

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KRISTY B. BIBLE NKA OGLE

Plaintiff-Appellee

-vs-

SHAWN E. BIBLE

Defendant-Appellant

: JUDGES:

:

: Hon. John W. Wise, P.J.

: Hon. W. Scott Gwin, J.

: Hon. Patricia A. Delaney, J.

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: Case No. 2018CA0001

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O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Coshocton County
Court of Common Pleas, Case No. 10-
DS-0143

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

December 13, 2018

APPEARANCES:

For Plaintiff-Appellee:

CHRISTIE M. L. THORNSLEY
309 Main Street
Coshocton, OH 43812

For Defendant-Appellant:

ROBERT E. WEIR
305 Main Street
Coshocton, OH 43812

Delaney, J.

{¶1} Defendant-Appellant Shawn E. Bible appeals the January 10, 2018 judgment entry of the Coshocton County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} Plaintiff-Appellee Kristy B. Bible nka Ogle (“Mother”) and Defendant-Appellant Shawn E. Bible (“Father”) were married on July 2, 2001. One child was born as issue of the marriage on May 28, 2004.

{¶3} The parties petitioned for a dissolution of marriage on February 26, 2010. On April 21, 2010, the trial court issued a Decree of Dissolution, which incorporated the terms of the Separation Agreement and Shared Parenting Plan. Pursuant to the terms of the Shared Parenting Plan, Mother was named residential parent of the child. Father had parenting time with the child on Mondays and Tuesdays and on alternating weekends pursuant to the terms of the Standard Visitation Guidelines, Local Rule of Practice 20(I). Pursuant to the parties’ incomes and the application of the Ohio Child Support Guidelines, the Child Support Computation Worksheet calculated Father’s child support obligation to be \$605.23 per month. The parties deviated from the guideline amount of support in the Shared Parenting Plan. The Shared Parenting Plan stated:

However, each party has knowingly, intelligently, and voluntarily agreed that the amount of child support calculated pursuant to the applicable worksheet would be unjust and inappropriate and would not be in the best interests of the child for the following reasons:

The parties will spend equal time with the minor child.

Therefore, the parties agree Husband's obligation to the Wife as and for child support for the minor child is the amount of \$563.75 per month, together with a 2% processing charge of \$11.27 per month.

(Shared Parenting Plan, April 21, 2010). The amount of deviation equaled 7%.

{¶4} On July 2, 2012, the Coshocton County Child Support Enforcement Agency ("CSEA") filed a motion to reinstate the child support ordered in the April 21, 2010 judgment entry at the rate of \$563.75 per month. The trial court granted the order on September 20, 2012.

{¶5} On April 22, 2017, the CSEA filed a motion to modify child support. The CSEA recommended a modification in Father's child support obligation from \$563.75 per month to \$257.11 per month based upon a reduction in Father's income.

{¶6} The matter came on for hearing before the magistrate on August 24, 2017. The record does not contain a transcript of the magistrate's hearing. This Court has held, "where an appellant fails to provide a transcript of the original hearing before the magistrate for the trial court's review, the magistrate's findings of fact are considered established and may not be attacked on appeal." *J.S. v. T.S.*, 5th Dist. Knox No. 16CA18, 2017-Ohio-1042, 2017 WL 1091590, ¶ 22 citing *Murray v. Miller*, 5th Dist. Richland No. 15CA02, 2015-Ohio-3726, ¶ 35; *Doane v. Doane*, 5th Dist. Guernsey No. 00CA21, 2001 WL 474267 (May 2, 2001); *State v. Leite*, 5th Dist. Tuscarawas No.1999AP090054, 2000 WL 502819 (Apr. 11, 2000); *Fogress v. McKee*, 5th Dist. Licking No. 99CA15, 1999 WL 668580 (Aug. 11, 1999); and *Strunk v. Strunk*, 5th Dist. Muskingum No. CT96-0015, 1996 WL 787981 (Nov. 27, 1996).

{¶7} The magistrate issued her decision on December 1, 2017. The magistrate made the following findings of fact relevant to this appeal.

{¶8} The parties had not followed the standard parenting schedule outlined in the Shared Parenting Plan since the termination of the marriage. Mother and Father stated they operated under an equal parenting time schedule, alternating weeks with the child, whereby the child would reside with Mother in one week and Father the following week. Immediately after the termination of the marriage, Mother agreed to waive Father's child support obligation because she and Father had a good relationship. Father contributed in-kind support for the child. When Father entered into a new relationship in 2012, Mother requested the order for child support to be reinstated because Father's in-kind contributions had terminated.

{¶9} When the parties entered in the Shared Parenting Plan, Mother earned \$18,000 per year and Father earned \$59,300 per year. At the time of the magistrate's hearing, Mother earned approximately \$26,936.00 per year. Father was employed with Asplundh and earned approximately \$15.43 per hour at 40 hours per week, with some overtime pay. Father earned approximately \$32,094.40 per year and an additional \$6,017.70 per year in overtime.

{¶10} Father was previously employed by Kaiser Aluminum. His tax returns showed Father earned \$63,001 in 2014, \$83,220 in 2015, and \$68,673 in 2016. Kaiser Aluminum terminated Father's employment on October 6, 2016 because he stole aluminum from the company. Based on the theft, Father was indicted on five counts of felony theft. Father was not convicted of the charges but participated in a diversion program whereby the charges would be dismissed if Father paid reparations in the

amount of \$19,051 to Kaiser Aluminum. Father had paid \$6,000 toward that obligation. Since his termination, Father had worked for Fanatics, Ohio Fabricators, and Asplundh. Prior to being employed at Kaiser Aluminum, Father was employed with Ohio Central Railroad. He resigned from his position because he misused a company credit card.

{¶11} The magistrate conducted her analysis pursuant to R.C. 3119 to determine whether there was a change in circumstances and the amount of child support. The magistrate first determined there was no change in circumstances based on the time spent with the child: the parties had shared equal parenting time since the termination of the marriage. Equal parenting time was considered at the time of dissolution when determining the appropriate amount of a deviation Father was entitled to.

{¶12} The magistrate next found there was a change in circumstances since the original child support order because both parties' incomes had increased. The magistrate also considered Father's claimed decrease in earning capacity as a change in circumstances. The magistrate relied on Ohio case law that stated a movant must show a change in circumstances was not the result of a voluntary or intentional act. In Ohio, a criminal act and the results thereof are considered voluntary actions; in this case, Father's decrease in income was based on his criminal activity and was therefore not a change in circumstances warranting a modification of child support. The magistrate found, but for Father's criminal conduct, Father would have been earning the wage of \$83,833 or more.

{¶13} The magistrate utilized the income levels of Mother at \$29,936 and Father at \$83,333 for the child support calculation worksheet. The child support calculation worksheet established child support payments from Father in the amount of \$758.61 per month. The magistrate found the amount was unjust and unreasonable due to the equal

sharing time with the child. The magistrate recommended a deviation equal to that in the original Shared Parenting Plan (7%), resulting in an award of \$705.51 per month in child support.

{¶14} Father filed objections to the magistrate's decision on December 14, 2017, but did not file a transcript of the magistrate's hearing with his objections. He argued the magistrate failed to deviate from the calculated amount by considering the conceded and undisputed parenting time of Father, which was 50% of the year. He stated the deviated amount of his child support obligation, utilizing Father's increased income, should be \$259.19 per month. Mother responded to Father's objections and argued the evidence in the record showed the parties have had equal parenting time since the termination of the marriage. Based on their equal parenting time, the trial court ordered a deviation of 7% in the original Shared Parenting Plan. As there was no change of circumstances other than the parties' incomes, Mother contended the terms of the Shared Parenting Plan remained the same and the magistrate did not err in deviating from the child support worksheet by 7%.

{¶15} On January 10, 2018, the trial court overruled Father's objections and adopted the magistrate's decision.

{¶16} It is from this judgment Father now appeals.

ASSIGNMENT OF ERROR

{¶17} Father raises one Assignment of Error:

{¶18} "THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DEVIATE IN ITS CHILD SUPPORT COMPUTATION PURSUANT TO O.R.C. §3119.23(D)."

ANALYSIS

{¶19} Father argues in his sole Assignment of Error that the trial court failed to deviate its child support computation based on the parties' equal parenting time. We disagree.

{¶20} We first note that Father does not appeal the trial court's determination to impute annual income to Father in the amount of \$83,333. A review of Father's argument that his child support obligation should be \$259.19 per month shows that Father arrived at that calculation based on the trial court's imputed annual income of \$83,333. Father's sole argument on appeal is that the trial court abused its discretion when it determined the deviation amount.

{¶21} Child support decisions, including the decision to deviate from the actual obligation, are reviewed for abuse of discretion. *Booth v. Booth*, 44 Ohio St.3d 142, 144, 541 N.E.2d 1028 (1989). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶22} There is no statutory provision for any credit or offset to a child support obligation when the parties agree to shared parenting. *Myers v. Brewer*, 2017-Ohio-4324, 91 N.E.3d 1249, ¶ 19 (2nd Dist). When there is shared parenting, a trial court may not automatically deviate from the worksheet amount in order to credit an obligor for any time the child spends with that parent. *Id.* citing *Pauly v. Pauly*, 80 Ohio St.3d 386, 388-389, 686 N.E.2d 1108 (1997); *Hubin v. Hubin*, 92 Ohio St.3d 240, 749 N.E.2d 749 (2001). R.C. 3119.24 allows the trial court to deviate from the guideline calculation if that amount "would be unjust or inappropriate to the children or either parent and would not be in the

best interest of the child because of extraordinary circumstances of the parents or because of any other factors or criteria as set forth in R.C. 3119.23 of the Revised Code.”

The fact that parents equally share in parenting time does not, by itself, justify a deviation in the amount of child support. *Id.* citing *Glassner v. Glassner*, 160 Ohio App.3d 648, 2005-Ohio-1936, 828 N.E.2d 642, ¶ 48 (5th Dist.). Equal parenting time is one factor to be considered by the trial court. R.C. 3119.24(B) lists the “extraordinary circumstances” that may be considered by the trial court: “(1) The amount of time the children spend with each parent; (2) The ability of each parent to maintain adequate housing for the children; (3) Each parent's expenses, including child care expenses, school tuition, medical expenses, dental expenses, and any other expenses the court considers relevant; [and] (4) Any other circumstances the court considers relevant.”

{¶23} R.C. 3119.23 provides the trial court an additional 16 factors it may consider in determining whether to deviate from the child support guideline. In his Assignment of Error, Father specifically refers this Court to R.C. 3119.23(D), which states, “[e]xtended parenting time or extraordinary costs associated with parenting time, provided that this division does not authorize and shall not be construed as authorizing any deviation from the schedule and the applicable worksheet, through the line establishing the actual annual obligation, or any escrowing, impoundment, or withholding of child support because of a denial of or interference with a right of parenting time granted by court order.” Father claims that based on the factors of R.C. 3119.24 and 3119.23, the trial court should have provided Father a greater downward deviation in his child support obligation than 7% as established in the original Shared Parenting Plan.

{¶24} In making its child support determination, the trial court first calculated that Father's obligation pursuant to the child support worksheet was \$758.61 per month based on the parties' increased incomes. The trial court next considered whether there were extraordinary circumstances and other factors pursuant to R.C. 3119.23 and 3119.24 to justify a deviation from the calculated child support amount.

{¶25} The magistrate found \$758.61 per month was unjust and unreasonable due to the equal sharing of time with the child. The magistrate determined the evidence showed no change in circumstances as to the amount of time Father and Mother spent with the child from the date of the original Shared Parenting Plan. Both parties testified the equal sharing of time with the child predated the termination of the marriage and was considered in determining the appropriate amount of a deviation Father was entitled to at that time. The Shared Parenting Plan, incorporated with the Separation Agreement, specifically stated the deviation given to Father was due to the fact that, "[t]he parties will spend equal time with the minor child." Father did not provide the transcript of the magistrate's hearing with his objections to the magistrate's decision. As such, the magistrate's findings of facts are established and cannot be attacked on appeal.

{¶26} Based on the evidence of established equal parenting time and the consideration of the statutory factors, the magistrate determined Father was entitled to a deviation equal to which was agreed in the original Shared Parenting Plan, which was a 7% deviation. We find no abuse of discretion for the trial court to utilize the deviation amount as set by the parties in the original Shared Parenting Plan. The parties originally agreed to a downward deviation of 7% based on the parties' equal parenting time. Father has not pointed to any evidence in the record to satisfy his burden to show there was a

change in the established equal parenting time or that a deviation in the amount of child support would be in the child's best interests to justify a greater deviation from the original child support order.

{¶27} The trial court did not err when it did not award Father a greater deviation in his support obligation for the parties' child. Additionally, the trial court's decision adopting the 7% child support deviation was reasonable and supported by the record.

{¶28} Father's sole Assignment of Error is overruled.

CONCLUSION

{¶29} The judgment of the Coshocton County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, John, P.J. and

Gwin, J., concur.