[Cite as *Nichols v. Nichols*, 2013-Ohio-3927.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bonnie S. Nichols,	:	
Plaintiff-Appellee,	:	
		No. 13AP-13
v.	:	(C.P.C. No. 10DR-07-3156)
Kevin E. Nichols,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 12, 2013

Bergman & Yiangou, and *Andrew J. Niese*, for appellee.

Sean O. Boyle, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations

DORRIAN, J.

{¶ 1} Defendant-appellant, Kevin E. Nichols ("father"), appeals from a December 5, 2012 order approving a shared-parenting decree entered by the Franklin County Court of Common Pleas, Division of Domestic Relations, that included a provision requiring him to pay child support retroactive to June 15, 2011. The court entered the order in response to a Civ.R. 60(A) motion filed by plaintiff-appellee, Bonnie S. Nichols ("mother"), seeking correction of a prior entry approving a shared-parenting plan that ordered father to pay child support retroactive to June 15, 2012. For the following reasons, we reverse.

Facts and Procedural History

{¶ 2} The parties were married on December 23, 2000, and two children were born as issue of the marriage. On September 15, 2010, the court granted a dissolution

of the parties' marriage and approved an agreed shared-parenting plan of their two minor children. In the plan, the parties agreed that "[n]o child support is to be ordered," but that "[b]oth parties agree[d] to share financial responsibility of [the] minor children equally." (July 23, 2010 Agreed Shared-Parenting Plan, 2.) The parties further agreed that "both [would] be residential parents and legal custodians of the minor child[ren] during the time in which the children reside[] with them." (Agreed Shared-Parenting Plan, 2). The parties identified mother as residential parent for school purposes.

{¶ 3} On June 15, 2011, mother filed a motion to "modify" child support (although child support had not previously been ordered), asserting that there had been a substantial change of circumstances since the termination of the marriage. Mother claimed that father had initially provided approximately $650 monthly for the care of the minor children but that he no longer was providing any monetary support for the children. She further claimed that father had represented to her that his income from a new job was substantially higher than his income at the time of the original shared-parenting plan.

{¶ 4} On November 7, 2011, father moved the court to designate him the residential parent of the children and to order mother to pay child support. Father claimed that, beginning in June 2011, mother had changed his parenting time from one in which the parent's "exchange[d] the children on a 50/50 basis" (Nov. 7, 2011 Motion, 2) to parenting time consistent with the guidelines contained in Loc.R. 27 of the Franklin County Court of Common Pleas, Division of Domestic Relations. After granting several continuances, the court ultimately scheduled the matter for a hearing to be held on June 15, 2012.

{¶ 5} On June 29, 2012, the parties filed a second amended shared-parenting plan[1] signed by both parties. The June 29, 2012 plan did not reflect a change concerning legal custody of the children—both parents continued in their status as residential parents and legal custodians. But the new shared-parenting plan expressly provided that father would pay monthly child support in the total amount of $1,020 and that

"[s]aid child support shall be *retroactive from the date of filing, which is June 15, 2012*." (Emphasis added.) (June 29, 2012, Second Amended Plan for Shared Parenting, 3.) The plan did not specify whether "date of filing" referred to the date of filing of mother's original motion for child support (filed on June 15, 2011), the first amended plan (filed on June 19, 2012), the second-amended plan (filed on June 29, 2012), an entry of the court, or some other document. Significantly, none of those documents were filed on June 15, 2012, the date stated in the second amended shared-parenting plan.

{¶ 6} Also on June 29, 2012, the trial court entered findings supporting a downward deviation from the amount of father's child support obligation as calculated using the R.C. 3119.022 child support worksheet, as follows:

> The child support guideline amount of $1,386.43 plus processing charge of $27.73 for a total of $1,414.26 per month for the minor children is unjust inappropriate and not in the best interest of the minor children.
>
> [Pursuant to] Ohio Revised Code Section 3113.23 the court may consider the relevant factors when deviating from child support guidelines: *The parties have agreed to this Shared Parenting Plan in which the parties will spend nearly equal time with the minor children.*
>
> Therefore Father shall pay child support of $1,000.00 plus $20.00 processing charge for a total of $1,020.00 per month for the minor children.
>
> * * *
>
> *Said child support shall be retroactive from the date of filing which is June 15, 2012.*
>
> During any time on or after the effective date of this order that **private health insurance is in effect** [emphasis sic], the following orders shall apply:
>
> 1. *Effective as of date of child support order*, Father shall pay a deviated amount of child support of $1,000.00, plus

[1] The record reflects that the parties submitted a first amended shared-parenting plan on June 19, 2012. They filed the second amended shared-parenting plan prior to the court taking action on the first amended plan.

> processing charge of $20.00, for a total of $1,020.00 per month for the minor children[.]

(Emphasis added.) (June 29, 2012 Findings, 1-3.)

{¶ 7} This entry includes two seemingly contradictory provisions concerning the effective date of father's obligation to pay $1,020 monthly child support. The entry first provides that the father's child support obligation is "retroactive from the date of filing which is June 15, 2012." Thereafter, the same entry provides that father shall pay $1,020 in monthly child support "effective as of the date of the child support order."

{¶ 8} On August 7, 2012, mother filed the Civ.R. 60(A) motion at issue in this appeal "request[ing] a correction due to an error." Mother represented as follows:

> The Second Amended Plan for Shared Parenting stated on page 3 under paragraph 5 the child support shall be retroactive from the date of filing, which is June 15, 2012 and it should have stated child support shall be retroactive from date of filing, which is June 15, 2011. Plaintiff requests that the Court make an Order that the typographical error be corrected to reflect the child support shall be retroactive from date of filing, which is June 15, 2011.

{¶ 9} On November 13, 2012, the court held an evidentiary hearing on mother's Civ.R. 60(A) motion. On December 5, 2012, the court issued a "Decree of Shared-Parenting Nunc Pro Tunc (Pursuant to Rule 60(A))" in which it concluded:

> IT IS THEREFORE ORDERED ADJUDGED and DECREED that Parties Shared Parenting Plan is approved and incorporated as part of this decree and the *effective date of said child support order shall be retroactive from the date of filing, which is June 15, 2011,* as if fully rewritten and made an order of the court.

(Emphasis added.)

{¶ 10} Father timely appealed and asserts a single assignment of error, as follows:

> THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S RULE 60(A) MOTION AMENDING THE AMENDED SHARED PARENTING PLAN AND AGREED ENTRY OF THE PARTIES.

{¶ 11} We sustain father's assignment of error for the reasons discussed below.

Legal Analysis

{¶ 12} Civ.R. 60(A) provides that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders." Thus, Civ.R. 60(A) is appropriately employed to correct clerical mistakes. "Under Civ.R. 60(A), a clerical mistake 'refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.' " *Wardeh v. Altabchi*, 158 Ohio App.3d 325, 2004-Ohio-4423 (10th Dist.), quoting *State ex rel. Litty v. Leskovyansky*, 77 Ohio St.3d 97, 100 (1996). " 'Substantive changes in judgments, orders, or decrees, however, are not within the purview of Civ.R. 60(A).' " *Thurston v. Thurston*, 10th Dist. No. o2AP-555, 2002-Ohio-6746, quoting *Chrisman v. Chrisman*, 12th Dist. No. CA97-10-109 (Feb. 8, 1999) and *Kuehn v. Kuehn*, 55 Ohio App.3d 245, 247 (12th Dist.1988). Because Civ.R. 60(A) does not authorize substantive changes to judgments, orders, or decrees, it is reversible error for a trial court to make a substantive change to a judgment, order or other part of the record on the authority of Civ.R. 60(A). *Wardeh*, at ¶ 12 ("Because substantive changes are not within the purview of Civ.R. 60(A), the trial court exceeded the scope of its authority in amending the October 31, 2003 civil protection order. Accordingly the November 5, 2003 entry amending the October 31, 2003 civil protection order must be reversed.").

{¶ 13} R.C. 3119.24 governs child support issues in cases involving shared-parenting orders. The statute provides:

> (A)(1) A court that issues a shared parenting order in accordance with section 3109.04 of the Revised Code shall order an amount of child support to be paid under the child support order that is calculated in accordance with the schedule and with the worksheet set forth in section 3119.022 of the Revised Code, through the line establishing the actual annual obligation, except that, 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 the extraordinary circumstances of the parents or because of any other factors or criteria set forth in section 3119.23 of the Revised Code, the court may deviate from that amount.

> (2) The court shall consider extraordinary circumstances and other factors or criteria if it deviates from the amount described in division (A)(1) of this section and shall enter in the journal the amount described in division (A)(1) of this section its determination that the amount would be unjust or inappropriate and would not be in the best interest of the child, and findings of fact supporting its determination.
>
> (B) For the purposes of this section, "extraordinary circumstances of the parents" includes all of the following:
>
> (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;
>
> (4) Any other circumstances the court considers relevant.

{¶ 14} In its June 29, 2012 child support entry, the trial court stated that "[t]he parties *have agreed* to this Shared Parenting Plan in which the parties will spend nearly equal time with the minor children" and that, therefore, father would pay a total of $1,020 per month in child support. (Emphasis added.)

{¶ 15} The Supreme Court of Ohio has recognized that:

> The law favors settlements. However, the difficult issue of child support may result in agreements that are suspect. In custody battles, choices are made, and compromises as to child support may be reached for the sake of peace or as a result of unequal bargaining power or economic pressures. The compromises may be in the best interests of the parents but not of the child. Thus, the legislature has assigned the court to act as the child's watchdog in the matter of support.

DePalmo v. DePalmo, 78 Ohio St.3d 535, 540 (1997).

{¶ 16} Under *DePalmo*, a trial court does not avoid its obligation to independently consider child support awards simply because the parties have agreed on a child support amount. The Third District Court of Appeals has considered a case similar to the one before us in that the parties agreed to reduce a father's child support

obligation based on an increase in the father's time with the children. Consistent with *DePalmo*, the Third District recognized that an "agreement between the parties that a reduction in child support was in the best interests of the child has little authority." *Fox v. Fox*, 3d Dist. No. 5-03-42, 2004-Ohio-3344, ¶ 19.

{¶ 17} However, in the case before us, it appears that the parties did not reach agreement as to whether father's child support obligation would be applied retroactively. In the evidentiary hearing held on mother's Civ.R. 60(A) motion, the following exchange occurred:

> [Father]: * * * I had no idea what the filing date was that's why I looked at the date on the actual document and I used the document as my guidance when I signed it. In my world, every contract that you sign that's what you go off of and you look at the last latest contract and that's what I thought I was signing.
>
> [The court]: You didn't ask your attorney what the date of filing is? I mean it's right there in the file.
>
> [Father]: It was right there on that actual document, Ma'am. That's why we looked at it and that's what we were looking at was the date on the document.
>
> [The court]: Who prepared the document, counsel?
>
> [Mother's counsel]: I did, Your Honor.
>
> * * *
>
> [Mother]: * * * [W]hen we made that agreement I was under the understanding that it [i.e., child support] was going back for the year that it had been continued.
>
> * * *
>
> [The court]: * * * [Father's] saying he only—he only signed it because he had the 2012 date. That why he signed it. I wasn't' there. I don't know. You both look like decent and credible people to me.

(Tr. 11-12; 14-15.)

{¶ 18} We conclude that mother and father in this case each had a different understanding of the shared-parenting agreement relative to the effective date of the child support order. That is, the shared-parenting "agreement" did not reflect an actual meeting of the minds of the parties. We acknowledge that, from the point of view of mother and her counsel, the use of June 15, *2012* in the June 29, 2012 second amended shared-parenting plan, rather than June 15, *2011* (which was the date of filing of mother's motion for a child support order) was a clerical error. But use of the June 15, 2012 date was not a clerical error in the view of the father. Rather, father testified that he relied on the June 15, 2012 date in agreeing to the plan, and the court expressly found him to be credible.

{¶ 19} The second amended shared-parenting plan and the court's entries incorporating the terms of that plan contain ambiguous language as to the effective date of father's child support obligation. In granting the Civ.R. 60(A) motion, the court did not, therefore, correct a clerical error, i.e.,"a mistake or omission, mechanical in nature and apparent on the record." Rather, the court accepted mother's interpretation of that ambiguous language, thereby resolving a substantive dispute between the parties as to the meaning of the language. Because Civ.R. 60(A) cannot be used to correct substantive errors, the trial court erred in entering the nunc pro tunc order changing the effective date of father's child support obligation from June 15, 2012 to June 15, 2011, and we therefore reverse the court's ruling granting relief pursuant to Civ.R. 60(A).

{¶ 20} Our reversal of the nunc pro tunc order should not, however, be construed as a limitation on the trial court's authority, in its discretion, to order father to retroactively pay child support from June 15, 2011—the date mother filed her motion seeking a child support order. Where a trial court modifies a child support order it may make the modification order effective from the date the motion for modification was filed. *Murphy v. Murphy*, 13 Ohio App.3d 388, 389 (10th Dist.1984). In view of the substantial time it frequently takes between the filing of a motion to modify child support obligations and the disposition of that motion "[a]ny other holding could produce an inequitable result." *Id.* "Whether to make a modification of support retroactive to the date of the motion is a question left to the sound discretion of the trial court." *Lightle v. Lightle*, 2d Dist. No. 2012 CA 8, 2012-Ohio-3284, ¶ 8. While it may

"often be equitable to apply a modification retroactively to the date of the motion, * * * a substantial arrearage or overage created by a retroactive modification can create a hardship to one of the parties." *Id.*, citing *Goodard-Ebersole v. Ebersole*, 2d Dist. No. 23493, 2009-Ohio-6581, ¶ 9; *Murphy*; *Smith v. Smith*, 2d Dist. No. 17486 (May 21, 1999); *Zamos v. Zamos*, 11th Dist. No. 2002-P-85, 2004-Ohio-2310, ¶ 16.

{¶ 21} We hold today only that the court improperly resolved the dispute by invoking the authority of Civ.R. 60(A). On remand, should matters concerning father's child support obligation and its retroactivity again be presented to the trial court, it must decide those matters in accord with the substantive and procedural requirements of the Ohio Revised Code. That is, as previously observed by both the Third and Ninth District Courts of Appeal "[t]he trial court is obligated to follow the mandatory procedures outlined in R.C. 3119.24(A)(1), 'regardless of whether the parties have reached an agreement on their own regarding child support.' " *Ankney v. Bonos*, 9th Dist. No. 23178, 2006-Ohio-6009, ¶ 33, quoting *Warner v. Warner*, 3d Dist. No. 14-03-10, 2003-Ohio-5132, ¶ 13.).

Conclusion

{¶ 22} For the foregoing reasons, appellant's assignment of error is sustained. We therefore reverse the December 5, 2012 nunc pro tunc judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, and remand this cause for further proceedings in accordance with law and consistent with this decision.

Judgment reversed; cause remanded.

BROWN, J., concurs.
CONNOR, J., dissents.

CONNOR, J. dissenting.

{¶ 23} Being unable to agree with the majority, I respectfully dissent. The insertion of the date June 15, 2012 was clearly a clerical error and the court obviously meant "retroactive from the date of filing June 15, 2011," the date of the original filing of the mother's motion for child support. Therefore, the use of Civ.R. 60(A) was proper to correct a clerical error.

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