

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

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| SHANON L. CAUDILL, | : | O P I N I O N |
| Plaintiff-Appellee, | : | CASE NO. 2009-P-0087 |
| - vs - | : | |
| ROBERT T. THOMAS, | : | |
| Defendant-Appellant. | : | |

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2000 JPI 00048.

Judgment: Reversed and remanded.

Robert J. Paoloni and Amanda J. Lewis, Paoloni & Lewis, 250 South Water Street, P.O. Box 762, Kent, OH 44240 (For Plaintiff-Appellee).

Lynda Harvey Williams, Lynda Harvey Williams & Associates, L.L.C., 2300 First National Tower, 106 South Main Street, Akron, OH 44308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Robert T. Thomas, appeals the judgment of the Portage County Court of Common Pleas, Juvenile Division, granting appellee Shanon L. Caudill's motion to modify child support and her motion to apportion a medical expense. At issue is whether the trial court abused its discretion in granting Shanon's motions. For the reasons that follow, we reverse and remand.

{¶2} The parties are the parents of two minor children, Robert Thomas (“Trei”), born November 10, 1994, and Isiah Thomas, born November 11, 1996. Robert lives in Columbus, Ohio, and works for Wal-Mart in asset protection. Shanon lives in Kent, Ohio, and works for Allstate Insurance in risk assessment. The parties were never married. In 2000, Shanon filed a complaint to determine parentage. In 2001, the court found a parent-child relationship existed between Robert and his sons. Robert was also ordered to pay child support and to provide health care insurance for the children.

{¶3} In 2005, the child support order was revised. Robert was ordered to pay \$222.66 per month per child. Unreimbursed out-of-pocket medical expenses were to be paid as follows: Shanon was ordered to pay the first \$100 per year per child. As to the remaining balance, she was required to pay 54 per cent and Robert was required to pay 46 per cent.

{¶4} On February 2, 2009, Robert filed a motion for modification of child support, asking the court to reduce his current child support obligation. In response, Shanon filed a motion to modify child support by increasing the order and a motion to modify the allocation of payment of medical expenses. The magistrate held a hearing on the motions on June 30, 2009.

{¶5} Robert testified that in 2006, he earned \$16.55/hour and worked 40 hours/week. In 2007, he earned \$17.55/hour and worked 40 hours/week. In 2008, he earned \$17.95/hour and worked 40 hours/week. In 2009, he earned \$19.95/hour, but his hours were reduced to 36/week. He therefore worked 72 regular hours in a two-week pay period. He testified that sometimes he works more than 36 hours/week, but

he is not guaranteed any overtime, and there are weeks when he does not work overtime.

{¶6} Shanon presented a summary and chart of Robert's work schedule from January 2009 through April 2009, which showed that Robert worked a total of 30 overtime hours in this period. They showed that during this four-month period, he worked an average of 83 hours in a two-week pay period, which included 11 overtime hours. However, it is unclear who prepared these documents, how they were made, whether they are accurate, and whether this pattern would continue beyond the limited period represented, let alone for the rest of the year.

{¶7} Robert testified that he also pays child support for his eldest son Kwame from another relationship in the amount of \$296.92/month pursuant to a court order through the Summit County Child Support Enforcement Agency. As of the date of the hearing, Kwame was 18 years old and had just graduated from high school in June 2009.

{¶8} Shanon testified that her gross income in 2007 was \$19,342.52. In 2008, it was \$19,734.66. While she testified her income in 2009 was the same as in 2008, she conceded that her pay stub from the first two weeks of February 2009, which was admitted in evidence, when extrapolated, demonstrated her gross income for that year would be \$26,282.88.

{¶9} Shanon testified that in February 2008, Trei underwent orthodontic treatment for braces, resulting in a bill for \$5,660. She submitted this bill to her own health insurance carrier, which paid \$1,500 toward it, and she paid the balance of \$4,160 out-of-pocket. She sought an order requiring Robert to pay his portion of the bill

pursuant to the court's order regarding the division of unreimbursed medical expenses. Shanon conceded she never submitted this bill to Robert. She said this was because he refused to discuss it with her. However, she did not offer any explanation as to why she did not submit the bill on her own to Robert's insurer. She did not dispute that this bill would have been covered by Robert's health care plan with Wal-Mart, which he was obligated to keep in place pursuant to court order.

{¶10} Following the hearing, the magistrate ordered each party to submit proposed findings of fact with respect to the calculation of child support and a child support guideline worksheet that incorporated those findings. Thereafter, the parties submitted their proposed findings and worksheets.

{¶11} In his decision, dated August 5, 2009, the magistrate found that Shanon's proposed findings and worksheet accurately summarized the evidence. Consistent with her proposal, the magistrate found that Robert worked an average of 83 hours in a two-week pay period. At \$19.95/hour, Robert's average gross income for a two-week pay period would be \$1,663.43. Extrapolating his average two-week pay in the first four months of 2009 for the entire year, the magistrate calculated Robert's annual income at \$43,249. However, the magistrate did not extrapolate Shanon's 2009 income based on her February 2009 pay stub. Instead, the magistrate calculated Shanon's annual income in 2009 at \$19,734, based solely on her income in 2008. The magistrate ignored her 2009 pay stub, which, as noted above, when extrapolated, showed her gross income in that year would be \$26,282.88.

{¶12} The magistrate also found that Robert was not entitled to credit for the child support payments he pays for his eldest son Kwame. This was based on the

magistrate's finding that these payments are for arrearages, rather than current child support, because Kwame had turned 18 and had graduated from high school. However, this does not explain the magistrate's failure to give Robert credit for the child support he paid after he filed his motion to modify but *prior to* Kwame's graduation from high school.

{¶13} Based on the parties' respective incomes, the magistrate increased Robert's child support obligation from \$222.66 per month per child to \$336.77 per month per child.

{¶14} The magistrate also apportioned the unreimbursed balance of Trei's orthodontia bill, which was \$4,160, which Shanon had already paid. The magistrate found her liable for the first \$100 of the bill. The balance was divided by ordering Robert to reimburse Shanon for 46 per cent of that amount, i.e., \$1,876.60.

{¶15} Robert filed objections to the magistrate's decision. Following a hearing, the court overruled the objections and adopted the magistrate's decision. Robert appeals the trial court's judgment, asserting four assignments of error. For his first assigned error, he alleges:

{¶16} "The trial court erred as a matter of law and abused its discretion when it failed to include in its calculation of Father's child support obligation child support paid by father to support father's older minor child (sic) as required by Ohio Rev. Code 3119.05(B)."

{¶17} A trial court's decision to adopt or reject a magistrate's decision will be reversed on appeal only for an abuse of discretion. *In re Ratliffe*, 11th Dist. Nos. 2001-P-0142 and 2001-P-0143, 2002-Ohio-6586, at ¶14. The same standard also applies to

judgments concerning child support. *Hale v. Hale*, 11th Dist. Nos. 2005-L-101, 2005-L-114, 2006-Ohio-5164, at ¶17. This court has recently stated that the term “abuse of discretion” is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *Gaul v. Gaul*, 11th Dist. No. 2009-A-0011, 2010-Ohio-2156, at ¶24, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District has also recently adopted this definition of the abuse of discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶65, citing Black’s Law Dictionary (4 Ed.Rev.1968) 25 (“A discretion exercised to an end or purpose not justified by and clearly against reason and evidence”).

{¶18} Robert argues the trial court abused its discretion by not giving him credit for monthly child support payments in the amount of \$296.22 he paid on behalf of his son Kwame from the date Robert filed his motion to modify on February 2, 2009 until the date Kwame graduated from high school in June 2009.

{¶19} R.C. 3119.05 provides in pertinent part:

{¶20} “When a court computes the amount of child support required to be paid under a court child support order ***, all of the following apply:

{¶21} “(B) The amount of any pre-existing child support obligation of a parent under a child support order *** actually paid shall be deducted from the gross income of that parent to the extent that payment under the child support order *** is verified by supporting documentation.”

{¶22} This court has held that an order modifying child support is usually retroactive, and therefore effective from the date of the filing of the motion to modify,

rather than from the date of the ruling on the motion. *Ober v. Ausra* (Dec. 15, 1995), 11th Dist. No. 95-P-0066, 1995 Ohio App. LEXIS 5556, *7.

{¶23} In light of the foregoing authority, Robert was entitled to credit for any child support paid for Kwame between the date Robert filed his motion to modify and the date Kwame graduated from high school. Contrary to Shanon's argument, because the amount of child support at issue is limited to the amount Robert paid from February 2009 until June 2009, the child support paid during this period represents current, rather than back, child support.

{¶24} We therefore hold the trial court abused its discretion in failing to credit Robert for child support payments he made for Kwame during the period of time at issue.

{¶25} Robert's first assignment of error is sustained.

{¶26} For his second assignment of error, Robert contends:

{¶27} "The trial court erred and abused its discretion when it used 2009 income statement for Father, but not for Mother, when calculating Father's child support obligation."

{¶28} Robert argues the trial court abused its discretion when it applied two different standards to the parties in calculating their gross incomes for child support purposes. In determining Robert's gross income, the magistrate extrapolated Robert's earnings in the first four months of 2009 in calculating his gross income for that year, but did not employ the same standard for Shanon. She conceded that extrapolating her pay stub for the first two weeks of February 2009 resulted in her gross income for that year being \$26,282.88. During the hearing the magistrate commented that Shanon did

not dispute this result, and allowed the pay stub to be admitted in evidence over her objection.

{¶29} Yet, in adopting Shanon's findings of fact, the magistrate ignored the significance of her 2009 pay stub, and simply relied on Shanon's income in 2008 in determining that her gross income for child support purposes was \$19,734. It is clear from the record that the pay stub presented for Shanon from February 2009, when extrapolated to the full year, would result in a significantly higher income than the amount used by the magistrate in his calculation. However, the record does not reveal any explanation as to why the magistrate and the court ultimately ignored this evidence.

{¶30} Because the trial court applied two different standards to the parties when it determined their respective incomes in calculating Robert's child support obligation, we hold the trial court abused its discretion. Basic principles of fairness and equity dictate that one party should not be given favored treatment over the other, particularly where the record does not provide any reason for such disparate treatment.

{¶31} We also note that both parties failed to produce the documents necessary to allow the court to make the proper calculations. By the date of the hearing, the parties had worked six months in 2009. Yet, the only documents presented concerning their incomes in that year consisted of one sample pay stub for each and an unauthenticated summary and chart of Robert's earnings from January through April. This put the court in the difficult position of having to calculate gross income without all pertinent documents, which would have been available from both employers. The problem was compounded by the fact that each party disputed the income earned and the hours worked by the other. These disputes could have been avoided if the parties

had submitted proper and complete records of their earnings. On remand the trial court should require the parties to submit such evidence as it deems necessary for it to make an informed, accurate, and equitable calculation of Robert's child support obligation.

{¶32} Robert's second assignment of error is sustained.

{¶33} For his third assignment of error, Robert alleges the following:

{¶34} "The trial court erred as a matter of law and abused its discretion when refused [sic] to average Father's overtime hours for the purpose of computing his child support obligation as required by Ohio Rev. Code 3119.05(D) and failed to include other factors that influence the computation of child support."

{¶35} Robert argues the trial court abused its discretion in failing to average his overtime income for the three years prior to the hearing in calculating his child support obligation. R.C. 3119.05 provides in pertinent part:

{¶36} "(D) When the court *** calculates the gross income of a parent, it shall include *the lesser* of the following as *income from overtime* ***:

{¶37} "(1) *The yearly average of all overtime *** received during the three years immediately prior to the time when the person's child support obligation is being computed;*

{¶38} "(2) *The total overtime *** received during the year immediately prior to the time when the person's child support obligation is being computed.*" (Emphasis added.)

{¶39} Robert argues that the trial court should have considered the average of his overtime for the last three years, which, he argues, is \$454.96, in calculating his gross income for child support purposes. However, Robert failed to present any evidence at the hearing to support such finding. In fact, there was no evidence

presented regarding the yearly average of all of his overtime received during the three years immediately prior to the hearing. Nor was any evidence presented regarding his total overtime in the year immediately prior to the hearing. While Shanon's worksheet shows that Robert made no "overtime" wages in 2009, the "gross income" figure in that worksheet includes an increase over and above Robert's regular pay, which reflects Robert's overtime extrapolated for the entire year based on overtime he worked during the first four months of 2009. Shanon argues that because there was no evidence presented regarding Robert's overtime in 2007 and 2008, thus precluding the three-year method of calculation, the trial court did not err in calculating Robert's overtime based solely on the few pay periods in 2009 when he worked overtime. However, the one-year method of calculating overtime requires evidence of the "total overtime" received during the year prior to the calculation of the person's child support obligation. Because no such evidence was presented, the trial court abused its discretion by including overtime in Robert's gross income.

{¶40} Next, Robert argues the trial court should have given him credit for the amount he paid to secure health insurance for his children. However, no evidence was presented at the hearing concerning such amount. We note that the document attached to Robert's motion to supplement the record purporting to indicate this amount was not authenticated or admitted in evidence, and therefore could not properly be considered by the court. On remand, the court should require the parties to submit such evidence as it deems necessary for it to determine Robert's request for credit for amounts paid by him for health insurance for the children.

{¶41} Robert's third assignment of error is sustained.

{¶42} Robert alleges the following for his fourth and final assigned error:

{¶43} “The trial court abused its discretion when it required Father to pay dental bills the Mother incurred on her ow (sic), when Father was ordered to provide dental care and he had complied.”

{¶44} Robert argues the trial court abused its discretion by ordering him to pay part of Trei’s orthodontia bill because it was covered by the health care insurance he had obtained pursuant to the court’s previous order and further because Shanon had no authority to incur any additional expense by submitting it to her own carrier.

{¶45} At the hearing, Shanon claimed she incurred a bill for \$5,660 for braces for Trei. She did not submit the bill to Robert or his insurer for payment. Instead, she submitted it for payment to her own health insurance carrier. Her insurer paid \$1,500 of the bill, and she paid the balance of \$4,160. She sought an order requiring Robert to reimburse her for his share of the bill pursuant to the court’s previous order regarding the allocation of unreimbursed medical expenses of the children.

{¶46} Shanon testified she submitted the bill to her own carrier rather than to Robert because he refused to discuss it with her. However, that does not explain her failure to submit the bill directly to Robert’s insurer. Because he was obligated by court order to pay for the insurance and had paid for it, Shanon was required to submit the bill to Robert or his insurer for payment. She was not authorized to submit it to her own insurer, thus incurring the expense resulting from its failure to pay it.

{¶47} Because Shanon failed to submit this bill to Robert’s insurance carrier and incurred this expense without authority to do so, we hold the trial court abused its discretion by ordering Robert to partially pay it.

{¶48} Robert's fourth assignment of error is sustained.

{¶49} For the reasons stated in the Opinion of this court, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas, Juvenile Division, is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with Concurring/Dissenting Opinion.

{¶50} I concur with the majority regarding the disposition of Robert's first assignment of error. I respectfully dissent from its holding that the trial court abused its discretion on the issues raised by his final three assignments of error. His second and third assignments of error allege the trial court miscalculated his income and overtime when determining child support. As the majority notes, the parties submitted virtually no competent evidence under the statute regarding these issues. Ultimately, the trial court made the best calculations it could based on the minimal evidence before it. I believe that it is the duty of the parties to place in the record before the trial court the evidence required to sustain their cases. Similarly, regarding Robert's fourth assignment of error, I would not find the trial court abused its discretion in ordering him to pay his portion of Trei's uncovered orthodontic bill. The majority reasons Shanon should have submitted

the bill to Robert's insurer prior to submitting it to her insurer, and paying the uncovered portion. This may have been the wisest course of action. But nothing indicates Robert could not seek recompense from his insurer now.