

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

SOPHIA ANN AUGIER,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2009-G-2932
MARC ALBERT AUGIER,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 06 DC 00009.

Judgment: Affirmed in part, reversed in part, and remanded.

Richard D. Messerman, 1940 Huntington Building, 925 Euclid Avenue, Cleveland, OH 44115 (For Plaintiff-Appellant).

Marc Albert Augier, pro se, P.O. Box 39711, Solon, OH 44139 (Defendant-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Sophia Ann Augier appeals from a judgment of the Geauga County Court of Common Pleas regarding several post-decree motions filed by her and her ex-husband, Marc Albert Augier. The parties have several children with severe disabilities. The tragic situation is compounded by Mr. Augier’s loss of employment after their divorce. To make matters worse, the parties’ continued bitter legal battle after the divorce caused Mr. Augier further financial distress, which, in turn, severely affects his prospects of finding employment to pay his child support obligation. The trial court reduced Mr. Augier’s child support payment and also made certain determinations

regarding other financial obligations the parties have toward each other. After reviewing the record and applying the applicable law, we affirm the trial court's judgment in part, reverse in part, and remand this case for further proceedings consistent with this opinion.

{¶2} Substantive Facts and Procedural History

{¶3} Mr. and Ms. Augier were divorced on May 22, 2007, pursuant to a Judgment Entry of Divorce. They have four children; three of them are autistic. At the time of the divorce, Mr. Augier was employed by KPMG with an annual income of \$119,000. Ms. Augier was not employed outside the home due to the special needs of the children. The court ordered Mr. Augier to pay \$439.48 per child per month in child support and \$3,500 per month in spousal support. The court ordered an upward deviation from the child support guideline because of the extensive physical and emotional needs of the children, the extended parenting time required of Ms. Augier, the increased costs to be incurred by Mrs. Augier due to the children's disability, and the disparity in the parties' income and financial resources. Pursuant to the divorce judgment, Ms. Augier retained the marital home, and she was to pay Mr. Augier the amount of \$33,997.60 to equalize the property division.

{¶4} On July 2, 2008, Mr. Augier was terminated from KPMG with no advance notice. His income was reduced to \$247 per week, half of his unemployment compensation benefit. Ms. Augier received the other half. Because of his loss of employment and drastic decrease of income, he filed a motion to modify child support on September 12, 2008.

{¶5} Ms. Augier, in turn, filed a motion to modify allocation of parental rights and responsibilities, specifically, to terminate the shared parenting plan and to modify

the companionship schedule. She alleged that Mr. Augier failed to utilize his parenting time. Both parties filed a motion to show cause.

{¶6} The magistrate held a hearing on these motions.¹ The testimony at the hearing reflects that Ms. Augier had the funds available to pay Mr. Augier the property settlement equalization payment of \$33,997.60, but refused to pay him because he was holding some personal property awarded to her. As Mr. Augier testified, his ex-wife's refusal to pay him his property settlement of \$33,997.60 caused him to incur credit card debts, which affected his credit rating and ruined him financially. It severely affected his ability to find employment in his field of financial management.

{¶7} After the hearing, the magistrate found that Mr. Augier's unemployment was not voluntary, and that he has made good faith efforts to seek employment to no avail. Because of his unemployment and loss of income, the magistrate recalculated his child support as \$103.50 per month per child, based on an annual minimum wage income of \$15,184. The magistrate also terminated his spousal support. The magistrate, however, required him to actively seek employment by contacting 20 potential employers per month and reporting to Geauga County Child Support Enforcement Division twice a month regarding his job-seeking efforts.

{¶8} The magistrate did not find Mr. Augier to be in contempt of court, but found Ms. Augier to be in contempt for failing to pay Mr. Augier his property settlement. The magistrate, therefore, sentenced her to five days in county jail, but suspended the sentence provided she paid him the sum of \$27,504.22 by September 20, 2009.

1. Ms. Augier's motion to modify allocation of parental rights and responsibilities is not part of this appeal.

{¶9} Ms. Augier filed objections to the magistrate’s decision. The court adopted the magistrate’s decision except for certain credit/offset calculations made by the magistrate. Ms. Augier now appeals, raising the following assignments of error:

{¶10} “[1.] The trial court erred and abused its discretion in overruling appellant’s objections to the Magistrate’s Decision and in calculating the appellee’s child support obligations based upon Ohio’s minimum wage as opposed to appellee’s actual income from unemployment compensation.

{¶11} “[2.] The trial court erred and abused its discretion to the prejudice of the appellant by finding her in contempt of Court despite the fact that appellee was shown to have violated virtually every term of the Court’s Judgment Entry of Divorce.

{¶12} “[3.] The trial court erred and abused its discretion to appellant’s prejudice in sustaining her objections to paragraph 75 of the Magistrate’s Decision, but in so doing using the wrong dollar amounts for the calculations.

{¶13} “[4.] The trial court erred and abused its discretion to appellant’s prejudice in awarding statutory interest on sums due the appellee from November 1, 2007 while finding appellant was entitled to an offset in the amount of Sixteen Thousand Eight Hundred Four Dollars and Forty-Nine Cents (\$16,804.49).”

{¶14} Mr. Augier’s Income for Child Support Calculation Purposes

{¶15} In her first assignment error, Ms. Augier argues the trial court should have based its child support calculation on Mr. Augier’s unemployment compensation benefits of \$25,636 per year, instead of an imputed minimum wage income of \$15,184.

{¶16} A trial court has broad discretion related to the calculation of child support, and, absent an abuse of discretion, an appellate court will not disturb a child support order. *Pauly v. Pauly*, 80 Ohio St.3d 386, 390.

{¶17} When a parent is unemployed, the parent’s income is the sum of the parent’s gross income and any “potential income” of the parent. R.C. 3119.01(C)(5)(b). Gross income includes “unemployment insurance benefits.” R.C. 3119.01(C)(7). As to “potential income,” R.C. 3119.01(11) states, in pertinent part:

{¶18} “Potential income’ means both of the following for a parent who the court *** determines is voluntarily unemployed or voluntarily underemployed:

{¶19} “(a) Imputed income that the court or agency determines the parent would have earned if fully employed as determined from the following criteria:

{¶20} “(i) The parent’s prior employment experience;

{¶21} “(ii) The parent’s education;

{¶22} “(iii) The parent’s physical and mental disabilities, if any;

{¶23} “(iv) The availability of employment in the geographic area in which the parent resides;

{¶24} “(v) The prevailing wage and salary levels in the geographic area in which the parent resides;

{¶25} “(vi) The parent’s special skills and training;

{¶26} “(vii) Whether there is evidence that the parent has the ability to earn the imputed income;

{¶27} “(viii) The age and special needs of the child for whom child support is being calculated under this section;

{¶28} “(ix) The parent’s increased earning capacity because of experience;

{¶29} “(x) Any other relevant factor.”

{¶30} Thus, when determining “potential income,” the court may impute income to an unemployed parent once the parent is found to be voluntarily unemployed or

underemployed. Before a trial court may impute income to a parent, however, the court must make a specific finding that the parent is voluntarily unemployed or underemployed. *Leonard v. Erwin* (1996), 111 Ohio App.3d 413, 417. Once a party is found to be voluntarily unemployed or underemployed, the court determines the potential income by imputing income to that party in accordance with the considerations of R.C. 3119.01(C)(11)(a). See, e.g., *Bruno v. Bruno*, 10th Dist. No. 04AP-1381, 2005-Ohio-3812, ¶15; *Williams v. Williams*, 10th Dist. No. CA2006-09-103, 2007-Ohio-2996, ¶8.

{¶31} Whether a parent is voluntarily unemployed for child support calculation purposes, and the amount of “potential income” to be imputed to a child support obligor, are matters to be determined by the trial court based upon the facts and circumstances of each case, and that determination will not be disturbed on appeal absent an abuse of discretion. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112.

{¶32} Under R.C. 3119.01(C)(11), “potential income” includes imputed income of a parent determined by the court to be voluntarily unemployed. Here, the finding by the magistrate that Mr. Augier was not voluntarily unemployed was adopted by the trial court and not challenged by Ms. Augier. Because he was not involuntarily unemployed, no income should be imputed to Mr. Augier - under R.C. 3119.01(5), the income of an unemployed parent who has not been found to be voluntarily unemployed is his gross income only. Therefore, Mr. Augier’s income, for child support calculation purposes, should be the gross amount of his unemployment insurance benefits. Although Mr. Augier actually received only half of it, the statute requires the use of the “gross income,” not the amount actually received, to calculate child support. Therefore, the

magistrate should have used the full amount of his unemployment benefits, or \$25,636, in her calculation.

{¶33} The magistrate, after finding Mr. Augier not voluntarily unemployed and stating, “[t]he law does not support the Court arbitrarily imputing income to Mr. Augier from the time he lost the job,” inexplicably went on to consider the statutory factors enumerated in R.C. 3119.01(11)(a) and imputed a minimum wage income of \$15,184 to him and used that arbitrary amount to calculate Mr. Augier’s child support calculation.

{¶34} The magistrate had no authority to impute an arbitrary minimum wage income to Mr. Augier after finding him not involuntarily unemployed. Under the circumstances of this case, the statute requires the magistrate to base the child support calculation on Mr. Augier’s gross income from his unemployment compensation. Therefore, the trial court abused its discretion in adopting the magistrate’s calculation of child support. The first assignment of error is sustained.

{¶35} Contempt Finding

{¶36} In the second assignment of error, Ms. Augier argues the court should have found her ex-husband, instead of her, in contempt of court for failure to comply with court orders.

{¶37} We review a trial court’s determination on contempt proceedings under the abuse of discretion standard. See *Onyshko v. Onyshko*, 11th Dist. No. 2008-P-0035, 2010-Ohio-969, ¶113, citing *Lincoln Health Care, Inc. v. Keck*, 11th Dist. No. 2002-L-006, 2003-Ohio-4864, ¶21.

{¶38} The May 22, 2007 Judgment Entry of Divorce ordered Ms. Augier to pay Mr. Augier \$33,997.60 within 60 days of the judgment entry to equalize property settlement. The funds were available to Ms. Augier when she refinanced the marital

home in October 2007. However, she refused to pay Mr. Augier any part of the ordered amount, because he allegedly was holding some of her personal property. She also claimed she was entitled to certain offsets. The magistrate found that under the divorce judgment, the payment of \$33,997.60 was not conditioned on any future act of either party. The magistrate also found that Ms. Augier could have acted in good faith by paying the settlement amount minus any claimed offset. The magistrate, therefore, found Ms. Augier to be in contempt of court. The court adopted the magistrate's finding of contempt. Our review of the evidence does not indicate the court abused its discretion.

{¶39} Regarding Ms. Augier's motion to show cause which alleged Mr. Augier was in contempt of court because he failed to name her as beneficiary on his life insurance policy and because he did not provide her with proof of marital debt, the magistrate found that Mr. Augier no longer has life insurance available to him through his employment, and that there was no prior court order requiring the parties to provide each other with proof of marital debt. The magistrate, therefore, did not find Mr. Augier to be in contempt. The court adopted the finding, and we do not find the court abused its discretion in not finding Mr. Augier in contempt. The second assignment of error is overruled.

{¶40} Calculation of Credits

{¶41} In its decision, the magistrate set forth various amounts of credit to which each party is entitled. Ms. Augier objected to some of the amounts calculated by the magistrate. The trial court recalculated some of the amounts. In her third assignment of error, Ms. Augier claims the trial court made its own errors in its recalculations.

{¶42} Ms. Augier challenges (1) the amount Mr. Augier received from cashing out his Stone Container 401K plan; (2) the income he received from Holmes Hollister, for which he provided professional service; and (3) his support arrearages.

{¶43} Regarding the amount Mr. Augier received for cashing out his Stone Container 401K, Mr. Augier testified the gross amount he received from T. Rowe Price was \$4,033.71. The magistrate found he received the net amount of \$3,223.71 after taxes and, therefore, determined Ms. Augier was entitled to half of \$3,223.71, or \$1,611.85. The trial court, inexplicably, listed the amount Ms. Augier was entitled to as \$2,500, which is clearly an error. The correct amount should be \$1,611.85, as the magistrate found.

{¶44} Regarding the \$5,000 Mr. Augier earned from Holmes Hollister for his professional service rendered during the marriage, the magistrate found that he received net cash of \$3,212.97 after taxes and, therefore, determined that Ms. Augier is entitled to half of it, or \$1,606.48. The trial court stated in a paragraph of its decision that the amount Mr. Augier received from Holmes Hollister was \$5,000, the pre-tax amount, but later listed in a chart the amount Ms. Augier is entitled to regarding the Holmes Hollister income as \$1,606.48, the after-tax amount. The magistrate is correct in finding Ms. Augier's entitlement to be half of what Mr. Augier actually netted after taxes, i.e., \$1,606.48. The trial court erred in stating two different amounts.

{¶45} Regarding the support arrearages, the testimony by Mr. Augier shows he conceded he owed child and spousal support arrearages in the amount of \$7,543.46. The magistrate, however, failed to include this amount in calculating the credits to which Ms. Augier is entitled. The trial court corrected the omission by including it in its own itemization of credits to Ms. Augier.

{¶46} Taking the support arrearages into account, we determine the correct amount that should be credited to Ms. Augier is \$15,916.34.² The third assignment is sustained because the trial court’s calculation is, indeed, in error. However, our calculation reflects a *lower* amount that should be credited to Ms. Augier than the trial court had determined (\$16,804.49).

{¶47} Imposition of Interest

{¶48} The fourth assignment of error concerns the interest the trial court ordered Ms. Augier to pay on the amount she owes Mr. Augier from November 1, 2007, at the statutory rate (8% for 2007 and 2008 and 5% for 2009). The trial court determined Ms. Augier’s total offsets to be \$15,397.49, which is \$16,804.49 reduced by an undisputed amount of tax refund Ms. Augier owes Mr. Augier (\$1,407). After the offsets, Ms. Augier owes Mr. Augier \$18,600.11, which represents the property settlement payment she owes him (\$33,997.60) less the offsets (\$15,397.49). The trial court ordered Ms. Augier to pay the statutory interest on “the money she has owed” Mr. Augier from November 1, 2007, the date she had the property settlement payment available to pay Mr. Augier.

{¶49} On appeal, Ms. Augier argues the trial court should not have awarded interest on the entire property settlement payment she owed since November 1, 2007, maintaining the court should have taken into account the offset she is entitled to.

2. The trial court’s list of credits should be revised as follows:

Stone Container 401	\$ 1,611.85
Holmes Hollister	\$ 1,606.48
E-Trade	\$ 475.00
½ balance of MBNA	\$ 2,614.45
½ balance of American Express	\$ 1,242.00
½ Verizon	\$ 385.00
Reimbursement/medicals	\$ 438.10
Support arrearage	\$ 7,543.46
Amount owed/credited to Ms. Augier	\$15,916.34

{¶50} Regarding the issue of interest on property division awards, the courts have held that R.C. 1343.03, Ohio's general pre-judgment and post-judgment interest statute, applies to domestic relations proceedings in which the trial court orders a distribution of marital assets. See *Curtis v. Rinehart* (Mar. 19, 2001), 4th Dist. No. 00CA019, 2001 Ohio App. LEXIS 1431, *10. "[A]n order distributing marital assets from one party to another has the force of a money judgment, and the recipient is entitled to interest on any amount due and owing under the order but unpaid." *Brannon v. Brannon* (June 27, 1997), 11th Dist. No. 96-T-5572, 1997 Ohio App. LEXIS 2897, *22, quoting *Woloch v. Foster* (1994), 98 Ohio App.3d 806, 812. See, also, *Balog v. Balog* (June 9, 1997), 12th Dist. Nos. CA96-08-077, CA96-08-081, and CA96-09-086, 1997 Ohio App. LEXIS 2457 (a trial court should order that interest begin on the date that the obligation becomes due and payable).

{¶51} Furthermore, a trial court possesses broad discretion in overall matters relating to the division of marital property. *Koegel v. Koegel* (1982), 69 Ohio St.2d 355, syllabus. More specifically, some courts have stated that in awarding interest, the trial court must be given wide latitude to affix interest to those monetary obligations which arise out of a property division upon divorce. *Curtis* at *6, citing *Koegel* at 356.

{¶52} In this case, the divorce judgment dated May 22, 2007, ordered Ms. Augier to pay Mr. Augier \$33,997.60 in the property division settlement. The trial court awarded Mr. Augier statutory interest on this amount from the date of November 1, 2007, when the funds became available to Ms. Augier for payment to Mr. Augier. The trial court is not required to consider setoff, and, therefore, we cannot say it abused its discretion in ordering the statutory interest on the full amount of the property division payment. The fourth assignment of error is without merit.

{¶53} For the foregoing reasons, the judgment of the Geauga Court of Common Pleas is affirmed in part, reversed in part, and this matter is remanded for further proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.