[Cite as *In re S.H.*, 2009-Ohio-6592.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: S.H. :

: C.A. CASE NO. 23382

: T.C. NO. JC 2007 8440

: (Civil appeal from Common Pleas Court, Juvenile Division)

:

. . . . . .

O P I N I O N

Rendered on the 11th day of December, 2009.

. . . . . .

MARCY A. VONDERWELL-HULL, Atty. Reg. No. 0078311, P. O. Box 8744, 14 West Fourth Street, Dayton, Ohio 45401
Attorney for Plaintiff-Appellant

CANDACE THOMAS and SAMUEL HARDING, 3806 Lakebend Drive, Apt. B-2, Dayton, Ohio 45404
Defendants-Appellees

. . . . . .

FROELICH, J.

{¶ 1} The Montgomery County Child Support Enforcement Agency ("MCCSEA") appeals from a judgment of the Montgomery County Court of Common Pleas, Juvenile Division, which ordered, in part, that Samuel Harding's child support obligation for his daughter be reduced to $75 per month plus an additional $25 per month if private medical insurance were not being provided and

$25 per month toward his arrearage.

{¶ 2} MCCSEA claims that the juvenile court lacked personal jurisdiction over it, that the court erred in failing to complete a new child support computation worksheet, that the court erred in deviating from the presumed support obligation, and that the court's finding of a change in circumstances was against the manifest weight of the evidence. Harding has not filed a responsive brief. For the following reasons, the judgment will be reversed and the matter will be remanded for further proceedings.

I

{¶ 3} In June 2007, Harding and Candace Thomas, the parents of S.H., participated in an administrative hearing held by MCCSEA to establish child support obligations. The hearing officer found that both parents were currently unemployed and were capable of working, and she imputed income to both parents in the amount of $14,248 based on full-time employment at the then-minimum wage. The hearing officer ordered Harding to pay Thomas $218.45 per month, plus a processing charge, for a total of $222.82 per month. Neither parent objected to the administrative order, and a juvenile court magistrate adopted the order on August 21, 2007. The juvenile court judge adopted the magistrate's order on the following day, and informed the parties that they had 14 days to object to that decision. No objections were filed.

{¶ 4} On September 10, 2008, MCCSEA moved for the court to hold Harding in contempt for failure to pay child support. The agency stated that, as of July 2008, Harding had a balance of $2,910.32, including the processing fee, and

that Harding had never made a payment toward his child support obligation. MCCSEA requested that Harding be sentenced to 30 days in jail and any "other necessary and proper relief." MCCSEA supported its motion with an affidavit from the Director of the Montgomery County Department of Job and Family Services ("MCDJFS"), who stated that the mother had assigned her child support rights to MCDJFS and that Harding had failed to comply with the court's child support order. A hearing was scheduled for November 5, 2008.

{¶ 5} Harding, Thomas, and counsel for MCCSEA were present at the November 5, 2008, hearing. Harding was referred to the Public Defender's Officer, and the matter was continued until January 21, 2009. When Harding failed to appear on January 21, 2009, the hearing before the magistrate was rescheduled for February 19, 2009, and a capias was issued for Harding's arrest. Harding was brought before the juvenile court on February 17, 2009.

{¶ 6} At the February 17, 2009, hearing, the juvenile court provided Harding with two options: (1) the court could set a bond and send him to jail pending the February 19 hearing, or (2) the court could go forward with the contempt hearing at that time, Harding could admit that he owed the money and that he failed to pay it, and the court would impose a jail sentence, suspend it, and order him to make payments. The court further stated that Harding would be required to waive his right to an attorney if they proceeded on that day.

{¶ 7} Harding elected to proceed before the judge at that time, and he waived his constitutional rights to counsel, to have the State prove beyond a reasonable doubt that he did not pay child support, to cross-examine the State's

witnesses, to present witnesses on his own behalf, and to remain silent. The court informed Harding that he could be sentenced to 30 days in jail. Harding admitted to failing to pay child support. MCCSEA indicated at the hearing that, as of that date, the arrearage was $4,319.97, and Harding stated that he had no reason to believe the accounting was erroneous. The court found that Harding understood and voluntarily waived his constitutional rights, that he understood and entered an admission that he failed to show cause why he should not be held in contempt of court, that he understood he had an obligation to pay child support for S.H., and that there was a previous order to pay child support and an amount toward his arrearage and he failed to pay pursuant to that order. The court found that the arrearage was $4,319.97.

{¶ 8} Harding informed the court that he was residing at Nova House and that he had 70 days of a 90-day period remaining. The court then engaged in the following discussion with the parties regarding Harding's payments.

{¶ 9} THE COURT: "Ms. Bronson, do you have a recommendation what the Court should set in terms of a payment on this? Should the Court maintain it or change it?

{¶ 10} MS. BRONSON: "Your Honor, maintaining it I think at this point given the circumstances is all that we would request.

{¶ 11} THE COURT: "Well, I think that's too much because of the current problems. The Court is going to – sir, you're obviously not currently employed, are you?

{¶ 12} MR. HARDING: "Employed?

{¶ 13} THE COURT: "Yes.

{¶ 14} MR. HARDING: "No. That's why I'm – I'm trying to get my life back together, man, at the Nova.

{¶ 15} THE COURT: "When was the last time you were employed?

{¶ 16} MR. HARDING: "Since '06, when I was in school.

{¶ 17} THE COURT: "All right. I'm going to set the child support amount – I'm going to reduce it. It is clear that he can't pay the $218.45 per month child support order currently in existence. I'm going to set it at $100 per month.

{¶ 18} "Sir, I'm reducing your child support obligation at this point to $100 a month. I'm going to set the arrearage repay at $25 a month – I'm reducing that also – and have those effective as of today, the reductions.

{¶ 19} ***

{¶ 20} MS. BRONSON: "*** Just one clarification: Given the recent – well, relatively recent change of the law, do we need to put some of this money for the cash medical designation or – I know it complicates things.

{¶ 21} THE COURT: "It does complicate things. Well, since you do this on a regular basis, what would be your recommendation regarding the cash medical portion?

{¶ 22} MS. BRONSON: "Well, unfortunately, there's no way to really set that without running the worksheet, and since mom is not here, I don't know. This child is on complete benefits, cash, medical, the whole shebang.

{¶ 23} THE COURT: "Without having completed a worksheet, which we're not going to do, is it your recommendation we don't put an amount in for the

medical care aspect, or should I reduce the support order itself and put part of that towards a medical order?

{¶ 24} MS. BRONSON: "Well, Your Honor, I can't recommend that we don't put any money for cash medical, so if the only option is to reduce the underlying order, I guess that's what I would suggest.

{¶ 25} THE COURT: "All right. Let's then at this point order that the payment be $75 a month as it relates to child support, $25 for medical care insurance issues, and then $25 a month for the arrearage repay.

{¶ 26} "Anything further, Ms. Bronson?

{¶ 27} MS. BRONSON: "No, Your Honor. Thank you."

{¶ 28} On March 13, 2009, the juvenile court issued an order, finding that (1) Harding is not bankrupt, employed, self-employed, or receiving worker's compensation or unemployment compensation, and he has no other income; (2) S.H.'s mother has no income, is receiving child support for another child in the amount of $1,668.80, has no work-related day care expenses, and is not ordered to pay child support; (3) there is no health insurance available to either party at reasonable cost; and (4) a "deviation from the State guidelines is granted to the father." The court ordered Harding to seek work and to pay $75 toward child support, $25 toward cash medical support, and $25 toward the arrearage, plus the 2% processing fee.

{¶ 29} MCCSEA appeals from the juvenile court's order, raising four assignments of error.

II

{¶ 30} MCCSEA's first assignment of error states:

{¶ 31} "THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT VIOLATED THE MONTGOMERY COUNTY CHILD SUPPORT ENFORCEMENT AGENCY'S DUE PROCESS RIGHTS BY CONDUCTING A SUPPORT HEARING WITHOUT PERSONAL JURISDICTION OVER THE MONTGOMERY COUNTY CHILD SUPPORT ENFORCEMENT AGENCY OR PLAINTIFF-APPELLEE CANDACE THOMAS."

{¶ 32} In its first assignment of error, MCCSEA contends that the trial court lacked personal jurisdiction over the agency when it entered the modified child support order, because the agency was not served with notice that the juvenile court would address Harding's child support obligation at the hearing. The agency emphasizes that Harding and MCCSEA were before the court on a capias pickup, not for a hearing to modify child support.

{¶ 33} "A court has jurisdiction to rule on a controversy between parties if it has obtained personal jurisdiction over the parties and possesses subject matter jurisdiction over the parties' claims. The subject matter jurisdiction of a court is a court's 'power to hear and decide a case upon its merits[.]' A court's subject matter jurisdiction is invoked by the filing of a complaint. Once a court of competent jurisdiction acquires jurisdiction over an action, its authority continues until a final judgment on the merits of the dispute before it has been issued. The defense of lack of subject matter jurisdiction can never be waived. Objections based upon lack of subject matter jurisdiction may be raised at any stage of the proceedings, and may even be raised for the first time on appeal.

{¶ 34} "In contrast, personal jurisdiction can be waived. A court obtains personal jurisdiction over a defendant by service of process, or by the defendant's voluntary appearance or actions. Thus, the defense of lack of personal jurisdiction is waived if it is not raised in a responsive pleading or in a motion filed prior to the answer." (Internal citations omitted.) *In re Burton S.* (1999), 136 Ohio App.3d 386, 391.

{¶ 35} R.C. 2151.23(A)(11) grants the juvenile court exclusive subject matter jurisdiction to hear and determine requests for child support, provided that the request is not ancillary to an action for divorce, dissolution, annulment, or legal separation, an action involving domestic violence, or an action for support under R.C. Chapter 3115. When a juvenile court makes or modifies a child support order, it must comply with R.C. Chapters 3119, 3121, 3123, and 3125. R.C. 2151.23(G).

{¶ 36} In general, the juvenile court's continuing jurisdiction to modify child support orders must be invoked by the filing of a motion and proper service on the parties. *In re Alexander-Segar*, Montgomery App. No. 22080, 2008-Ohio-1580, at ¶9-11; Civ.R. 75(J). See, also, *Walker v. Walker*, 151 Ohio App.3d 332, 2003-Ohio-73 (stating that the court's continuing jurisdiction to modify child support order is not invoked absent a written motion and proper notice). Juv.R. 16(A) states that "[e]xcept as otherwise provided by these rules, summons shall be served as provided in Civil Rules 4(A),(C),(D), 4.1, 4.2, 4.3, 4.5 and 4.6."

{¶ 37} Here, MCCSEA and Harding were before the juvenile court due to MCCSEA's motion for Harding to show cause why he should not be held in

contempt for failure to pay child support. MCCSEA was served with notice of the scheduled hearing and of Harding's appearance before the juvenile court on the capias. However, the fact that the parties were before the court on a matter other than a motion to modify child support did not deprive the juvenile court of subject matter jurisdiction in this case, and MCCSEA waived any challenge based on lack of notice. MCCSEA may not have been aware prior to the February 17, 2009, hearing that the juvenile court might consider addressing the merits of the contempt motion or Harding's child support order at the capias hearing; however, MCCSEA was present at the hearing and actively participated in the hearing, including the discussion of a modified support order, without objection.

{¶ 38} If the agency believed that a separate hearing and/or a written motion to modify by Harding was required in order for the court to consider reducing Harding's support order, the agency should have objected to the juvenile court's consideration of the underlying support order. Not only did MCCSEA not object to the proceedings, it was actively involved in the process of determining the eventual court order. Based on the record, MCCSEA voluntarily submitted to the juvenile court's exercise of personal jurisdiction over the agency with respect to each of those issues, and it has waived any personal jurisdiction challenge.

{¶ 39} The first assignment of error is overruled.

II

{¶ 40} MCCSEA's second and third assignments of error will be addressed together. They state:

{¶ 41} "THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED

ITS DISCRETION WHEN IT FAILED TO COMPLY WITH O.R.C. §3119.02.

{¶ 42} "THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT DEVIATED FROM THE CHILD SUPPORT SCHEDULE."

{¶ 43} In its second assignment of error, MCCSEA asserts that the juvenile court was required to complete a child support worksheet, and that its failure to do so constituted reversible error. MCCSEA's third assignment of error argues that the court deviated from the statutorily presumed amount of support, as set forth in R.C. 3119.03, without making any findings of fact to support its deviation.

{¶ 44} "[A] trial court's decision regarding child support obligations falls within the discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion." *Pauly v. Pauly*, 80 Ohio St.3d 386, 390, 1997-Ohio-105. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 45} "In any action in which a court child support order is issued or modified ***, the court or agency shall calculate the amount of the obligor's child support obligation in accordance with the basic child support schedule, the applicable worksheet, and the other provisions of sections 3119.02 to 3119.24 of the Revised Code." R.C. 3119.02. The Supreme Court of Ohio has required strict compliance with the statutory procedures for an initial award or modification of a child support order. *Marker v. Grimm* (1992), 65 Ohio St.3d 139. Addressing R.C. 3113.215, which formerly addressed the calculation of child support obligations, the

supreme court stated that use of the worksheet is mandatory and that it "must *actually* be completed for the order or modification of support to be made." (Emphasis sic.) Id. at 142. The trial court must include the worksheet in the record so that an appellate court can meaningfully review the trial court's order. Id.

{¶ 46} Generally, the amount of child support that would be payable under a child support order, as calculated pursuant to the basic child support schedule and applicable worksheet through the line establishing the actual annual obligation, is rebuttably presumed to be the correct amount of child support due. R.C. 3119.03. However, R.C. 3119.22 authorizes the court to order an amount of child support that deviates from the amount determined from the child support schedule and worksheet if, upon considering the factors set forth in R.C. 3119.23, the court determines that the calculated amount "would be unjust or inappropriate and would not be in the best interest of the child." If the court enters a child support order that deviates from the calculated amount, "the court must enter in the journal the amount of child support calculated pursuant to the basic child support schedule and the applicable worksheet, through the line establishing the actual annual obligation, its determination that that amount would be unjust or inappropriate and would not be in the best interest of the child, and findings of fact supporting that determination." R.C. 3119.22; see, also, *Marker*, 65 Ohio St. at 143 (stating that any deviation from the worksheet and the basic child support schedule must be entered in the court's journal and include findings of fact).

{¶ 47} In reducing Harding's child support order to $100 per month – and, later, to $75 per month with an additional $25 toward medical care – plus $25 per

month toward his arrearage, the juvenile court failed to use the applicable worksheet and include it in the record. Although the juvenile court's March 13, 2009, order found that Harding was unemployed, the court did not explain its decision to grant a deviation from the State guidelines, and it failed to include the findings of fact required by R.C. 3119.22. Such findings were particularly important in this case given the fact that Harding was also unemployed when the initial support order was issued. See *Baire v. Baire* (1995), 102 Ohio App.3d 50, 55 (stating that a deviation is not sufficient to support a modification if the deviation was "within the contemplation of the parties and the court at the time the original support order was issued.") At that time, $14,248 in annual income ($6.85 x 40 hours x 52 weeks) had been imputed to Harding based on a finding that Harding was voluntarily unemployed. The juvenile court made none of the findings as to whether the amount of child support calculated under the schedule and worksheet was appropriate or whether that amount would not be in the best interest of Harding's child.

{¶ 48} We appreciate the court's desire, especially with a busy docket, to resolve Harding's contempt, to establish a fair support order, and to return Harding to NOVA where he was "trying to get [his] life back together," but the law is explicit that the worksheet must "actually be completed" and the reasons for any deviations be included in findings of fact in the order. In short, the juvenile court abused its discretion when if failed to follow the prescribed statutory procedures. See *Hirzel v. Ooten*, Meigs App. Nos. 06CA10, 07CA13, 2008-Ohio-7006.

{¶ 49} The second and third assignments of error are sustained.

III

{¶ 50} MCCSEA's fourth assignment of error states:

{¶ 51} "THE TRIAL COURT ERRED AS A MATTER OF FACT AND WENT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN IT FOUND THAT THERE EXISTED A CHANGE IN CIRCUMSTANCE SUBSTANTIAL ENOUGH TO REQUIRE A MODIFICATION OF THE EXISTING CHILD SUPPORT ORDER."

{¶ 52} In light of our disposition of the second and third assignments of error, the fourth assignment of error is moot.

V

{¶ 53} The judgment of the trial court will be reversed and the matter will be remanded for further proceedings.

. . . . . .

GRADY, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Marcy A. Vonderwell-Hull
Candace Thomas
Samuel Harding
Hon. Anthony Capizzi