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IN THE
COURT OF APPEALS OF INDIANA

LESA DAVIS,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 32A01-0903-CV-104
	)	
ANTONY ROMACK	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Stephenie LeMay-Luken, Judge
Cause No. 32D05-0710-DR-115

November 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Lesa Davis (Mother) appeals the ruling on her Verified Motion for Modification of Parenting Time Order and Child Support, in which she sought an order directing her ex-husband, Antony Romack (Father) to pay weekly child support for the parties' three minor children. Mother presents the following restated issues for review:

1. Did the trial court commit reversible error in failing to enter written findings in support of its order denying Mother's motion?

2. Did the trial court commit reversible error in failing to enter a child support order against Father?

We affirm.

The facts are that the parties were divorced by a dissolution decree on June 1, 2005. The parties have three minor children. Father was awarded primary physical custody of the children and Mother was ordered to pay child support. In 2007, the parties filed an Agreed Entry on Custody, Parenting Time, Child Support (the Agreed Entry). The Agreed Entry provided that Mother would assume the role of primary custodian of the children, with Father to exercise visitation every other weekend. In addition, and relevant to the issue presented in this appeal, the Agreed Entry provided, as follows:

> Father to have parenting time a minimum of two times (2x) a week when his work schedule permits. Father shall give Mother 12 hours notice of [sic] if he is able to exercise parenting time. If Mother's cell phone does not pick up, Father may leave a message on Mother's voice mail. Mother shall not allow her voice mail to become full.
>
> * * * * *
>
> With the exceptions listed though-out [sic] the parties' Agreed Entry, all sections of the Indiana Parenting Time Guidelines are adopted and shall be

followed including the holiday parenting time.

* * * * *

> Federal and State Income Tax Exemption: The parties agree that Mother shall be allowed to claim all three minor children as tax deductions on her yearly Federal and State Income Tax Returns, after Tax Year 2007. The parties agree that said tax exemptions [sic] are equivalent to Father paying child support in the amount of $9,000.00 yearly.
>
> Modification of Child Support Obligations: The parties agree that as long as the parties' agreed entry on custody and parenting time remains in effect neither party shall seek modification of the parties' agreed child support obligation as the parties' agreed entry on equal division of all uninsured healthcare, extracurricular activities expenses, and their provision of tax exemptions is just and fair.

Appellant's Appendix at 31-32, 34. The Agreed Entry was approved by the court and entered on December 12, 2007.

Sometime in July 2008, Mother filed a Verified Motion for Modification of Parenting Time Order and Child Support and a Verified Petition for Contempt. These were based upon allegations that Father violated the conditions of the Agreed Entry in that he did not exercise mid-week visitation with his children, did not exercise his holiday parenting time, and repeatedly failed to pay his share of the children's medical expenses in a timely fashion. As a result of the alleged violations of the Agreed Entry, Mother sought a finding of contempt and the imposition of a child support order. Following a hearing, the court denied Mother's motion for contempt and denied her motion for child support. The court also clarified that Father was to exercise extended visitation with the children in the summer (i.e., "per the Agreed Entry, … one half of the summer for parenting time") and was to pay his portion of

the children's medical bills directly to the providers. Mother appeals the trial court's denial of her request to impose a child support obligation upon Father.

1.

Mother contends the trial court committed clear error in failing to enter findings to support its decision. We note that Father did not respond to this argument in his appellate brief.

> An appellee's failure to respond to an issue raised in an appellant's brief is, as to that issue, akin to failing to file a brief. This failure does not relieve us of our obligation to correctly apply the law to the facts in the record in order to determine whether reversal is required. However, counsel for appellee remains responsible for controverting arguments raised by appellant. For appellant to win reversal on the issue, [the appellant] must establish only that the lower court committed prima facie error. Prima facie means at first sight, on first appearance, or on the face of it.

Khaja v. Khan, 902 N.E.2d 857, 868 (Ind. Ct. App. 2009) (quoting *Cox v. State*, 780 N.E.2d 1150, 1162 (Ind. Ct. App. 2002)) (citations omitted).

In support of her argument, Mother primarily cites the principle that a "deviation [from the Child Support Guidelines] must be supported by proper written findings justifying the deviation." *Quinn v. Threlkel*, 858 N.E.2d 665, 670 (Ind. Ct. App. 2006). This contention in turn is based upon the premises that the failure to impose a child support obligation upon Father constituted a deviation from the Guidelines and that the traditional payment of periodic child support contemplated in the Guidelines is the norm against which any alleged deviation is to be measured. The latter premise is faulty. In this particular case, as will be more fully explained in Issue 2, the parties effectively waived the Guidelines as the

template for their child support obligations, in favor of the non-traditional arrangement set out in the Agreed Entry. In the Agreed Entry, Mother stipulated that the proceeds she would realize as a result of being able to claim the children on her taxes amounted to a $9000 benefit to her, which constituted reasonable child support unless and until the agreed-upon parenting time terms were altered. As a result, she thereby agreed that $9000 was a reasonable amount of child support and also agreed that receiving it in that form, versus the more traditional receipt of periodic child support payments, was reasonable. So long as the Agreed Entry governs these matters, it, and not the Guidelines, is the measure of whether a particular circumstance constitutes a deviation, thus giving rise to the Guidelines' requirement of written findings. Therefore, Mother has not made a prima facie showing that the trial court committed clear error in failing to enter findings.

2.

Mother contends the trial court erred in denying her motion to modify the Agreed Entry with respect to Father's obligation to pay periodic child support.

Our Supreme Court has placed a "strong emphasis on trial court discretion in determining child support obligations" and has acknowledged "the principle that child support modifications will not be set aside unless they are clearly erroneous." *Lea v. Lea*, 691 N.E.2d 1214, 1217 (Ind. 1998). As we have noted above, the particular means of satisfying the noncustodial parent's child support obligation in this case is somewhat unique. The trial court approved the parties' agreement that the obligation would be met by

allocation of the tax exemptions pertaining to the parties' children. Mother alleged that Father had violated the terms of the Agreed Entry and therefore that its provisions, including the matter of child support, no longer governed. If such was the case, and in the absence of a subsequent agreement between the parties, the trial court would calculate Father's support obligation via application of the Guidelines. The parties agreed, however, that the Agreed Entry would govern these aspects of their legal obligations "as long as the parties' agreed entry on custody and parenting time remains in effect[.]" *Appellant's Appendix* at 34. In fact, the parties agreed that they would not even *seek* modification while these provisions remain in effect. The parties then sought and received the trial court's imprimatur, which the court gave by imposing the terms of the agreement in an order. Accordingly, the threshold question is not whether the trial court adhered to the Guidelines in both form and substance in ruling on Mother's motion, but whether the Agreed Entry still governs the parties' relationship with respect to custody and parenting time . We conclude that it does.

By its own terms, the Agreed Entry is to remain in force so long as the custody and parenting time provisions set out in the Agreed Entry are not altered. Mother did not seek to alter those terms in her motion to modify. Rather, she alleged that Father had violated several of those terms, specifically that he did not exercise mid-week visitation and that he did not timely pay his portion of at least some of the children's medical expenses. There was evidence adduced at the hearing, however, from which the court could reasonably find that Mother failed to adhere to the requirement that she in some cases consult, and in all cases at

least notify, Father before incurring medical expenses on the children's behalf. It appears instead that in many cases Mother merely presented Father with a demand for reimbursement after the fact. There was also evidence that Father paid such bills when he became aware of them. To avert this problem in the future, the trial court directed the parties to make arrangements to pay their respective portions of the children's medical expenses directly to the providers.

With respect to visitation, Father pointed out that the Agreed Entry provided he would exercise mid-week visitation "when his work schedule permits." *Appellant's Appendix* at 31. He testified that he presently works at UPS, as he did while the parties were married. He testified that during the seven months the Agreed Entry was in effect he had been working too late in the evenings to allow him to spend time after work with the children and still return them to Mother's house by a reasonable time. In other words, his work schedule did not permit mid-week visitation. He further testified that he worked the same hours while the parties were married, and that Mother was aware of this when she entered into the Agreed Entry. Ultimately, he testified that his work did not permit him to exercise mid-week visitation during the first seven months the Agreed Entry was in effect. Thus, he had not violated the terms of the Agreed Entry because the contemplated prerequisite for mid-week visitation had not occurred. Finally, the court clarified that Father was to exercise extended visitation for half of the summer. None of the court's rulings alter the parenting time arrangement set out in the Agreed Entry.

In summary, the parties agreed in the Agreed Entry that the imposition of a child support order would not be warranted in the present circumstances (i.e., when the parenting time arrangement set out in the Agreed Entry remains unchanged). Moreover, we note that a child support modification may be made only upon a showing of changed circumstances so substantial and continuing as to make the current terms unreasonable. Ind. Code Ann. § 31-16-8-1(1) (West, PREMISE through 2009 1st Regular Sess.). Put simply, the relevant circumstances here have not changed. The trial court's denial of Mother's motion to order Father to pay weekly child support is not clearly erroneous.

Judgment affirmed.

BAKER, C.J., and RILEY, J., concur.