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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE PATERNITY OF F.B.	)	
P.B.	)	
Appellant,	)	
vs.	)	No. 55A04-1006-JP-360
J.M.,	)	
Appellee.	)	

APPEAL FROM THE MORGAN CIRCUIT COURT
The Honorable Matthew G. Hanson, Judge
The Honorable Brian Williams, Magistrate
Cause No. 55C01-0803-JP-34

November 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

P.B. (Father) appeals from the trial court's order finding him in contempt and modifying his child support payment to $54 per week. Father presents four issues for our review, which we consolidate and restate as:

1. Did the trial court err in finding Father in contempt for failing to pay child support?

2. Did the trial court err in modifying Father's support obligation to $54 per week?

We affirm in part, reverse in part, and remand.

In October of 2005, Father and J.M. (Mother) had a child out of wedlock, F.B. (the child). On March 7, 2008, a verified petition for support was filed in the Morgan Circuit Court. On June 19, 2008, the trial court approved an agreed entry submitted by the parties that established paternity in Father, awarded custody of the child to Mother, and required Father to pay $90 a week in child support.

In June of 2008, Father worked for Print Pack earning $470 per week. That same month, Father's vehicle was lost because of flooding. Father was able to get a ride to and from work for a couple of weeks. Father claims that in July 2008 he was fired from his job for not showing up, which is why he did not apply for unemployment benefits. Father was also in the National Guard. Father was discharged from the National Guard because he has COPD. Father stopped receiving pay from the National Guard around July 4, 2009. Father did not seek Veteran's disability benefits and has not applied for Social Security disability benefits because he maintains his COPD only limits his ability to work. At some point in 2009, Father worked for Big O Tires for a couple of weeks before that business closed.

Father again did not seek unemployment benefits. Father maintains that he remains unemployed because of limits placed upon him by his having COPD.

Immediately after the court's order setting support, the Title IV-D office of Morgan County issued an income withholding order to Father's then-employer, Print Pack, and to Army Active Duty. Since the court's order, Father has made six child support payments:

03/13/09	$788.00
01/30/09	$ 19.79
12/31/08	$ 18.58
12/01/08	$ 38.97
10/01/08	$122.11
07/18/08	$ 68.06

The $788 payment in March of 2009 was taken from Father's tax refund. The other payments resulted from income-withholding orders in place at Print Pack and with the Army.

Father has two other children, ages 7 and 11, and they all live with Father's mother. Father receives food stamps and TANF[1] for his older children because their mother does not pay child support.

On November 20, 2009, Father filed a letter with the court in which he requested modification of his child support and sought enforcement of his parenting time with the child. On March 19, 2010, Mother filed a Verified Petition for an Order to Appear and Show Cause based upon Father's failure to pay child support as ordered. The trial court held a hearing on the pending motions on April 8, 2010 and subsequently issued its findings and order on May 26, 2010. Specifically, the court found Father "willfully failed to comply with the Court's order regarding payment of child support and is in contempt of Court."

Appellant's Appendix at 5. The court sentenced Father to ninety-days, all suspended. The trial court also found that as of March 31, 2010, Father's arrearage was $6702.49. In calculating Father's support obligation, the court imputed income to Father of $400 per week, resulting in a weekly child support obligation of $54. The court reduced Father's support obligation to that amount, retroactive to November 30, 2009, the date Father filed his letter with the court. In its order, the trial court did not require Father to make additional payments toward the arrearage. Father now appeals.

1.

Father presents several arguments in support of his position that the trial court erred in finding him in contempt. First, Father argues that the trial court erred in holding a contempt hearing without advising him of his right to counsel. Second, Father argues that the trial court's contempt finding is not supported by evidence that his failure to pay his child support obligation was willful. Finally, Father argues that the trial court erred in ordering him to be incarcerated without any attainable purge provision.

We begin by noting that Mother has not filed an appearance in this appeal to defend the contempt order. Further, although the State has entered an appearance, the State does not respond to Father's arguments regarding contempt, acknowledging that its only interest in this appeal is the child support modification. In this situation, we will not take on the burden of developing arguments for the appellee. *Butrum v. Roman*, 803 N.E.2d 1139 (Ind. Ct. App. 2004). We may reverse the trial court if the appellant establishes prima facie error. *Id*.

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[1] TANF refers to "the federal Temporary Assistance for Needy Families program under 42 U.S.C. 601 *et seq*." Ind. Code Ann. § 12-7-2-189.8 (West, Westlaw through 2010 2nd Regular Sess.).

"Prima facie error is defined as at first sight, on first appearance, or on the face of it." *Willard v. Peak*, 834 N.E.2d 220, 223 (Ind. Ct. App. 2005).

Indiana law provides that "where the possibility exists that an indigent defendant may be incarcerated for contempt for failure to pay child support he or she has a right to appointed counsel and to be informed of that right prior to commencement of the contempt hearing." *In re Marriage of Stariha*, 509 N.E.2d 1117, 1121 (Ind. Ct. App. 1987). Here, Mother filed a Verified Petition for an Order to Appear and Show Cause asking that Father be found in contempt for failure to pay child support. Father was not represented by counsel at the April 8, 2010 contempt hearing, nor did the trial court advise him of his right to an attorney or to a court-appointed attorney if Father proved to be indigent. Further, it is clear that the possibility of incarceration existed. Indeed, the trial court ordered Father to serve 90 days incarceration, all suspended. Father clearly risked the possibility of losing his physical liberty. Based on the forgoing, we conclude that Father was denied his due process right to appointed counsel at the contempt hearing.[2] *See id*. We therefore reverse the court's finding of contempt and remand with instructions for the trial court to vacate its order in this regard.

2.

Father argues that the trial court's modified support order reducing his support obligation to $54 per week is based on an income figure for Father that has no basis in fact.

[2] Having concluded that the contempt finding cannot stand, we need not address whether the evidence sufficiently established that Father's failure to pay his child support obligation was willful. With regard to the purge provision, we note that to avoid being punitive in nature, a contempt order "must offer an opportunity for the recalcitrant party to purge himself . . . of the contempt." *In re Paternity of C.N.S.*, 901 N.E.2d 1102, 1106 (Ind. Ct. App. 2009). Here, the contempt order did not contain a purge provision. The contempt order is improper for this reason as well.

In his November 30 letter to the court, Father requested the court review his child support obligation. Father's initial child support obligation was based upon the fact that he was employed earning approximately $470 per week and was further being compensated as an active member of the National Guard. In support of modification, Father testified that since the previous support order was entered, he lost his job, he was discharged from the National Guard, and he has only been able to secure employment for a period of two to three weeks. Father asserts that he suffers from COPD, which limits his ability to work. Father maintains that his only income is $280 a month he receives in TANF. Father thus maintains that the trial court abused its discretion in imputing to him an income of $400 per week.[3]

"We place a 'strong emphasis on trial court discretion in determining child support obligations' and regularly acknowledge '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) (quoting *Stultz v. Stultz*, 659 N.E.2d 125, 128 (Ind. 1995)). "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). In order to determine that a finding or conclusion is clearly erroneous, our review must leave us with the firm conviction that a mistake has been made. *Yanoff v. Muncy*, 688 N.E.2d 1259 (Ind. 1997). We give due regard to the trial court's ability to assess the credibility of witnesses. *Menard, Inc. v. Dage-MTI Inc.*, 726 N.E.2d 1206 (Ind. 2000). While we defer substantially to findings of fact, we do not do so to conclusions of law. *Id.* We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of

[3] On the court's child support worksheet, the trial court credited Father the amount he receives from TANF.

the judgment. *Yoon v. Yoon*, 711 N.E.2d 1265 (Ind. 1999).

The Indiana Child Support Guidelines allow a court to use potential income if a parent is voluntarily unemployed or underemployed without just cause. *See* Child Support Guideline 3(A)(3). In such cases,

> child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community. If there is no work history and no higher education or vocational training, the facts of the case may indicate that weekly gross income be set at least at the federal minimum wage level.

The Commentary to this Guideline warns, however, that "attributing potential income that results in an unrealistic child support obligation may cause the accumulation of an excessive arrearage, and be contrary to the best interests of the child(ren)." In each case, "a great deal of discretion will have to be used" in determining potential income. Ind. Child Supp. G. 3(A), Commentary 3(A); *see also J.M. v. D.A.*, 935 N.E.2d 1235 (Ind. Ct. App. 2010).

Although the trial court did not make any specific findings regarding Father's ability to work, it is evident from the record that the trial court considered Father's work history in attributing to Father income of $400 per week. This amount is less than what Father earned when employed, perhaps taking into account that Father is no longer in the National Guard. Father did not claim that he is incapable of working, but only that his condition limits his opportunities. The trial court's comments during the hearing demonstrate that the court considered Father's job losses and illness, but that the court did not find either circumstance to excuse Father's failure to pay child support. The court also noted Father's lack of effort in his attempts to visit the child and also that it took Father over a year to seek a modification.

The court's comments during the hearing clearly indicate that the court found Father capable of working. Given Father's previous income of $470 per week, and giving due deference to the trial court, we cannot conclude that the $400 income imputed to Father is unrealistic. The trial court did not abuse its discretion in this regard.

We affirm in part, reverse in part, and remand.

BARNES, J., and CRONE, J., concur.