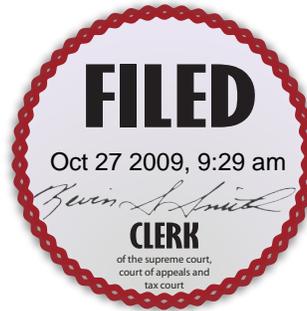


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE PATERNITY OF E.P.,)
)
M.B., Father,)
)
Appellant-Petitioner,)
)
vs.)
)
S.P., Mother, and STATE OF)
INDIANA,)
)
Appellee-Respondent.)

No. 68A01-0904-JV-195

APPEAL FROM THE RANDOLPH CIRCUIT COURT
The Honorable Max C. Ludy, Jr., Judge
Cause No. 68C01-9302-JP-16

October 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

M.B. (“Father”) appeals the trial court’s order denying Father’s motion for the appointment of counsel. Father raises one issue, which we restate as whether the trial court erred in denying Father’s motion for the appointment of counsel to represent him in connection with his petition to modify child support. We affirm.

The relevant facts follow. Father was ordered to pay child support in the amount of \$35.00 per week beginning in August 1993. Father was incarcerated in April 2008 and was scheduled to be released in August 2009. On November 20, 2008, Father filed a verified petition to modify child support. On that same day, Father filed a motion for the trial court to appoint counsel to represent him in connection with his petition to modify child support. On February 25, 2009, the State filed a verified information for contempt citation alleging that Father failed to comply with the court’s order regarding his child support obligations.

On March 18, 2009, the trial court held a hearing. At the hearing, Father requested the trial court to appoint counsel to represent him in connection with his petition to modify support. The trial court declined Father’s request.¹ At the conclusion of the hearing, the trial court modified Father’s child support obligation from \$35.00 per week to \$25.00 per week, effective from November 21, 2008. The court also ordered that beginning on August 21, 2009, the Friday after Father was scheduled to be released from incarceration, Father’s child support obligation shall revert to the amount of \$35.00 per week and an additional \$10.00 per week toward Father’s child support arrearage.

¹ However, the trial court did appoint counsel to represent Father in connection with the State’s verified information for contempt citation, and the trial court scheduled a hearing for October 30, 2009 related to the contempt citation.

The sole issue is whether the trial court erred in denying Father's motion for the appointment of counsel to represent him in connection with his petition to modify child support. In his motion for court appointed counsel, Father requested the trial court to appoint an attorney pursuant to Ind. Code § 34-10-1-2(b) and Sholes v. Sholes, 760 N.E.2d 156 (Ind. 2001). Father argues that the trial court erred in denying his request for appointed counsel.

In civil cases, "a prisoner has no absolute right to counsel." Sabo v. Sabo, 812 N.E.2d 238, 242 (Ind. Ct. App. 2004). The appointment of counsel for an indigent person who is either prosecuting or defending a civil action is controlled by Ind. Code §§ 34-10-1-1, -2. Ind. Code § 34-10-1-1 provides that "[a]n indigent person who does not have sufficient means to prosecute or defend an action may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as an indigent person."

Prior to 2002, Ind. Code § 34-10-1-2 provided as follows:

If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the court shall:

- (1) admit the applicant to prosecute or defend as an indigent person; and
- (2) assign an attorney to defend or prosecute the cause.

In interpreting this statute, the Indiana Supreme Court concluded:

The procedure for the trial court to determine when counsel must be appointed is: (1) the litigant is to apply to the trial court for leave to proceed "as an indigent person"; and (2) if the trial court finds that the applicant is

both indigent and without sufficient means to prosecute or defend the action, the trial court shall appoint counsel for the applicant.

Sholes, 760 N.E.2d at 160. Father argues that “[t]he *Sholes* doctrine should apply to the case at bar.” Appellant’s Brief at 5. Father argues that he “should be considered indigent because he lacks the financial means to hire counsel for himself.” Id.

However, in 2002, Ind. Code § 34-10-1-2 was amended and the relevant portion of the statute now reads as follows:

- (b) If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the court:
 - (1) shall admit the applicant to prosecute or defend as an indigent person; and
 - (2) may, under exceptional circumstances, assign an attorney to defend or prosecute the cause.
- (c) The factors that a court may consider under subsection (b)(2) include the following:
 - (1) The likelihood of the applicant prevailing on the merits of the applicant’s claim or defense.
 - (2) The applicant’s ability to investigate and present the applicant’s claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action.
- (d) The court shall deny an application made under section 1 of this chapter if the court determines any of the following:
 - (1) The applicant failed to make a diligent effort to obtain an attorney before filing the application.
 - (2) The applicant is unlikely to prevail on the applicant’s claim or defense.

This amendment changed the trial court's appointment of counsel from a mandatory act to a discretionary appointment, which is allowed where "exceptional circumstances" exist. See Ind. Code § 34-10-1-2(b)(2). The amendment also now requires the trial court to deny a request for appointed counsel if the applicant: (1) failed to make a diligent effort to obtain counsel; or (2) is unlikely to prevail on the claim. See Ind. Code § 34-10-1-2(d). Father appears to acknowledge that the Indiana legislature amended Ind. Code § 34-10-1-2 and that "this court must apply the current version of the statute" Appellant's Reply Brief at 2. However, Father argues that "[t]he factors required to be considered . . . mandate the same result that the court should have appointed counsel." Id.

Under Ind. Code § 34-10-1-2(d)(1), the trial court shall deny an application for the appointment of counsel where the applicant fails to make a diligent effort to obtain an attorney before filing the application. Here, there is no evidence in the record that Father made a diligent effort to obtain an attorney. Therefore, the trial court properly denied Father's request for the appointment of counsel. See Smith v. Harris, 861 N.E.2d 384, 386 (Ind. Ct. App. 2007) (holding that the trial court did not err in declining to appoint counsel where the incarcerated appellant/defendant presented no evidence that he made a diligent effort to obtain an attorney), trans. denied.²

² Father also argues that "[t]he State's argument is further faulty when the State argued [Father] made no effort to retain counsel. How could he? He was incarcerated and was found indigent." Appellant's Reply Brief at 2. However, Ind. Code § 34-10-1-2 does not contain an exception for applicants who are incarcerated. See Smith, 861 N.E.2d at 386 (observing that the defendant who was incarcerated was required to show that he made a diligent effort to obtain an attorney); Sabo, 812 N.E.2d at 245 (observing that the defendant who was incarcerated was required to show that he lacked sufficient means to prosecute his action).

We also observe that the issue in this case was the modification of child support. We note that child support modification is controlled by statute, that Father was provided with some materials regarding child support, and that the child support modification issue before the trial court in this case was not so complex as to require the assistance of counsel. Indeed, at the hearing, the trial court asked Father his position on his child support modification request, and Father stated that he received some paperwork while in jail and argued that the trial court could order his child support obligation to be “as low as almost one cent or one dollar a week.” Transcript at 15. Father also argued: “All I am asking is my support be lowered while I am incarcerated. Once I am out, you know, I have no problem with going back [S]ince I have been incarcerated that is what has gotten me in my biggest mess. It is because it keeps adding up while I am incarcerated.” Transcript at 14-15. Father’s argument demonstrated his ability to present his claim and arguments without an attorney given the relative non-complexity of the facts and legal issues in his child support modification action. As such, we cannot say that the trial court erred in denying Father’s request for the appointment of counsel. See Sabo, 812 N.E.2d at 245 (observing that the defendant/applicant did not lack sufficient means to prosecute

Father also argues that “[t]he burden should not be on an indigent incarcerated person to know they have to present evidence of trying to obtain an attorney when they have no money means or property with which to obtain one.” Appellant’s Reply Brief at 3. However, we observe that “[Ind. Code] § 34-10-1-1 places the burden upon the party seeking to proceed ‘as an indigent person’ to demonstrate that he or she is indigent and without ‘sufficient means,’” and that he or she made a diligent effort to obtain an attorney. See Sims v. Ivens, 774 N.E.2d 1015, 1019 (Ind. Ct. App. 2002).

his action in a dissolution proceeding where the issues involved in the civil matter were not so complicated as to require the assistance of counsel).³

For the foregoing reasons, we affirm the trial court's denial of Father's motion for court appointed counsel to represent him in connection with his petition to modify child support.⁴

Affirmed.

CRONE, J., and MAY, J., concur.

³ Father does not challenge on appeal the trial court's order modifying Father's child support obligation from \$35.00 per week to \$25.00 per week for the period of time Father was incarcerated.

⁴ The State argues that Father's appeal is moot and should be dismissed because "there is no effective relief that this Court can render to Father on appeal." Appellee's Brief at 4. However, we do not address this argument because we affirm the trial court's denial of Father's motion on other grounds.