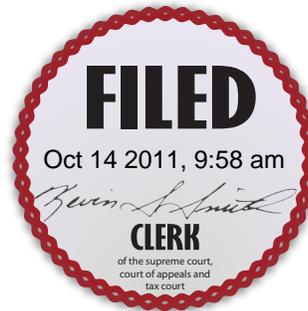


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

WILLIAM A. GOEBEL
Goebel Law Office
Crawfordsville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN LOVEALL,)
)
Appellant-Petitioner,)
)
vs.) No. 23A01-1102-DR-47
)
SUSAN (Loveall) KELLY,)
)
Appellee-Respondent.)
)

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable John A. Rader, Special Judge
Cause No. 23C01-9808-DR-207

October 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Brian Loveall (“Father”) appeals the trial court’s decision in favor of his former wife, Susan (Loveall) Kelly (“Mother”). Father contends that the trial court erred by granting Mother’s petition for modification of child support. Specifically, he argues that the trial court erred by finding that the change in circumstances required by statute was substantial without finding that it was continuing. We affirm.

Facts and Procedural History

Father and Mother have three children together: S.L, born January 20, 1993, T.L., born February 2, 1996, and K.L., born May 20, 1998. In August 1998, Mother filed a petition for dissolution. During dissolution proceedings, Mother and Father entered into a settlement agreement. The dissolution court approved and incorporated the settlement agreement into the dissolution decree and dissolved the parties’ marriage in November 1998.

The agreement addresses several topics, only some of which are relevant to this appeal. Regarding custody and child support, the parties agreed that Father would have custody of the children, and Mother would have parenting time during the days Father worked.¹ Appellant’s App. p. 15. Mother and Father also agreed that although the trial court had calculated child support, neither would pay child support to the other based upon Mother’s extended parenting time. *Id.*

¹ At the time of the agreement, Father worked a “four days on, four days off” schedule. *See* Appellant’s App. p. 15.

In March 2005, Mother filed a petition to modify custody and request for child support. In her petition, Mother stated that it was in the best interest of the children to modify custody in her favor. In August 2005, the trial court denied Mother's petition.²

Over four years later, Mother filed a petition identical to the March 2005 petition. The trial court granted Mother's petition in part, awarding her physical custody of the parties' oldest child, S.L. T.L. and K.L., however, remained in the custody of Father. Both parties were ordered to submit child support obligation worksheets. In September 2009, the court ordered Father to pay thirty dollars per week in child support to Mother.

The following May, the parties agreed to modify the custody provision of the decree of dissolution. The trial court approved the parties' agreement, which provided that Mother would assume physical custody of all three children. Despite the fact that Mother received custody of all the children, the parties reached an agreement terminating Father's obligation to pay child support:

Parties agree that neither shall pay child support to the other until further Order of this court and that said agreement is part of the consideration for the parties['] execution of this instrument and the fact that [Father] did not receive any support from [Mother] for a number of years. The parties agree that neither party owes the other any amount of support at this time.

Appellant's App. p. 35. Three months later, Mother filed a petition to modify the support order to require Father to pay child support. In her petition, Mother stated that a recent reduction in her work hours meant that her income, when calculated at forty hours per

² In its order, the trial court references allegations made by Mother regarding Father's alcohol consumption. In denying Mother's petition for modification, the trial court stated that there was "insufficient evidence to determine that the father's alcohol consumption changed from prior to the time the dissolution herein was granted." Appellant's App. p. 22. The transcript of this hearing is not before us.

week, was less than minimum wage. *Id.* at 38. Mother also stated that Father had significant income and that he should be ordered to pay child support. *Id.*

The trial court held a hearing on Mother's petition, during which the parties submitted a stipulated child support obligation worksheet. At the hearing, Mother testified that her hours at Midland Mills had been "cut down by approximately ten hours a week." Tr. p. 8. Mother also stated that she had no reason to anticipate an increase in her income, as her employer's state and federal funding had been cut. *Id.* Further, she stated, "[T]here's limited jobs. I'm a nutrition director." *Id.*

Father did not dispute Mother's testimony regarding her income, stating, "I have no idea what she makes." *Id.* at 12. Father also testified that his income at the time of the parties May 2010 agreement was considerably less than his income at present. *Id.* at 14. The court ordered the parties to submit post-hearing briefs and took the matter under advisement.

The court granted Mother's petition and ordered Father to begin paying \$263 per week in child support. The trial court stated that at the time of the May 2010 agreement, Father was unemployed and receiving approximately \$350 per week. Appellant's App. p. 57. At the time of the agreement, Mother was working approximately thirty-five hours per week, earning less than eight dollars per hour. *Id.* The court also found:

5. The father's argument [regarding modification] was two-fold (A) the parties were required to abide by the agreement that provided for no support and (B) there was no change in circumstances.
6. The mother disputed father's position and further suggested that the Agreement itself was effective until further Order of the Court.

7. The Court finds that a substantial change in circumstances has occurred in that father's income has increased substantially and the mother's income has decreased from the time of the May 5, 2010, Agreement.

8. The father's argument that the May 5, 2010, Agreement prevents the Court from now ordering support must fail.

9. The Court finds that father argues that part of the consideration for the May 5, 2010, Agreement is non-payment of support in the past by the mother but generally past consideration cannot serve as the only consideration for an enforceable contract.

10. Further, this Court will not countenance an Agreement wherein one spouse would condition a change of custody on another spouse not accepting support. This potentially has a two-fold effect of requiring the parent who does have the best interest of the children as their concern to give up financial support for those children in order that they may be with such parent and would allow a higher earning parent to utilize the cost of custody proceedings as a bargaining chip in the custody of the children.

Id. at 58 (formatting altered). In December 2010, Father filed a motion to correct errors, which was denied. Father now appeals.

Discussion and Decision

On appeal, Father argues that the trial court abused its discretion by modifying his child support obligation to require him to pay support for the parties' three children. Specifically, he contends that trial court erred by finding that the change in circumstances required by statute was substantial without finding it to be continuing.³ Father abandons his argument made to the trial court that his nonpayment of support was consideration for his agreement with Mother to modify custody of two of their children to her.

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.*

³ Father does not challenge the trial court's finding that his income increased substantially from the time of the parties' May 2010 agreement.

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.*

In reviewing a decision regarding a petition to modify child support, we will reverse if there is a showing that the trial court abused its discretion.⁴ *Meredith v. Meredith*, 854 N.E.2d 942, 947 (Ind. Ct. App. 2006). We consider the evidence most favorable to the judgment without reweighing the evidence or judging the credibility of the witnesses. *Id.* An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances that were before the trial court, including any reasonable inferences to be drawn therefrom. *Id.*

Indiana Code section 31-16-8-1, which governs the modification of support orders, provides in pertinent part:

- (a) Provisions of an order with respect to child support . . . may be modified or revoked.
- (b) Except as provided in section 2 of this chapter, modification may be made only:
 - (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable

Changes in employment and relative financial resources of the parties have been held sufficient to support a modification in child support. *Walters v. Walters*, 901 N.E.2d 508, 511 (Ind. Ct. App. 2009) (holding that ex-wife’s recently-acquired employment and corresponding income was substantial change in circumstances justifying modification of child support); *Burke v. Burke*, 809 N.E.2d 896, 898 (Ind. Ct. App. 2004) (a substantial change in circumstances warranting a downward modification of husband’s child support obligation existed where ex-husband experienced a decrease in pay); *Harris v. Harris*,

⁴ Our Supreme Court has noted that the standard of review has been stated both as “abuse of discretion” and “clear error.” See *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 940 (Ind. 2005).

800 N.E.2d 930, 938 (Ind. Ct. App. 2003) (change in employment and financial situation of both parties presented substantial and continuous change to justify child support modification), *trans. denied*.

Mother testified that her employment hours had decreased by ten hours per week. She stated that after this reduction in her hours, her income, when calculated at forty hours per week, was less than minimum wage. Mother also testified that she had no reason to believe her income would increase and that her employer relied upon federal and state funding, which had been cut due to the poor economy. When asked about the prospect of finding additional employment, she stated that she worked as a nutrition director, which has limited job availability.

While the trial court did not expressly designate the change in circumstances as continuing, Mother's testimony supports the conclusion that a substantial and continuing change in circumstances—as the trial court found, Mother's decrease in income and Father's increase in income—had occurred, which made the previous child support order unreasonable. We conclude that the trial court did not abuse its discretion by modifying Father's child support obligation.

Further, we agree with the trial court's conclusion that an agreement to modify custody that is conditioned upon one spouse not receiving child support is contrary to public policy. The agreement in this case is particularly worrisome. As the trial court points out, this type of agreement may create a situation in which a parent must forego the right to child support to obtain custody of their children—in essence, economic considerations become paramount, especially where one parent is in a superior financial

position. As our Supreme Court has stated, “If there is one overriding policy concern in dissolution actions, it is protecting the welfare and interests of children.” *Voigt v. Voigt*, 670 N.E.2d 1271, 1278 n.10 (Ind. 1996).

Affirmed.

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