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.

FILED
Aug 12 2011, 9:29 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEYS FOR APPELLANT:

SEAN G. THOMASSON
MIRIAM HUCK
Thomasson, Thomasson, Long & Guthrie, P.C.
Columbus, Indiana

IN THE
COURT OF APPEALS OF INDIANA

J.M.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 36A01-1104-DR-164
	)	
J.W.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE JACKSON SUPERIOR COURT
The Honorable Bruce A. MacTavish, Judge
Cause No. 36D02-0811-DR-708

August 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

J.M. ("Father") appeals the dissolution court's order modifying custody, parenting time, and child support. Father presents two issues for our review:

1. Whether the dissolution court abused its discretion when it deviated from the Parenting Time Guidelines ("the Guidelines") in awarding him visitation with his son.

2. Whether the dissolution court erred when it calculated his child support obligation.

We reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Father and J.W. ("Mother") were married and had two children together.[1] The parties divorced in 2005, and the dissolution decree awarded sole custody of the parties' minor children to Mother, and awarded parenting time pursuant to the Guidelines to Father. In 2008, the dissolution court issued an order modifying custody and awarded Father custody of the parties' son, B.M., with Mother exercising parenting time according to the Guidelines.

On February 7, 2011, when B.M. was sixteen years old, Mother filed a petition to modify custody after B.M. expressed his desire to live with Mother. Following a hearing regarding custody, parenting time, and child support, the dissolution court issued an order awarding Mother "legal and physical custody" of B.M. Appellant's App. at 13. And the court awarded Father parenting time with B.M. as follows: every other Saturday or Sunday for six hours, the time to be agreed upon between B.M. and Father. Finally, the

[1] Appellant's brief does not disclose the date of the parties' marriage, and we could not find that date in the record.

dissolution court ordered Father to pay $142.13 per week in child support for B.M. This appeal ensued.

DISCUSSION AND DECISION

Initially, we note Mother did not file an appellee's brief. When the appellee fails to file a brief, we need not undertake the burden of developing an argument for the appellee. Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006). Rather, we will reverse the trial court's judgment if the appellant presents a case of prima facie error. Id. "Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it." Id. (quotation omitted). Where an appellant does not meet this burden, we will affirm. Id.

Issue One: Parenting Time

Father first contends that the dissolution court abused its discretion when it deviated from the Guidelines without explanation. In Haley v. Haley, 771 N.E.2d 743, 752 (Ind. Ct. App. 2002), this court observed:

> The Guidelines state that there is a presumption that they are applicable in all cases covered by the Guidelines. Ind. Parenting Time Guidelines, Scope of Application, 2. Therefore, we must start with the proposition that any visitation order established by the trial court should mirror the Guidelines. However, while we may start with that proposition, it is only a presumption, one which may be overcome by the facts particular to the circumstances. According to the Guidelines, before a trial court may enter a visitation order which deviates from the model contained in the Guidelines, the trial court must provide a written explanation for the deviation. Parenting Time G., Scope of App., 2.

(Emphasis added.)

Here, the dissolution court awarded Father significantly less parenting time with B.M. than the Guidelines recommend, and the court provided no explanation for that

deviation. Accordingly, we are unable to give appropriate review to the visitation order in light of the Guidelines which apply. Thus, we must remand to the dissolution court to enter a visitation order explaining the deviation from the Guidelines.

Still, Father contends that remand would be futile because there was no evidence presented at the hearing to support a deviation from the Guidelines. Indiana Code Section 31-17-4-1 provides:

> (a) A parent not granted custody of the child is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development.
>
> (b) The court may interview the child in chambers to assist the court in determining the child's perception of whether parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development.
>
> (c) The court may permit counsel to be present at the interview. If counsel is present:
>
> > (1) a record may be made of the interview; and
> >
> > (2) the interview may be made part of the record for purposes of appeal.

Father did not object to the dissolution court's interview with B.M., and his counsel did not ask to be present for the interview. It is possible that the dissolution court can explain its reasons for deviation from the Guidelines based upon that interview with B.M. Moreover, we are not convinced that there is not a factual basis in the record for the court's decision. Regardless, the commentary to the Scope of Application of the Guidelines states that a written explanation need not be as in depth as special findings and conclusions. We remand with instructions for the dissolution court to explain the deviation from the Guidelines.

Issue Two: Child Support

Father next contends that the dissolution court erred when it included Father's overtime pay in calculating his child support obligation. In the alternative, Father argues that the trial court erred when it included his overtime pay as income but did not employ an equitable method of calculating his payments based on his overtime pay as described in the commentary to the Child Support Guidelines. The dissolution court's order reflects that it based Father's child support obligation solely upon his 2010 income, which included a substantial amount of overtime pay, which, by its nature, is not guaranteed income.

A trial court's calculation of a child support obligation is presumptively valid and will be reversed only if it is clearly erroneous or contrary to law. Young v. Young, 891 N.E.2d 1045, 1047 (Ind. 2008). A decision is clearly erroneous if it is clearly against the logic and effect of the facts and circumstances before the trial court. Id.

The first step in establishing a child support obligation is to determine each parent's weekly gross income. Scott v. Scott, 668 N.E.2d 691, 696–97 (Ind. Ct. App. 1996). Indiana Child Support Guideline 3(A) sets forth the following definition of weekly gross income:

> For purposes of these Guidelines, "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 imputed income based upon "in-kind" benefits. Weekly Gross Income of each parent includes income from any source, except as excluded below, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, overtime, [etc.]

(Emphasis added).

Here, Father has consistently earned a significant amount of overtime pay during the recent past. Indeed, in 2010 alone, Father earned more than $30,000 in overtime pay. And, at the time of the hearing in March 2011, Father was on track to earn even more in overtime pay for the year. We cannot say that the dissolution court clearly erred when it included Father's overtime pay in calculating his child support obligation.

Still, Father is correct that the commentary to the Child Support Guidelines strongly recommends an alternative approach to including overtime pay in child support payments. Commentary (2)(b) to Child Support Guideline 3A provides in relevant part:

> [Overtime pay] is sensitive to downturns in the economy. The fact that overtime . . . has been consistent for three (3) years does not guarantee that it will continue in a poor economy. Further, it is not the intent of the Guidelines to require a party who has worked sixty (60) hour weeks to continue doing so indefinitely just to meet a support obligation that is based on that higher level of earnings. . . .
>
> . . . When the court determines that it is appropriate to include irregular income, an equitable method of treating such income may be to require the obligor to pay a fixed percentage of overtime, bonuses, etc., in child support on a periodic but predetermined basis (weekly, bi-weekly, monthly, quarterly) rather than by the process of determining the average of the irregular income by past history and including it in the obligor's gross income calculation.

On remand, the dissolution court shall modify its child support order consistent with the commentary set out above. In particular, the court shall require Father to pay a fixed percentage of his actual overtime pay in child support on a weekly, bi-weekly, monthly, or quarterly basis, in the court's discretion.

Reversed and remanded.

RILEY, J., and MAY, J., concur.