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IN THE
COURT OF APPEALS OF INDIANA

TERESA ARMSTRONG,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 18A04-0705-CV-260
	)	
JEFFREY ARMSTRONG,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT NO. 3
The Honorable Robert L. Barnet, Judge
Cause No. 18D01-9909-DR-52

November 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Teresa Armstrong (Mother), appeals the trial court's Order calculating Appellee-Respondent's, Jeffrey Armstrong (Father), weekly gross income, and the trial court's decision that Father need not pay child support over and above his responsibilities for A.A.'s higher education expenses.

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

ISSUES

Mother raises two issues on appeal, which we restate as follows:

(1) Whether the trial court abused its discretion by excluding Father's overtime income when calculating his weekly gross income for the purpose of apportioning his contributions to A.A.'s higher education expenses; and

(2) Whether the trial court abused its discretion in ordering that Father pay no child support for A.A. above and beyond his responsibilities for her higher education expenses.

FACTS AND PROCEDURAL HISTORY

Mother and Father's marriage was dissolved May 22, 2000. Their eldest child, R.A., born November 8, 1979, was emancipated by mutual consent. Mother was awarded primary physical custody of their youngest child, A.A., born May 22, 1986. Father was ordered to pay $140.00 per week in child support. A.A. graduated from high school in May 2005 and enrolled in Purdue University's pre-veterinary program beginning in August 2005. Father and Mother agreed A.A. would not have to contribute funds to her undergraduate degree in an effort to allow her to save for veterinary school.

On May 17, 2005, Mother filed a Petition for Educational Expenses. The trial court did not render its Order until March 5, 2007. In the meantime, A.A. received scholarships, grants, and assistance from Purdue to cover her freshman year tuition. Her only expenses that year stemmed from a twelve-month lease to live in an apartment off-campus, and the costs related thereto. She signed another twelve-month lease for her sophomore year, but failed to retain her scholarships, grants, and other assistance adding tuition costs to her educational expenses. Mother's husband fronted payments for all of A.A.'s educational expenses, totaling $27,269.76, as of January 2007. Father contributed $7,000.00 for A.A.'s freshman year expenses, which totaled $14,461.15. A.A. spent the approximately twenty weeks she was not in school her freshman year at Mother's house. She visited Father infrequently.

Once Mother remarried in 2006 she quit her job, where she earned approximately $25,000.00 per year, and was supported by her husband. Father was employed for thirty-two years by the same company, but resigned in October 2005 due to concerns regarding the company's financial viability. He started receiving a pension, in the amount of $24,587.00 per year, and also began working for a different company, earning $30,888.00 per year, outside of overtime pay. Father voluntarily worked overtime when he began his new employment, but shortly thereafter overtime became mandatory. Father was uncertain how long overtime would be mandatory.

On January 26, 2007 a hearing was held on Mother's Petition. On March 5, 2007, the trial court issued its Order, which stated, in pertinent part:

6. [Mother] should contribute thirty-two percent (32%) and [Father] should contribute sixty-eight (68%) of the balance of [A.A's] fees, tuition, books and miscellaneous expenses for the Fall 2005/Spring 2006 school year and each school year thereafter[,] after grants, and scholarships received by [A.A.] Room and board expenses should be defined as [A.A.'s] rent, utility and food expense.

* * *

11. [Mother] should pay thirty-two percent (32%) and [Father] should pay sixty-eight (68%) of the cost of a lap top computer, modem and router for [A.A.]

12. Any prior Wage Assignment or Income Withholding Order issued herein should be vacated. The prior child support order herein should be modified to provide that if [A.A.] is residing in a residence hall, for any full week during the summer that [A.A.] visits with [Mother] the [Father] should pay child support to [Mother] in the sum of One Hundred Forty-Three Dollars ($143.00) per week through the office of the Delaware County Clerk. If [A.A.] is residing [off-campus] and the parties are paying rent [Father] should not be required to pay child support to [Mother] during periods of visitation by [A.A.] with [Mother].

13. [Father] should receive credit under this Order for any child support paid to [Mother] after August 14, 2005[,] as provided in paragraph 12. [Father] should reimburse [Mother] any difference owed after the deduction of said support and other amounts outside the Clerk's office by [Father] to [Mother].

(Appellant's App. pp. 111-13).

Mother now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

A trial court's modification of a support order will be reversed only for an abuse of discretion, that is, when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Burke v. Burke*, 809 N.E.2d 896, 898 (Ind. Ct. App. 2004). In determining whether the trial court abused its discretion in modifying a child support order, we neither reweigh the evidence nor judge the credibility of witnesses, but instead consider only the evidence most favorable to the judgment together with all reasonable inferences to be drawn therefrom. *Id.* Where there is substantial evidence to support the determination of the trial court, the judgment will not be disturbed even though we may have reached a different conclusion. *Id*.

II. *Overtime Income*

Mother first argues the trial court abused its discretion by not including Father's overtime income when calculating his contribution to their daughter's educational expenses. As we have found with respect to overtime income:

> The Indiana Child Support Guideline's definition of weekly gross income includes overtime pay. *See* Ind. Child Supp. Guideline 3(A)(1). However, such income can be "irregular or [non-guaranteed], which cause[s] difficulty in accurately determining the gross income of a party." Ind. Child Supp. Guideline, Commentary 2(b). Thus, a determination as to whether overtime should be included in a parent's weekly gross income is very fact sensitive. For that reason, when a trial court determines that it is not appropriate to include irregular income in the determination of a parent's child support obligation, the trial court should express its reasons. In addition, the dependability of a parent's overtime income and the parent's ability to maintain such income are crucial factors in determining whether such income should be included in a parent's weekly gross income. Therefore, the trial

> court must indicate in its findings and conclusions that it has considered those factors.

Railing v. Hawkins, 746 N.E.2d 980, 982 (Ind. Ct. App. 2001) (some internal citations omitted). With respect to overtime pay in the automotive industry, case law supports the idea that overtime income could be excluded when calculating weekly gross income because the automotive industry is "subject to periodic economic downturns." *Thompson v. Thompson*, 696 N.E.2d 80, 83 (Ind. Ct. App. 1998) (citing *Carter v. Morrow*, 563 N.E.2d 183, 186-87 (Ind. Ct. App. 1990)). However, the trial court must still articulate its reasons for excluding these "less dependable incomes," in light of the above-discussed principles. *Thompson*, 696 N.E.2d at 84.

Here, each party submitted their own worksheet and documentation for the trial court to use in determining the parties' weekly gross incomes and compute the appropriate child support amount. Mother included Father's retirement income and income from his current job, including overtime, when computing his weekly gross income. She included his overtime wages as a part of his gross income because his overtime is mandatory. Mother attributed minimum wage earnings to herself because her doctor recommended that she not work. On the other hand, Father's worksheet included his retirement income and the income from his current job, excluding his overtime income because "it is not guaranteed nor something that [he] can depend upon." (Appellant's App. p. 106). He calculated Mother's weekly gross income at $25,000.00 based on her per year income before voluntarily terminating her employment to relocate with her current husband.

The trial court adopted Father's calculations of both Mother's and Father's weekly gross incomes. However, when the trial court issued its Order, it gave no explanation for excluding Father's overtime income when computing his weekly gross income, contrary to the case law of this State. *See Railing*, 746 N.E.2d at 983 (the trial court did not abide by the requirements of Child Support Guideline 3 when it failed to discuss Father's overtime pay in computing his weekly gross income); *see also Thompson*, 696 N.E.2d at 84 (reversing the trial court's exclusion of Father's overtime and bonus income because the trial court failed to indicate consideration of the dependability of said income); *compare with Carter*, 563 N.E.2d at 186 (holding the trial court's statement, "[i]n setting the amount of child support the [c]ourt did not use the respondent's overtime because of its uncertainty," is sufficient articulation for deviating from the Child Support Guidelines). Therefore, we reverse the trial court's exclusion Father's overtime income in calculating his weekly gross income and remand to the trial court with instructions to consider whether Father's overtime income should be excluded in light of the above discussion.

III. *Father's Child Support Obligation*

Mother also argues the trial court abused its discretion by failing to require Father to pay child support for the twenty weeks a year A.A. is not at school and resides with Mother. Father maintains that he should not be required to pay room and board expenses for twelve months, and additionally pay child support during A.A.'s breaks from school. The trial court agreed with Father, stating, in pertinent part:

> The prior child support order herein should be modified to provide that if [A.A.] is residing in a residence hall, for any full week during the summer that [A.A] visits with [Mother, Father] should pay child support to [Mother] in the

> sum of One Hundred Forty-Three Dollars ($143.00) per week through the office of the Delaware County Clerk. If A.A. is residing off campus and the parties are paying rent [Father] should not be required to pay child support to [Mother] during periods of visitation by A.A. with [Mother].

(Appellant's App. pp. 112-13). Additionally, Mother argues that the trial court's finding "[Father] should receive credit under this Order for any child support paid to [Mother] after August 14, 2005 . . . ." is in conflict with Ind. Child Support Guideline 6. (Appellant's App. p. 113).

Indiana Child Support Guideline 3(G)(1) states, "[i]f the parents have a child who is living away from home while attending school, his or her child support obligation will reflect the adjustment found on Line J of the Post-Secondary Education Worksheet." That same Guideline references Indiana Child Support Guideline 6 Commentary, Extraordinary Educational Expenses, which derives its authority from Ind. Code § 31-16-6-2. Specifically, I.C. § 31-16-6-2(b) states, "[i]f the court orders support for a child's educational expenses at a postsecondary educational institution under subsection (a), the court shall reduce other child support for that child that: (1) is duplicated by the educational support order, and (2) would otherwise be paid to the custodial parent." If a trial court deviates from the Child Support Guidelines it should provide specific findings explaining the deviation. *Quinn v. Threlkel*, 858 N.E.2d 665, 673 (Ind. Ct. App. 2006) (citing *Matter of Paternity of T.W.C.*, 645 N.E.2d 1128, 1130 (Ind. Ct. App. 1995)).

In *Quinn*, a mother requested child support from their child's father when the child came home from college for visits. We agreed with the trial court that the father "should not be asked both to contribute to room and board costs . . . and not receive an abatement from

child support for making such a contribution, regardless of whether [the child] frequently visits [the mother] at her home." *Quinn*, 858 N.E.2d at 674. In following that same sentiment in the instant case, we agree with the trial court that "[i]f A.A. is residing off campus and the parties are paying rent [Father] should not be required to pay child support to [Mother] during periods of visitation by [A.A.] with [Mother]." However, as the trial court also notes, if A.A. lives in a residence hall, Father will be required to pay child support to Mother when A.A. is home for school breaks. Mother argues that it is impossible to find nine-month leases on a college campus, as support for her argument that Father should pay both room and board and child support for A.A. While the trial court agreed with Mother that nine-month leases are not available on college campuses, we find no evidence in the record to support such a contention. Regardless, as the trial court also points out, twelve-month leases are not necessary for residence halls. So, while Mother and Father agreed A.A. could live in an apartment (and could only find apartments with twelve-month leases) and agreed A.A. should not bear any of the costs of her undergraduate education, Mother's request for additional child support payments fails.

Additionally, we do not find that requiring reimbursement to Father for child support payments made after August 14, 2005, when he started paying A.A.'s educational expenses, violates Child Support Guideline 6. On the contrary, the trial court's Order conforms with I.C. § 31-16-6-2(B)(1), to the extent that the trial court shall reduce other child support payments that are duplicated by the educational support order, requiring Father pay a portion of A.A.'s educational expenses.

CONCLUSION

Based on the foregoing, we conclude that the trial court abused its discretion by excluding Father's overtime income when calculating his weekly gross income for the purpose of apportioning his contributions to A.A.'s higher education expenses without explanation. The trial court did not abuse its discretion in ordering that Father pay no child support for A.A. above and beyond his responsibilities for her higher education expense.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, C.J., and SHARPNACK, J., concur.