[Cite as *Mullins-Nessle v. Cardin*, 2009-Ohio-6748.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

CHRISTINE MULLINS-NESSLE,	:	
Plaintiff,	:	CASE NO. CA2009-07-036
	:	O P I N I O N
- vs -		12/21/2009
	:	
JAMES PATRICK CARDIN,	:	
Defendant-Appellant.	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 2007-JJ-14806

Gayle A. Walker, 2400 Clermont Center Drive, Batavia, Ohio 45103, for appellee, Clermont County Child Support Enforcement Agency

Crowe & Welch, Christopher S. Cushman, 1019 Main Street, Milford, Ohio 45150, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, James Patrick Cardin, appeals from the decision of the Clermont County Court of Common Pleas, Juvenile Division, awarding plaintiff, Christine Mullins-Nessle, formerly known as Christine Mullins, retroactive child support and the right to claim her daughter as an exemption for federal income tax purposes in the years 2005

through 2008.[1] For the reasons outlined below, we reverse and remand for further proceedings.

{¶2} In March of 2005, Mullins-Nessle, then a Warren County resident, filed a complaint with the Warren County Court of Common Pleas, Juvenile Division, seeking to establish a father-child relationship between Cardin, a Clermont County resident, and her two-year-old daughter, Lauren Rachelle Mullins, as well as the establishment of a child support order.

{¶3} At the July 13, 2005 hearing on Mullins-Nessle's complaint, the state presented the Warren County Juvenile Court magistrate with genetic test results indicating Cardin was the child's father. In addition, the magistrate heard the following testimony:

{¶4} "[THE STATE]: * * * Ms. Mullins, you wish to have child support set today?

{¶5} "[MULLINS-NESSLE]: Actually I would wish to dismiss this.

{¶6} "THE COURT: Okay. Is Ms. Mullins receiving any kind of state assistance for the benefit of the minor child?

{¶7} "[THE STATE]: She is not, Your Honor.

{¶8} "THE COURT: Is that correct, ma'am?

{¶9} "[MULLINS-NESSLE]: That is correct.

{¶10} "THE COURT: As the two of you are not married and you're not receiving state assistance[,] if you're sure you wish to dismiss I can allow that, but I want you to understand that if you change your mind and later on down the road you decide you want child support, I'm not going to allow you to have that child support set retroactive to today's date or past today's date.

{¶11} "[MULLINS-NESSLE]: I understand.

1. Pursuant to Loc.R. 6(A), we sua sponte remove this appeal from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

{¶12} "THE COURT: Why is it that you don't think child support is in the best interest of your daughter?

{¶13} "[MULLINS-NESSLE]: The reason being is that I'm engaged to be married and my fiancée wants to adopt and [Cardin] and I was just discussing this out here in the lobby of him signing over his rights to me so that she can be adopted by my fiancée, soon to be husband. [sic]

{¶14} "* * *

{¶15} "THE COURT: * * * So you're sure that you want to dismiss the child support complaint, ma'am[?]"

{¶16} "[MULLINS-NESSLE]: Yes.

{¶17} "THE COURT: And you're sure that's what you want to happen also sir?

{¶18} "[CARDIN]: Yes.

{¶19} "THE COURT: Okay. Then I will dismiss the complaint."

{¶20} As stated in the July 13, 2005 decision, which was later adopted in its entirety by the Warren County Juvenile Court, the magistrate found Cardin to be the child's natural father and "order[ed] the [c]omplaint for [s]upport dismissed at the request of the parties." However, the decision made no mention of the magistrate's order prohibiting Mullins-Nessle from seeking retroactive child support.

{¶21} Following the Warren County Juvenile Court's decision, Mullins-Nessle, along with her daughter, moved to Jasper County, Missouri. Cardin, however, continued to reside in Clermont County.

{¶22} In May of 2007, and pursuant to the Uniform Interstate Family Support Act, a child support petition was submitted to the Clermont County Juvenile Court on Mullins-Nessle's behalf. The petition, which was filed by a Joplin Regional Prosecutor located in Jasper County, Missouri, sought the establishment of an order against Cardin for current

child support, as well as an order for retroactive child support.

{¶23} After conducting a hearing on June 26, 2007, the Clermont County Juvenile Court ordered Cardin, who was not represented by counsel, to pay $210.01 per week as "current support," but "reserve[d the] issue of past support."[2] Three days later, Cardin, still acting without counsel, filed an objection to the magistrate's decision. Thereafter, the Clermont County Juvenile Court overruled Cardin's objections and adopted the magistrate's decision in its entirety. Cardin did not appeal from that decision.

{¶24} In May of 2008, nearly nine months later, the Clermont County Child Support Enforcement Agency (CSEA) filed a motion in the Clermont County Juvenile Court seeking to establish, among other things, an "order for past support for 2005, 2006 and 2007 * * *." In response, Cardin, who was now represented by counsel, filed a "Motion to Reallocate the Tax Exemption for the Minor Child & Notice of Hearing." A hearing on CSEA's motion for "past support" was conducted in August 2008.

{¶25} In the March 25, 2009 decision, the Clermont County Juvenile Court magistrate quoted the parties' entire July 13, 2005 conversation regarding retroactive child support. However, despite this, the magistrate determined that the Warren County Juvenile Court's "entries do not reflect that [Mullins-Nessle was] precluded from bringing an action for past support," and that their conversation had "no legal effect" since it was "never made part of a court order." The magistrate then ordered Cardin to pay "back support" from January 1, 2005 to June 28, 2007, and "awarded [him with] the tax exemption beginning with the tax year 2009 and thereafter."

{¶26} On April 8, 2009, Cardin filed an objection to the Clermont County Juvenile Court magistrate's decision. Two weeks later, on April 22, 2009, Cardin filed a "Motion for

2. The Clermont County Juvenile Court's order establishing "current support" became effective on June 28, 2007.

Decision Nunc Pro Tunc" with the Warren County Juvenile Court requesting it to amended its July 13, 2005 entry to include language of its "oral holding" prohibiting Mullins-Nessle from seeking retroactive child support.[3] On May 11, 2009, the Warren County Juvenile Court amended its July 13, 2005 entry to state the following:

{¶27} "The Court orders the Complaint for Support dismissed at the request of the parties. [Mullins-Nessle] is prohibited from seeking retroactive child support."

{¶28} On May 26, 2009, Cardin filed a "Memorandum in Support of Objections" with the Clermont County Juvenile Court and attached the Warren County Juvenile Court's nunc pro tunc entry amending its July 13, 2005 decision. Thereafter, the Clermont County Juvenile Court, without making any reference to the Warren County Juvenile Court's nunc pro tunc entry, summarily overruled Cardin's objections and adopted the magistrate's decision in its entirety.

{¶29} Cardin now appeals from the Clermont County Juvenile Court's entry approving and adopting the magistrate's decision, raising three assignments of error.

{¶30} As an initial matter, we note that in ruling on objections to a magistrate's decision, Civ.R. 53(D)(4)(d) requires a trial court to undertake an independent review of the objected matters in order to ascertain whether the magistrate properly determined the factual issues and appropriately applied the law. *Koeppen v. Swank*, Butler App. No. CA2008-09-234, 2009-Ohio-3675, ¶26. In turn, the ultimate authority and responsibility over the magistrate's findings and rulings is vested with the trial court. *Hampton v. Hampton*, Clermont App. No. CA2007-03-033, 2008-Ohio-868, ¶13; *McElrath v. Travel Safe.com Vacation Ins.,* Trumbull App. No. 2002-T-0085, 2003-Ohio-7206, ¶25. Therefore, a decision

3. The "function of a nunc pro tunc journal entry is to correct an omission in a prior journal entry so as to enter upon the record judicial action actually taken but erroneously omitted from the record." *Brewer v. Hankins* (Aug. 17, 1998), Madison App. No. CA98-01-003, at 7, quoting *Roth v. Roth* (1989), 65 Ohio App.3d 768, 771; see, also, *Brusaw v. Brusaw* (May 8, 2000), Warren App. Nos. CA99-03-038, CA99-04-042, at 3-4.

to modify, affirm or reverse a magistrate's decision lies within the sound discretion of the trial court and should not be reversed on appeal absent an abuse thereof. *Bartlett v. Sobetsky,* Clermont App. No. CA2007-07-085, 2008-Ohio-4432, ¶8, citing *Foster v. Foster,* 150 Ohio App.3d 298, 2002-Ohio-6390, ¶9; *Randall v. Randall*, Darke App. No. 1739, 2009-Ohio-2070, ¶8-10. An abuse of discretion is more than error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶31} Assignment of Error No. 1:

{¶32} "THE TRIAL COURT ERRED IN CONSTRUING R.C. 3115.16 AS ALLOWING RETROACTIVE SUPPORT AWARDS WHERE PARENTAGE HAS BEEN PREVIOUSLY ESTABLISHED."

{¶33} In his first assignment of error, although couched in an argument regarding the statutory interpretation of R.C. 3115.16, Cardin essentially claims that he should not have been ordered to pay retroactive child support. We agree.

{¶34} In this case, the evidence indicates that the parties entered into an agreement whereby Mullins-Nessle agreed to dismiss her complaint for support, effectively barring her from seeking retroactive child support in the future, if Cardin agreed to consent to the adoption of their child by her "fiancé, soon to be husband." As the CSEA is undoubtedly aware, the Ohio Supreme Court permits parties to enter into agreements regarding child-support orders, so long as the agreements are not unreasonable, made under duress, or otherwise flawed. See, e.g., *Byrd v. Knuckles*, 120 Ohio St.3d 428, 2008-Ohio-6318 (parties to a child-support order can agree to modify a child-support arrearage). In turn, as the Clermont County Juvenile Court's entry is in direct opposition to the parties prior agreement, and because the record is devoid of any evidence indicating the agreement they reached in open court was unreasonable, made under duress, or otherwise flawed, we find that the

Clermont County Juvenile Court erred in its decision ordering Cardin to pay retroactive child support. Therefore, based on the facts and circumstances of this case, Cardin's first assignment of error is sustained and the Clermont County Juvenile Court's order establishing the payment of retroactive child support is vacated.

{¶35} Assignment of Error No. 2:

{¶36} "THE TRIAL COURT ERRED IN FAILING TO APPLY THE DOCTRINE OF RES JUDICATA TO THE REQUEST FOR RETROACTIVE CHILD SUPPORT."

{¶37} In his second assignment of error, Cardin argues that the Clermont County Juvenile Court erred by failing to apply the doctrine of res judicata to bar the CSEA's request for retroactive child support. In support of this assertion, Cardin claims that the "Warren County Order prohibits retroactive support in this matter." We agree.

{¶38} Res judicata principles can apply to prevent parties, and those in privity with them, from modifying or collaterally attacking a previous judgment. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶34; *State ex rel. Arcadia Acres v. Ohio Dept. of Job & Family Servs.*, 123 Ohio St.3d 54, 2009-Ohio-4176, ¶18. As noted by the Ohio Supreme Court, "an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit." (Emphasis sic.) *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 1995-Ohio-331, citing *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62.

{¶39} In her original complaint filed with the Warren County Juvenile Court, Mullins-Nessle sought an "order of establishment of child support, for all extraordinary medical, dental and optical expenses, and for such further relief as the [c]ourt shall deem just and equitable." As noted above, however, instead of litigating those claims at the July 13, 2005 hearing before the Warren County Juvenile Court, Mullins-Nessle entered into an agreement with Cardin resulting in the dismissal of her complaint. Therefore, because "an existing final

judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit," we find that the Clermont County Juvenile Court erred by not applying the doctrine of res judicata to bar CSEA's request for retroactive child support. (Emphasis sic.) See *Stacy v. Mash*, Franklin App. No. 07AP-243, 2008-Ohio-147, ¶10-11, quoting *Grava* at 382, 1995-Ohio-331. Accordingly, Cardin's second assignment of error is sustained.

{¶40} Assignment of Error No. 3:

{¶41} "THE TRIAL COURT COMMITTED PLAIN ERROR AND ABUSED ITS DISCRETION IN FAILING TO DESIGNATE APPELLANT AS THE PARTY ELIGIBLE TO CLAIM THE ALLOCATION FOR THE DEPENDENCY EXEMPTION FOR ALL TAX YEARS."

{¶42} In his third assignment of error, Cardin argues that the Clermont County Juvenile Court improperly awarded Mullins-Nessle with the right to claim their child as an exemption for federal income tax purposes in the years 2005 through 2008. In support of this claim, Cardin argues that Mullins-Nessle previously "told the court to award it to him."

{¶43} Whenever a court issues, modifies, reviews, or otherwise reconsiders a child support order, it must designate which parent may claim the child as a dependent for federal income tax purposes. R.C. 3119.82; *Hammel v. Klug*, Clermont App. Nos. CA2004-04-032, CA2004-05-033, 2004-Ohio-6242, ¶18. R.C. 3119.82 provides that if the parties agree on which parent shall claim the tax exemption then the court "shall" award that parent accordingly. *Dindal v. Dindal*, Hancock App. No. 5-09-06, 2009-Ohio-3528, ¶20. However, where the parties cannot agree as to who shall receive the tax exemption, the court may award the exemption to the noncustodial parent "only if the court determines that this furthers the best interest of the children * * *." R.C. 3119.82; *Tuttle v. Tuttle*, Butler App. Nos. CA2006-07-176, CA2006-07-177, 2007-Ohio-6743, ¶20. The decision to allocate the tax exemption is a matter left to the discretion of the trial court. *Hammel* at ¶18, citing *Will v. Will*

(1996), 113 Ohio App.3d 8, 11; see, also, *Bailey v. Bailey,* Clermont App. No. CA2004-02-017, 2004-Ohio-6930, ¶27.

{¶44} After a thorough review of the record, and based on our decision in his first assignment of error, Cardin's assertion that the Clermont County Juvenile Court erred by not awarding him the right to claim their child as an exemption for the years 2005 and 2006 is rendered moot. However, since Cardin was ordered to pay "current support" effective June 28, 2007, and since the Clermont County Juvenile Court simply awarded Mullins-Nessle with the 2007 and 2008 federal income tax exemption without *any* discussion regarding the parties alleged agreement on such allocation, nor any reference to R.C. 3119.82, including any discussion referencing the best interest of the child, we remand this cause to the Clermont County Juvenile Court to reassess its decision in accordance with R.C. 3119.82.[4] Therefore, without rendering an opinion on the merits of his claim for the years 2007 and 2008, Cardin's third assignment of error is sustained.

{¶45} Judgment reversed and remanded.

POWELL and HENDRICKSON, JJ., concur.

4. The magistrate's March 25, 2009 decision merely states that "[Cardin] is awarded the tax exemption beginning with the tax year 2009 and thereafter."

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