MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Theodore E. Rokita
Attorney General

Andrew J. Ireland
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

State of Indiana,
Appellant-Intervenor,

v.

Michael Fuller,
Appellee-Petitioner,

and

Kimberly Gibson,
Appellee-Respondent

March 9, 2022

Court of Appeals Case No. 21A-JP-2473

Appeal from the Noble Superior Court

The Honorable Robert E. Kirsch, Judge

Trial Court Cause No. 57D01-1807-JP-59

Crone, Judge.

Case Summary

[1] The State of Indiana, as an intervening party, appeals the trial court's order abating the child support arrearage owed by Michael Fuller (Father) based upon a stipulation between Father and Kimberly Gibson (Mother), parents of a minor child, S.F. The State argues that the trial court's order constitutes an abuse of discretion and is contrary to law. We agree and therefore reverse and remand.

Facts and Procedural History

[2] Mother gave birth to S.F. out of wedlock on February 15, 2017. That same day, Father executed a paternity affidavit establishing himself as S.F.'s biological father, and the parties shared joint legal custody by agreement. Mother and Father separated in June 2018, and Father filed a petition regarding child custody, child support, and parenting time. In August 2018, the trial court entered an order that required, among other things, that Father pay child support in the amount of $226.00 per week.

[3] In June 2021, the State, as an intervening party, filed a motion for contempt and rule to show cause due to Father's failure to comply with a June 2019 trial court order providing for an amended child support obligation of $111.00 per week in current support resulting in an arrearage of $2404.29 as of May 25, 2021. The trial court granted the State's motion for contempt and issued a writ of body attachment for Father.

[4] On August 20, 2021, Father sent a pro se request to the trial court for custody modification and a child support review hearing. On September 1, 2021, Father and the State filed, and the trial court approved, an agreed entry providing that Father was in contempt of Court for failure to pay child support as ordered. The parties agreed that Father would thereafter pay $111.00 per week in child support, plus $10.00 per week toward the arrearage, which had risen to $3,736.29. Father was sentenced to thirty days in the Noble County Jail, with sentence stayed on the condition that Father meet his child support obligation for a period of one year.

[5] A review hearing was held on October 18, 2021. Both Father and Mother appeared pro se at the hearing, and the State was represented by counsel. During the hearing, Father and Mother advised the trial court that they had reached an agreement providing for joint legal and shared physical custody of S.F. Father and Mother further agreed that Father's child support arrearage should be modified to "-0-" as of October 18, 2021. Appealed Order at 1. The State objected to the complete abatement of Father's child support arrearage.

[6] On October 26, 2021, the trial court entered its amended order granting Father's request for a complete abatement of his child support arrearage. The court stated that it "does not find that … any case law known to the Court, forecloses the right of the parties, subject to the approval of the Court, to freely agree to the vacation of an accumulated child support arrearage owed by one party to the other." *Id.* Accordingly, the trial court stated that it "accepts the parties' agreement and releases and discharges in full the accumulated child

support arrearage as of this date by [Father] to [Mother]." *Id.* at 1-2. The State now appeals.

Discussion and Decision

[7] The State argues that the trial court abused its discretion by granting Father's request for abatement and eliminating the child support arrearage he accrued prior to his request. Father did not file an appellee's brief, allowing us to apply a less stringent standard of review. We may reverse if the appellant establishes prima facie error—that is, error at first sight. *Romero v. McVey*, 167 N.E.3d 361, 365 (Ind. Ct. App. 2021). The State has unquestionably met that standard.

[8] Our supreme court has long held that a court may not retroactively reduce or eliminate child support obligations after they have accrued.[1] *Whited v. Whited*, 859 N.E.2d 657, 661 (Ind. 2007); *Zirkle v. Zirkle*, 202 Ind. 129, 172 N.E. 192, 194 (1930). Indeed, Indiana Code Section 31-16-16-6(a) clearly states that "a court may not retroactively modify an obligor's duty to pay a delinquent support payment." Thus, even assuming that Father's August 20, 2021 letter to the trial court may be construed as a petition to modify his child support obligation, any modification granted by the trial court could not eliminate the arrearage he accrued prior to the date of the letter. A trial court's retroactive modification of child support payments is erroneous if the modification relates back to a date earlier than the filing of the petition to modify. *Sexton v. Sedlak*,

[1] There are exceptions to this rule, but none apply here.

946 N.E.2d 1177, 1183-84 (Ind. Ct. App. 2011) (citing *Becker v. Becker*, 902 N.E.2d 818, 820 (Ind. 2009)), *trans. denied*.

[9] Moreover, the fact that Father and Mother entered into an agreement to abate Father's child support arrearage is of no moment. It is well settled that an individual cannot contract away his or her obligation to support his or her children. *See Bussert v. Bussert*, 677 N.E.2d 68, 71 (Ind. Ct. App. 1997) (providing that any agreement which purports to contract away a child's right to support is unenforceable as directly contrary to the public policy of protecting the welfare of children), *trans. denied*. Contrary to the trial court's statement, the court's "approval" of such agreement does not somehow make it enforceable. Appealed Order at 1. While Mother and Father's new custody arrangement may justify the agreed to modification of Father's current child support obligation to zero, such modification cannot apply retroactively to the arrearage accrued prior to August 20, 2021. In sum, we conclude that the trial court's retroactive abatement of Father's child support obligation is contrary to law, and therefore we reverse and remand for further proceedings consistent with this opinion.

[10] Reversed and remanded.

Bradford, C.J., and Tavitas, J., concur.