father's annual income, this amounts to $56.55 weekly. If the child support obligation worksheet is amended to reflect Father's weekly gross income to be $1059.78 as opposed to $1,116.33, the recommended child support obligation changes from $148.36 to $142.00 per week. In light of the resources available for the support of A.G.L., we find this to be a de minimis difference and need not remand for a new child support award. See e.g., In re Marriage of Nienaber, 787 N.E.2d 450, 457 n.6 (Ind. Ct. App. 2003) (finding de minimis mathematical error to be harmless and reversal not warranted).

Father also contends that a shareholder distribution was improperly added to his income although "[he] testified that he was not a shareholder of Optimum." Appellant's

Brief at 13. As previously discussed, the trial court found Father's testimony regarding Optimum ownership to lack credibility, and we will not assess credibility on appeal.

In much the same vein, Father argues that he did not benefit from the repayment of shareholder loans because any such loans were solely from his wife and any repayment would have gone to her. At the hearing, Father did not offer documentary evidence regarding the loan origin or repayment terms, instead choosing to take the position that he received only a $3,000 monthly salary for his full-time chiropractic services and had no interest in the profit or loss of Optimum. Once again, an acceptance of Father's appellate argument would involve a determination of credibility contrary to that made by the trial court. This we cannot do.

Father also makes a cursory allegation that tax-exempt interest income should not have been included as income available for child support purposes. However, he fails to develop a cogent argument with citation to relevant authority and has thus waived his contention for appellate review. Ind. Appellate Rule 46(A)(8)(a).

Father's final allegation of error with regard to the calculation of his income available for child support is that the trial court should have deducted Father's student loan payments as a business expense. According to Father, he could not generate income as a chiropractor without first having obtained the requisite education. This may well be; however, an education obtained prior to the formation of a business cannot represent an ordinary and necessary expense of conducting that business. It is pre-existing debt. Moreover, Father owes his student loan regardless of whether he ever offers chiropractic services. The trial

court was not obliged to include it as an ordinary and necessary expense for the production of business income.

In light of the foregoing, Father has demonstrated no clear error in the calculation of his income available for child support.

Mother's Income Available for Child Support

Father contends that the minimum-wage income of $290 per week attributed to Mother is inadequate. In particular, he claims that the evidence supports a single conclusion, that Mother has elected to stay home with her young twins as opposed to seeking employment, and thus income commensurate with her education should be imputed to her.

The Indiana Child Support Guidelines ("Guidelines") advocate a total income approach to calculating weekly gross income. Ratliff v. Ratliff, 804 N.E.2d 237, 245 (Ind. Ct. App. 2004). 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. Ind. Child Supp. G. 3(A).

A court can consider many factors in determining whether someone is underemployed, including a conscious decision to reduce income to avoid a higher child support obligation. In re Marriage of Turner v. Turner, 785 N.E.2d 259, 265 (Ind. Ct. App. 2003). The Guidelines give the trial court wide discretion to impute potential income to a parent when the trial court is convinced the parent's unemployment or underemployment has been contrived for the sole purpose of evading support obligations. Id. (citing Gilpin v. Gilpin,

664 N.E.2d 766, 768 (Ind. Ct. App. 1996)). However, the guidelines make it clear that to determine whether potential income should be imputed, the trial court should review the obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community. Id. As previously observed, "[a] trial court's calculation of child support is presumptively valid." Young, 891 N.E.2d at 1047. We will reverse only for clear error. Id.

Father correctly observes that Mother acknowledged a "plan" to stay home with her children "at this time." (Tr. 58.) However, taken in context, Mother's testimony indicates that the current (and temporary) plan arose after Mother had experienced significant employment changes and tried unsuccessfully to obtain employment commensurate with her training and experience. Mother testified:

> Q: [Mother], are you currently employed?
>
> A: No.
>
> Q: Alright. When this matter was first filed in August of '09 were you employed?
>
> A: No.
>
> Q: Were you receiving unemployment compensation?
>
> A: Yes, I was.
>
> Q: And you were laid off from Verizon, is that right?
>
> A: Yes, I was.
>
> * * *
>
> Q: [Mother], beginning the 1st of March of 2010, were you able to obtain employment?

A: Yes, I was.

Q: And where did you find work?

A: I was a contractor for ATCO Communications but working for Verizon again.

Q: And what type of work did you do?

A: I was a specialist of engineering, same position I held at Verizon when I worked there.

Q: And why were you going through ATCO versus Verizon directly? Or was there a reason?

A: Um, because I'm a contractor, and it means that I basically get no benefits; I'm just an hourly contractor on an as needed basis until Verizon no longer required my services.

Q: And was Verizon willing to hire you directly or did you have to go through ATCO?

A: Only through ATCO.

Q: Okay. And the last paycheck you received from ATCO then was October 16th of 2010?

A: Correct.

Q: Alright. So you were employed basically from March til the middle of October?

A: Correct.

* * *

Q: And have you sought employment back with ATCO since you gave birth to your kids?

A: Yes, I did.

Q: Alright. And what was their response?

> A: I actually contacted Frontier, which is now Frontier, Verizon sold to Frontier, and I contacted them and they said that they were no longer in need of my services. So, I contacted ATCO, at which point I told them that Frontier no longer needed me and requested if they had anything further for me, or another position, I would be interested. And they said they didn't have anything further at this time.
>
> Q: Okay. Did you also try and obtain unemployment compensation?
>
> A: Yes, I did.
>
> Q: And what was their response?
>
> A: I was not able to receive unemployment benefits; I was rejected.
>
> Q: So at this point you have no income.
>
> A: Correct.
>
> Q: And is your plan to stay home with your kids at this time?
>
> A: At this time, yes.

(Tr. 53-58).

There is no evidence that Mother rejected any available opportunity for employment. Nor is there evidence that her current unemployment was motivated by a desire to evade a fair contribution toward A.G.L.'s support. Mother now provides full-time care for her three children, obviating the necessity for summer and after-school child care costs that had previously been incurred for A.G.L. We also observe that the trial court decided to impute some income to Mother. Given the totality of the facts and circumstances before the court, we find no abuse of discretion.

Retroactivity of Child Support Modification

Mother filed her petition for modification of child support in August of 2009. The trial court's order of January 20, 2011 modified Father's child support to $148 weekly, commencing January 7, 2011. Additionally, the trial court ordered that Father's child support be modified to $100 per week, effective January 1, 2010. Father complains that the retroactive modification is unsupported by a separate child support worksheet and is thus arbitrary.

"A trial court has discretion to make a modification of child support relate back to the date the petition to modify is filed, or any date thereafter." Becker v. Becker, 902 N.E.2d 818, 820 (Ind. 2009). Here, the trial court selected a date that was several months after the filing of the petition to modify, and elected to award a reduced weekly amount. Father has cited no authority for his proposition that the trial court was obliged to complete a separate child support worksheet to justify the reduction, nor has Father demonstrated prejudice to his substantial rights.

Attorney's Fees

Finally, Father argues that the trial court abused its discretion when it ordered him to pay $3,000 of Mother's attorney's fees. Pursuant to Indiana Code Section 31-16-11-1, a trial court has broad discretion to impose attorney's fees on either parent. Thompson v. Thompson, 868 N.E.2d 862, 870 (Ind. Ct. App. 2007). We will reverse an order for the payment of attorney's fees only when the award is clearly against the logic and effect of the facts and circumstances before the court. Id.

The trial court may properly consider the respective resources of the parties, their financial earning abilities, and "any other factors that bear on the reasonableness of the award." Id. Moreover, the trial court may consider any misconduct that necessitated additional legal expenses for the other party. Id.

Here, the trial court concluded that Father should pay $3,000 of Mother's attorney's fees "as a result of father's superior income and father's obtrusive behavior in frustrating the discovery process." (App. 8.) The record supports the finding that Father has greater income than does Mother. There is also evidence that Father was uncooperative in providing business and personal income documents. We find no abuse of discretion in the trial court's order that Father pay a portion of Mother's attorney's fees.

Conclusion

Father has demonstrated no abuse of the trial court's discretion in its order for child support and the payment of attorney's fees. Accordingly, Father has demonstrated no abuse of discretion in the trial court's ruling on the motion to correct error.

Affirmed.

MATHIAS, J., and CRONE, J., concur.