

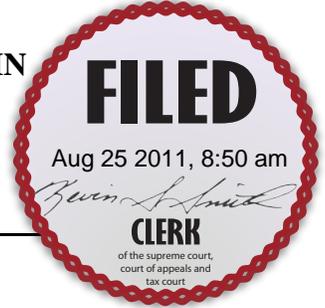
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**IN THE
COURT OF APPEALS OF INDIANA**

LINDA S. WETZEL,)
)
Appellant-Respondent,)
)
vs.)
)
JOHN E. WETZEL,)
)
Appellee-Petitioner.)

No. 29A02-1008-DR-968

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Wayne A. Sturtevant, Judge
Cause No. 29D05-0511-DR-3213

August 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Linda S. Wetzel (“Mother”) appeals a trial court order modifying the weekly child support obligation of John E. Wetzel (“Father”) from \$255 to \$0, where the two major changes in circumstances include Mother’s receipt of inheritance money and Father’s decrease in income due to the flailing housing market. The trial court concluded that such circumstances were proper bases for a support modification, and recalculated the parties’ incomes to determine the modified child support obligations. The trial court found that Mother’s income exceeded Father’s, calculated Father’s new obligation at a negative \$115.50, and ordered him to pay \$0 per week and to pay for health insurance on the couple’s two children. The trial court did not order Mother to pay support. Mother appeals, asserting that the trial court miscalculated the parties’ incomes and improperly made its order contingent upon an outside circumstance. We affirm.

Facts and Procedural History

Mother and Father were married on February 14, 1998. On October 9, 2001, they gave birth to twin daughters, E.W. and A.W. The couple divorced on September 15, 2006, and their marital settlement agreement provided for joint legal custody of E.W. and A.W., with Mother having primary physical custody. Father’s overnight parenting time was approximately 136 to 140 nights per year, or about thirty-eight percent of the overall nights. The trial court ordered Father to pay \$255 in weekly child support and to maintain health insurance on the children. The settlement agreement included the following provision: “The parties anticipate that Wife will receive money and future income from the estate and/or trust

established by her great uncle, recently deceased. Upon receipt of Wife's inheritance, the parties agree to recalculate child support based on Wife's new income, including the amounts she receives as an inheritance." Appellee's App. at 5.

On June 17, 2009, Father filed a request for modification of child support, citing his decreased income and Mother's receipt of her inheritance. On February 4, 2010, Mother filed a motion for a contempt finding against Father, citing an alleged failure both to pay child support and to maintain health insurance on the children.¹ On February 10, 2010, the trial court held a hearing on both motions.

At the hearing, the parties presented evidence regarding their incomes. Father was the sole owner of Winner's Circle Homes, LLC ("Winner's Circle"), a custom-home-building business formed in the late 1990s, and was one of two partners in WCH Partners, LLC ("WCH Partners"), a custom-home-building business formed in 2007. In 2009, he formed a solely owned flooring business, First Floor Carpet, LLC ("flooring business"). Father's exhibits A through G were admitted by stipulation of the parties and consisted of Father's 2007 and 2008 individual and home-building business tax returns; 2009 bank records for Father's home-building businesses and his new flooring business; and Father's 2009 individual bank account records. The exhibits and testimony showed that as a custom-home builder, Father had experienced a decrease in income from approximately \$75,000 to \$80,000 per year in his best years to \$27,550 in 2009, due to the collapse of the real estate market. By

¹ Respondent's Exhibit I shows that Father made reduced payments of \$850 for June through August 2009; \$550 for September through November 2009; \$500 for December 2009; \$400 for January 2010; and \$450 for February 2010. Father testified that he had allowed the children's health insurance to lapse in December 2009, but that he had re-applied for such insurance as of the February 2010 hearing. Tr. at 32.

2009, almost all his income was derived from the floor covering business he had started on the side. In the meantime, Mother had received an inheritance from her deceased uncle, taking her from an annual income of about \$24,000 to a three-year average of \$42,667 from 2007 through 2009.

On February 22, 2010, the trial court issued an order denying Mother's motion for contempt and granting Father's request for modification. The trial court determined that Father's gross weekly income was \$528 and Mother's gross weekly income was \$820. Consequently, the trial court concluded that Father's child support obligation was a negative \$115.50 and decreased Father's weekly support payments to \$0, while still ordering him to maintain health insurance on the children. The trial court made its order retroactive to the date of Father's motion and, instead of ordering Mother to pay Father for the support he had paid during the time the motion was pending, gave him a credit against any future obligation that might be recalculated once the housing market recovers.

On March 22, 2010, Mother filed a motion to reconsider, arguing that the trial court miscalculated the parties' incomes. The trial court held a hearing and denied Mother's motion. Mother now appeals.² Additional facts will be provided as necessary.

Discussion and Decision

Mother contends that the trial court miscalculated the parties' incomes and considered improper factors when modifying the original child support order. In all family court matters

² On May 16, 2011, Mother filed a motion to strike Father's appellee's brief, which we deny in an order issued contemporaneously with this decision.

involving children, the overarching policy goal is to protect the best interests of the children. *Clark v. Clark*, 902 N.E.2d 813, 816 (Ind. 2009). Decisions regarding child support are generally within the sound discretion of the trial court. *Payton v. Payton*, 847 N.E.2d 251, 253 (Ind. Ct. App. 2006). As such, we apply an abuse of discretion standard and will reverse a modification order only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* In so doing, we consider only the evidence and reasonable inferences favorable to the judgment. *Id.* “However, we will not blindly adhere to the computation of support without giving careful consideration to the variables that require changing the result in order to do justice.” *Id.* Where, as here, the trial court did not issue special findings, we will affirm the general judgment if it can be sustained upon any legal theory supported by the evidence. *Borum v. Owens*, 852 N.E.2d 966, 969 (Ind. Ct. App. 2006).

Indiana Code Section 31-16-8-1(b) lists the circumstances in which a child support order may be modified, stating that except when another statute applies, modification may be made only:

(1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or

(2) upon a showing that:

(A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and

(B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

I. Calculation of Parties' Incomes

On appeal, Mother does not dispute that there has been a substantial change of circumstances since the original support order was entered in 2006. Rather, she asserts that in the process of analyzing Father's modification request, the trial court miscalculated the parties' incomes. She bases her assertion upon the following: (A) the trial court's refusal to deem Father voluntarily underemployed and thereby impute potential income to him; (B) the trial court's calculation of Father's income derived from self-employment; and (C) the trial court's decision to include her inheritance in the calculation of her income.

A. Underemployment

The trial court found that Father had an income of \$27,000 in 2009. Citing Father's engineering degree and capabilities, Mother contends that Father should have been deemed voluntarily underemployed and that, as such, the trial court should have attributed to him an annual income of \$129,065. Indiana Child Support Guideline 3(A)(3) addresses voluntary underemployment, providing in pertinent part as follows:

If a court finds a parent is voluntarily unemployed or underemployed without just cause, 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.

The commentary to the guideline states that one of the reasons for attributing potential income is "to discourage a parent from taking a lower paying job to avoid the payment of significant support." Child Supp. G. 3, cmt. 2c. The commentary stresses that the decision to

attribute potential income is a matter within the trial court's discretion and that subparagraph -(A)(3) is aimed at situations where the parent refuses to be employed to his or her capabilities. *Id.* The commentary further notes that in determining a parent's income, "[c]are should be taken to set support based on dependable income, while at the same time providing children with the support to which they are entitled," with irregular income sources being "sensitive to downturns in the economy." *Id.*

Here, Father's principal business was custom-home-building. He began working in the home-building business when he was twelve and got his college degree in construction engineering in 1992. Tr. at 14. During the timeframe relevant to this appeal, he was the sole owner of Winner's Circle and was one of two partners in WCH Partners. His income from his construction businesses decreased substantially from the time of the original 2006 support order to early 2010, due to a well-documented downturn in market conditions. Although Winner's Circle had previously built an average of two to three custom homes per year, it did not have any custom buyers in 2008 and 2009 and thus built no custom homes during those years. Winner's Circle had a 2003 spec home that Father had unsuccessfully attempted to sell, which he temporarily used as a model home and eventually used as rental property. However, he testified that the income derived from renting the spec home "doesn't cover the [mortgage] payments and expenses." *Id.* at 19.³ As a result, Father had no income from

³ Father received a share of rent from another rental home. It was built around 2004 or 2005 and was the only home ever built by Deluxe Custom Homes, LLC ("Deluxe"), of which Father was one of two partners. Father testified that "[i]t costs more to own and maintain it than we receive in rents. So we do receive a monthly rent income, but that's off-set by the expenses." Tr. at 25. Like the other rental home, it was worth less than the amount "owed on it." *Id.* at 26. Deluxe also owns two vacant lots, which it has been unable to sell.

Winner's Circle in 2009. WCH Partners completed construction on a home in 2008, and in 2009, Father took only \$2000 in draws from that business. As of February 2010, WCH Partners had no assets, and Father and his partner were attempting to close the company. *Id.* at 22-23. In 2009, Father made approximately \$25,000 from the flooring business.

Because Father's construction businesses target high-end buyers, Mother asserts that during the market downturn, he should have simply built cheaper, smaller homes. However, Father testified that he could not compete with entry-level home-builders, who "have a niche [and] build repetitively the same home over and over again and it makes it more affordable for a first-time buyer It would cost more to build the way I do than they charge." *Id.* at 15. Amidst the economic downturn, Father worked fifty to sixty hours per week, making continued attempts to market his custom-home-building businesses, while forming and growing the flooring business to the point where it represented his major source of income, albeit a lower overall income. Thus, from the record it does not appear that Father refused to work; rather, he attempted to sustain his fragile home-building businesses, while proving resourceful and realistic by growing his flooring business. We agree with this Court's statement in *In re E.M.P.*, 722 N.E.2d 349, 352 (Ind. Ct. App. 2000), that "child support orders cannot be used to force parents to work to their full economic potential or make their career decisions based strictly upon the size of potential paychecks." In this vein, we do not believe that, in order to increase his paycheck during an economic downturn, a business owner should be expected to walk away from a business in which he has invested his time and expertise and from which he has developed goodwill. To the extent Mother now

asserts that the trial court should have “instruct[ed] Father to find a more profitable industry [or] seek alternate employment,” Appellant’s Br. at 20, we note that Father *did* seek an alternate means of earning income by venturing into the related business of flooring and carpet installation. Consequently, we conclude that the trial court acted within its discretion in refusing to attribute potential income to Father.⁴

B. Father’s Income from Self-Employment

Mother next asserts that the trial court miscalculated the income that Father derived from self-employment. A trial court’s calculation of child support is presumptively valid and will not be reversed unless it is clearly against the logic and circumstances before the trial court or if the trial court has misinterpreted the law. *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 949 (Ind. Ct. App. 2006). Child Support Guideline 3(A)(2) provides in part,

Weekly Gross Income from self-employment, operation of a business, rent, and royalties is defined as gross receipts minus ordinary and necessary expenses. In general, these types of income and expenses from self-employment or operation of a business should be carefully reviewed to restrict the deductions to reasonable out-of-pocket expenditures necessary to produce income. These expenditures may include a reasonable yearly deduction for necessary capital expenditures. Weekly Gross Income from self-employment may differ from a determination of business income for tax purposes.

Here, the main dispute between the parties concerns which of Father’s expenditures and deductions were properly excludable in determining his weekly gross income. Mother specifically challenges the use of Father’s 2007 and 2008 tax returns as evidence of his gross

⁴ To the extent Mother argues that the trial court should have ordered Father to sell some of his assets to provide for his children, we note that the trial court has followed the parties’ relative financial positions from the time of the original dissolution. In the process, the court has considered testimony and exhibits concerning the parties’ relative assets and liabilities, as well as their personal choices on where and with whom to live. We will not second-guess the trial court’s decision.

weekly income for child support purposes. “The adjusted gross income from a party’s tax return is a useful point of reference, but the court must evaluate the deductions taken in arriving at that figure to ensure [that] they are reasonable out-of-pocket expenditures necessary to produce income [pursuant to Child Support Guideline 3(A)(2)].” *Young v. Young*, 891 N.E.2d 1045, 1049 (Ind. 2008).

In *Young*, our supreme court noted that the trial court had used the adjusted gross income figure from the father’s tax return in calculating his child support, and in so doing, “had permitted the entirety of the depreciation that [he had] deducted on his tax returns to be deducted from his income for child support purposes with no apparent consideration of whether the depreciation was appropriate or was overly accelerated for favorable tax treatment.” *Id.* at 1049. The *Young* court emphasized that trial courts must “carefully review these deductions to ensure they are reasonable out-of-pocket expenditures necessary to produce income.” *Id.* As a result, the *Young* court remanded the issue to the trial court for reconsideration as to which of the father’s deductions were proper in calculating his income for child support purposes.

Here, the trial court used Father’s 2007 and 2008 business and individual tax returns to determine his income for those two years. Because he had not yet prepared his 2009 tax return at the time of the February 2010 modification hearing, Father submitted his personal bank statements for 2009, along with photocopies of all checks he received. He also submitted the 2009 checking account statements from his businesses, which corroborated his testimony that he took a total of \$27,550 in draws and wages from his businesses. The trial

court based its calculation of Father's gross weekly income on the 2009 figures, which did not contain the depreciation and deductions utilized by the trial court in *Young*. As such, we find *Young* to be distinguishable. We also note that Mother neither objected to the introduction of the exhibits containing the 2009 figures nor offered evidence that contradicted them. To the extent she now, in her appellant's brief, offers figures that she asserts to be more accurate representations of Father's income, we note that such figures apply only to 2007 and 2008, with no figures offered for 2009. In sum, we conclude that the trial court did not err in calculating Father's weekly income at \$528.

C. Mother's Inheritance

Mother next argues that the trial court erred in including her inheritance as income. We disagree, based on the child support guidelines and the terms of the original marital settlement order. First, Child Support Guideline 3(A)(1) states in part, "Weekly Gross Income of each parent includes income from any source, except as [otherwise] excluded^[5] ... and includes, but is not limited to, income from salaries, wages ... gifts, *inheritance*, prizes, and alimony or maintenance received from other marriages." (Emphasis added.)

Mother relies on *Gardner v. Yrttima*, 743 N.E.2d 353 (Ind. Ct. App. 2001), as support for her argument that her inheritance was improperly included as gross income. There, another panel of this Court determined that, generally, inheritances are properly considered in calculating a parent's weekly gross income. *Id.* at 358. However, the *Gardner* court

⁵ The listed exclusions cover means-tested public assistance benefits and survivor benefits for other children residing in the home, neither of which appears to apply concerning Mother's inheritance money. Ind. Child Support Guideline 3(A)(1).

affirmed the trial court's decision to exclude the inheritance from the mother's gross income calculation due to the lack of evidence that she derived any regular, ongoing income from the inheritance. *Id.* at 356. We find *Gardner* to be distinguishable in two ways. First, at the time that it was decided, the child support guidelines did not specifically include inheritances on the list of sources of income to be included in such a calculation. Second, unlike the mother in *Gardner*, Mother received cash disbursements from the trust on a regular and ongoing basis.

Moreover, the original marital settlement order contains the following language: "The parties anticipate that [Mother] will receive money and future income from the estate and/or trust established by her great uncle, recently deceased. Upon receipt of [Mother's] inheritance, the parties agree to recalculate child support based on [Mother's] new income, including the amounts she receives as an inheritance." Appellee's App. at 5. Mother signed the order, and the record does not indicate that she objected to the provision. As such, her argument that her inheritance was improperly considered as a changed circumstance in a support modification proceeding is meritless.

Finally, Mother characterizes the trial court's decision to include her inheritance as attributing potential earnings to her under Child Support Guideline 3(A)(3). She thus argues that the trial court improperly deemed her voluntarily unemployed.⁶ We disagree with this characterization and therefore need not address whether she was voluntarily or involuntarily

⁶ Mother cites evidence that she took whatever jobs she could get but was unable to maintain an employment situation that coincided with her children's schedules.

unemployed. Instead, we conclude that the trial court considered her inheritance as *actual* income and merely used an average of her trust fund disbursements from the preceding three-year period in calculating her weekly gross income.⁷ As such, her inheritance money was included as *actual*, not *potential*, income. Thus, the trial court acted within its discretion in including Mother's inheritance in determining her weekly gross income.

II. Contingency

Mother also contends that the trial court erred by making its 2010 modification order contingent upon an outside circumstance, i.e., the state of the housing market. In its modification order, the trial court observed,

[I]t is anticipated that the housing market will improve, and that [Father] will be able to return to the occupation in which he is experienced and trained. It is also anticipated that [Father's] flooring business will also grow as the economy and housing market improves. [Father] is placed under an ongoing duty to notify [Mother] of any continuing change of income that would bring his child support obligation into the positive range.

Appellant's App. at 24.

We do not read the trial court's statement as creating a contingency. Instead, we find the court's statement to be similar to its prior statement in the 2006 property settlement regarding the anticipation of a support recalculation upon Mother's receipt of her inheritance. In both instances, the trial court set the parties' support obligations and merely observed that certain circumstances would merit a recalculation. In its 2010 support order, the court calculated Father's child support obligation at a negative \$115.50, and set his payments at \$0,

⁷ Mother's trust income was \$41,000 in 2007, \$45,000 in 2008, and \$42,000 in 2009. The trial court took the average, \$42,667 annually, and calculated Mother's gross weekly income at \$820.

except to the extent that he had to maintain health insurance on the children. In lieu of ordering Mother to reimburse Father for partial payments made between the date he filed his modification petition and the date of the trial court's retroactive order, the court simply designated that sum as a credit against Father's anticipated future support obligation. The court also placed Father under an affirmative duty to report income changes to Mother, thereby further signaling to Father that he should not view the support order as permanent relief from his child support obligation. As such, we find no reversible error on this point.

In sum, we conclude that the trial court acted within its discretion in modifying the child support order based on its recalculation of the parties' incomes. Consequently, we affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.