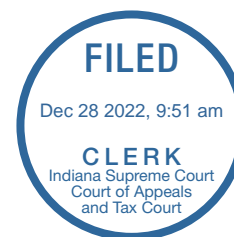


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

Thomas Grover Brooks III,
Appellant,

v.

Tracy Joy Brooks,
Appellee.

December 28, 2022

Court of Appeals Case No.
22A-DC-1528

Appeal from the Bartholomew
Superior Court

The Honorable Joseph W. Meek,
Senior Judge

Trial Court Cause No.
03D01-1802-DC-868

Brown, Judge.

[1] Thomas Grover Brooks (“Father”) appeals the trial court’s order denying his motion to modify his child support obligation. We reverse and remand.

Facts and Procedural History

[2] In October 2018, the trial court issued a Final Decree dissolving the marriage of Father and Tracy Joy Brooks (“Mother”) and providing that Father shall pay child support as set forth in a settlement agreement. The settlement agreement provided that Father shall pay child support of \$338 per week plus nineteen percent of any periodic bonus he may receive. A child support obligation worksheet attached to the settlement agreement included a weekly gross income of \$2,660 for Father and \$528.46 for Mother. In August 2019, the court issued an order providing that Father earned \$120,000 per year and was required to pay child support of \$232 per week. A child support obligation worksheet attached to the order included a weekly gross income of \$2,307.01 for Father and \$769.23 for Mother. In September 2020, the court issued an agreed entry providing in part that Father’s child support shall remain at \$232 per week.

[3] On May 27, 2021, Father filed a motion to modify child support. Father argued that there had been a change in circumstances so substantial and continuing as to make the terms of the child support order unreasonable. He also argued that, at the time his child support was determined, he “was imputed at \$120,000.00,” he had “not made that amount per year in the last 2 years since the child support order went into effect,” and he had been unemployed for the previous six months. Appellant’s Appendix Volume II at 19.

[4] On August 26, 2021, the court held a hearing. Father testified that he most recently worked for “E-Gineering,” he lost that job in November of 2020, and he had been unemployed for about eight months. Transcript Volume II at 6. He testified that he previously worked for “Carono” and a “sales force.” *Id.* at 6-7. He testified that he had worked in multi-media for fifteen years, he did “a lot of flash work [with] the old flash player,” that when the flash player was terminated “it killed [his] entire career,” that “literally like overnight [he] could not find work,” and that he had to compete against traditional engineers. *Id.* at 8. He indicated that he was in the process of a career shift. He testified that he started a business in screen printing, he would be lucky to break even that year, and he was hoping to make \$50,000 within two years. He testified: “I am inputted [sic] right now at about [\$120,000] a year and I am making zero and it’s killing me. I mean I have wiped out my savings. I have no money. I have taken out business loans and I have had family members loan me money like I am literally living off nothing and this is killing me. And I don’t know why I am paying this much money for child support when I don’t and so.” *Id.* at 16. On cross-examination, Father indicated that he had college and graduate degrees, that he worked from March through November 2020 as a contractor for “E-Gineering,” and after that he lived on unemployment benefits. *Id.* at 19. When asked “you have applied for jobs only at places that your specific degree is in,” he replied “[t]hat’s correct. Computers.” *Id.* at 22. He also indicated that he was married and lived with his attorney who had income. On redirect, he testified that he contributed to expenses related to utilities, rent, internet, gas, and groceries and that he had not yet had to depend on his spouse’s income.

[5] On February 17, 2022, Father filed a Request for Judgment noting that he filed his motion to modify child support on May 27, 2021, and a hearing was held on August 26, 2021. On March 16, 2022, the court issued an order denying Father’s motion to modify child support.¹ Father filed a motion to correct error, which was deemed denied.

Discussion

[6] We note that Mother has not filed an appellee’s brief, and we need not undertake the burden of developing arguments for her. *See Meisberger v. Bishop*, 15 N.E.3d 653, 656 (Ind. Ct. App. 2014). We apply a less stringent standard of review and reverse if Father establishes *prima facie* error. *See id.* *Prima facie* is defined as “at first sight, on first appearance, or on the face of it.” *Graziani v. D & R Const.*, 39 N.E.3d 688, 690 (Ind. Ct. App. 2015). This rule was established so that we might be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. *Wright v. Wright*, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002).

[7] Father maintains that he lost his job in November 2020, he attempted to find another job in IT for months while starting his own business, he was forced to change career paths, and he faced a change in circumstances so substantial and continuing as to make the terms of child support unreasonable. He argues:

¹ The trial court’s order did not include any findings regarding Father’s weekly gross income or the reason it denied his motion.

“After taking this issue under advisement for 6 months, all the information Father got was that his motion was denied. It is unclear as to what evidence the trial court used to determine if Father was voluntarily unemployed or underemployed.” Appellant’s Brief at 11. He argues:

Father is not voluntarily underemployed. However, Father did start his own company and acknowledge[s] that he will need to be imputed at a high [sic] rate than what he is currently making. Father made on average \$60,000 – \$75,000 prior in his multimedia field. Although Father would argue that he should be imputed around \$60,000.00, Father would agree [to] be imputed \$75,000 and not the \$23,000.00 he made last year due to starting his own company.

Id. at 13. In his conclusion, Father states:

Father did not voluntarily leave the above jobs and is unable to make the same amount of income. Father would ask for this court to impute him at \$75,000.00/yr for purpose of child support and remand the remaining issues of arrears or credit the Father might be owed or still owes Mother.

Id. at 14.

[8] We review the denial of a petition to modify child support under the clearly erroneous standard. *Tirey v. Tirey*, 806 N.E.2d 360, 363 (Ind. Ct. App. 2004), *trans. denied*. We review a denial of a motion to correct error for abuse of discretion. *Speedway SuperAmerica, LLC v. Holmes*, 885 N.E.2d 1265, 1270 (Ind. 2008), *reh’g denied*. Ind. Code § 31-16-8-1 governs modification of child support orders and provides in part:

- (a) Provisions of an order with respect to child support . . . may be modified or revoked.
- (b) Except as provided in section 2 of this chapter, and subject to subsection (d), 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.

[9] Indiana Child Support Guideline 3A(1) states “weekly gross income” is defined “as actual weekly gross income of the parent if employed to full capacity, potential income if unemployed or underemployed, and the value of ‘in-kind’ benefits received by the parent” and includes but is not limited to income from salaries, wages, dividends, capital gains, and unemployment insurance benefits. Further, Indiana Child Support Guideline 3A(2) provides that weekly gross income “from self-employment [and] operation of a business . . . is defined as gross receipts minus ordinary and necessary expenses.”

[10] As for potential income, Indiana Child Support Guideline 3A(3) provides that, if a court finds a parent is voluntarily unemployed or underemployed without just cause, it may calculate support based on the parent’s potential income and

that 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 Guideline 3A states, "a great deal of discretion will have to be used in this determination" and "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)." It also states: "If the involuntary layoff can be reasonably expected to be brief, potential income should be used at or near that parent's historical earning level. If the involuntary layoff will be extensive in duration, potential income may be determined based upon such factors as the parent's unemployment compensation, job capabilities, education and whether other employment is available. Potential income equivalent to the federal minimum wage may be attributed to that parent."

[11] We observe that the trial court did not make any findings of fact regarding Father's employment, income, or business, any calculation related to his child support obligation, or any reason for its denial of his motion to modify child support. The record reveals that Father lost his job in 2020, unsuccessfully attempted to find other employment in the field in which he had worked, and started a business. Father testified regarding his prior employment, the fields in which he was employed, his education, his income, and the business he hoped to grow. Father's testimony shows that his income had decreased substantially since the trial court's support order in September 2020. Father showed there

were changed circumstances so substantial and continuing as to make the existing child support order unreasonable.

[12] Based on the record before us, we conclude that Father has established *prima facie* error. We note Father agrees that his child support obligation should be calculated using an income for him of \$75,000 per year. We reverse and remand with instructions to enter an amended child support modification order which sets Father's basic weekly child support obligation based on an annual gross income for Father of \$75,000, or a weekly gross income of \$1,442.31, retroactive to August 26, 2021, and to determine the exact amount of his arrearage or the credit Mother may owe him.

[13] Reversed and remanded.

Altice, J., and Tavitas, J., concur.