[Cite as *Devir v. Devir*, 2010-Ohio-3111.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

LISA K. DEVIR	:	
	:	Appellate Case No. 23509
Plaintiff-Appellee	:	
	:	Trial Court Case No. 05-DR-421
v.	:	
	:	(Civil Appeal from
WILLIAM L. DEVIR	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 2nd day of July, 2010.

. . . . . .

KEITH KEARNEY, Atty. Reg. #0003191, ROGERS & GREENBERG, LLP, 2160 Kettering Tower, Dayton, Ohio 45423
Attorney for Plaintiff-Appellee

CHARLES D. LOWE, Atty. Reg. #0033209, 1500 Kettering Tower, Dayton, Ohio 45423
Attorney for Defendant-Appellant

. . . . . .

FAIN, J.

{¶ 1} Defendant-appellant William L. Devir (William) appeals from an order of the Montgomery County Common Pleas Court, Domestic Division, that modified his spousal support payments to his ex-wife, plaintiff-appellee Lisa K. Devir (Lisa), from $750 per month to $400 per month. The court also ordered Lisa to pay child support of $237 per month per child, and to pay $50 per month towards an arrearage

created by the retroactive application of the child support award.

{¶ 2} William contends that the trial court abused its discretion by failing to impute income to Lisa in the amount of $30,000 per year, and in ordering William to pay 72% of the uninsured medical, dental, and optical expenses for the parties' minor children, Robert and Meaghan. William further contends that the trial court erred in permitting Lisa to satisfy her $5,466 child support arrearage by paying it at the rate of $50 per month, and by not requiring Lisa to pay interest on the arrearage. Finally, William contends that the trial court abused its discretion in failing to award both dependent tax exemptions to William for the year 2007, and in reducing the spousal support award effective November 1, 2007, instead of April 2007.

{¶ 3} We conclude that the trial court did not abuse its discretion in failing to impute income to Lisa, because the evidence indicates that Lisa was not voluntarily underemployed. The trial court also did not abuse its discretion in assigning the date Lisa's child support obligation would begin, in allocating the percentage of uninsured medical, dental, and optical expenses she would pay, or in allowing Lisa to satisfy a child support arrearage at less than the statutory amount presumed in R.C. 3123.21. Evidence in the record supports these decisions.

{¶ 4} We further conclude that the trial court did not err in failing to require Lisa to pay interest on the child support arrearage, as she did not willfully fail to pay. The arrearage was caused by the retroactive child support order, not by Lisa's actions. The trial court did not abuse its discretion in splitting the dependency tax exemptions for the year 2007, a year in which each parent had legal custody of the children for about half of the year. Finally, the trial court did not abuse its discretion

in modifying spousal support retroactive to the date William filed a motion for termination of support. A court-ordered requirement of notifying another party of a change in circumstances might possibly satisfy due process concerns about imposing financial obligations prior to the time a motion for modification is filed. However, no such requirement exists in the case before us, and spousal support was properly reduced as of the date that William filed his motion. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 5} The judgment and decree of divorce in the case before us was issued in July 2006. The decree designated Lisa Devir as residential parent and custodian for the parties' two minor children, Robert, born in July 1989, and Meaghan, born in October 1990. William was ordered to pay child support in the amount of $552 per month per child. He was also ordered to pay spousal support in the amount of $2,000 per month, for 84 months. The amount of spousal support was made subject to the trial court's continuing jurisdiction. Spousal support would also terminate upon the death of either party, Lisa's remarriage, or if Lisa cohabited as defined by Ohio law. The parties were each given one child as an exemption for tax purposes. When the decree was filed, William was earning approximately $180,000 per year.

{¶ 6} In May 2007, the parties filed an agreed order, reducing spousal support from $2,000 a month to $750, and reducing child support to $475 per month per child. William had previously been terminated from his previous job in December 2006, and was earning only $61,000 per year.

{¶ 7} In June 2007, William filed a motion for change of custody, for reallocation of parental rights, for termination of his child support obligation, and for an order requiring Lisa to pay child support. An agreed order was filed in August 2007, naming William residential parent and legal custodian of Robert and Meaghan. An amended order was then filed in October 2007, suspending William's child support obligation, effective June 30, 2007. William also filed a motion in November 2007, asking the court to terminate the spousal support obligation.

{¶ 8} A hearing was held on these matters in November 2007, at which the sole witnesses were Lisa and William. According to the evidence, Lisa had met a man, Rusty Bennett, in March 2007, and they embarked on a boyfriend/girlfriend relationship that ended in May or June 2007. Bennett lived in Idaho, and Lisa decided to move there, because she had always wanted to live out west and had "had enough of the problems in Ohio." Lisa also had friends in Idaho, including Bennett and others.

{¶ 9} Lisa moved to Grangeville, Idaho around June 26, 2007. She voluntarily left her job as a respiratory therapist at Miami Valley hospital, where she had been earning $22 an hour as a respiratory therapist. While in Ohio, Lisa worked part-time, earning between $27,000 and $30,000 per year, and attended nursing school.

{¶ 10} Lisa testified that the closest respiratory therapist position in Idaho was 200 miles away. Consequently, Lisa took a position at Syringa General Hospital as a certified nurse's aide, making $10 an hour. Lisa again worked part-time, and attended nursing school at Walla Walla Community College in Washington.

{¶ 11} After arriving in Idaho, Lisa rented a four-bedroom home located on approximately 80 acres, for $650 per month. Bennett lived there also, but Lisa claimed they did not share a bedroom and were not intimate, because they had decided to just be friends. Bennett was not employed, and did not contribute to household expenses, other than paying for his own food. Lisa's yearly income was about $18,000 per year, plus $9,000 in spousal support, and her expenses were about $46,000. She was currently paying expenses with savings and money she had received in the divorce settlement.

{¶ 12} At the time of the hearing, William was employed as an intermittent appointee in the federal government and as a part-time fire-fighter and medic for a local township. His yearly income was approximately $65,000, and he testified to having monthly expenses of about $5,706, not including $919 for health insurance, of which $500 was for the children's health insurance. William's spousal support obligation was $9,000 per year, and he was current in that obligation. Like Lisa, William had expenses that exceeded his income.

{¶ 13} After hearing the evidence, the magistrate issued a decision in March 2008. The magistrate concluded that there had been a change of circumstances and that jurisdiction existed to modify spousal support. Spousal support was reduced from $750 per month to $400 per month, effective November 1, 2007. The magistrate also ordered Lisa to pay child support of $237 per month per child, effective August 15, 2007, and an additional $50 monthly on the arrearage, which was caused by the retroactive award of support. In addition, the magistrate ordered William to maintain health insurance, because Lisa did not have health insurance

available through her employer. William was ordered to pay the first $100 of uninsured medical cost per child per year, and the remaining costs were to be spilt by the parties, with William paying 72% and Lisa paying 28%. These amounts were in proportion to their percentage of income on line 16 of the child support computation worksheet.

{¶ 14} William filed objections to the magistrate's decision. In June 2009, the trial court overruled William's objections and adopted the magistrate's decision as the order of the court. William appeals from this order.

II

{¶ 15} William's First Assignment of Error is as follows:

{¶ 16} "THE TRIAL COURT ABUSED ITS DISCRETION IN NOT IMPUTING INCOME TO LISA IN THE AMOUNT OF $30,000 PER YEAR."

{¶ 17} Under this assignment of error, William contends that the trial court abused its discretion by failing to impute $30,000 in income to Lisa. This is the amount Lisa made as a respiratory therapist in Ohio before quitting her job and voluntarily moving to Idaho.

{¶ 18} The general standard of review for decisions in domestic relations cases is abuse of discretion. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. Modification of child support orders fits within this general standard, and we may, therefore, reverse the trial court only for abuse of discretion. *Woloch v. Foster* (1994), 98 Ohio App.3d 806, 810. An abuse of discretion " 'implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore*

(1983), 5 Ohio St.3d 217, 219 (citation omitted).

{¶ 19} To determine the appropriate amount of child support, the trial court must evaluate the income of each parent. R.C. 3119.01(C) (5) defines "income" as either of the following:

{¶ 20} "(a) For a parent who is employed to full capacity, the gross income of the parent;

{¶ 21} "(b) For a parent who is unemployed or underemployed, the sum of the gross income of the parent and any potential income of the parent."

{¶ 22} R.C. 3119.01(C)(11) defines "potential income." Subsections (a) and (b) include as potential income the following items: (a) imputed income that a parent would have earned if fully employed, as determined from statutory criteria; and (b) imputed income from any non-income producing assets. The criteria used to determine the income a parent would have earned if fully employed under R.C. 3119.01(C)(11)(a) include:

{¶ 23} "Imputed income that the court or agency determines the parent would have earned if fully employed as determined from the following criteria:

{¶ 24} "(i) The parent's prior employment experience;

{¶ 25} "(ii) The parent's education;

{¶ 26} "(iii) The parent's physical and mental disabilities, if any;

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

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

{¶ 29} "(vi) The parent's special skills and training;

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

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

{¶ 32} "(ix) The parent's increased earning capacity because of experience;

{¶ 33} "(x) Any other relevant factor."

{¶ 34} Before the court reaches the question of what items should be included within imputed income, the court must first find that a parent is voluntarily underemployed or voluntarily unemployed. The Supreme Court of Ohio has held that "the question whether a parent is voluntarily (i.e., intentionally) unemployed or voluntarily underemployed is a question of fact for the trial court. Absent an abuse of discretion, that factual determination will not be disturbed on appeal." *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112.

{¶ 35} In the case before us, the trial court did not conclude that Lisa is or was voluntarily underemployed. We agree with the trial court. Lisa did voluntarily leave her job in Ohio and move to Idaho, but she works the same amount of hours in Idaho that she previously worked in Ohio. The trial court could find, as it evidently did, that Lisa's relocation to Idaho was not motivated, even in part, by a desire to decrease her earned income. Lisa has not been employed full-time in either job, because she has been attending school to become a registered nurse. The smaller yearly salary in Idaho results from a lower hourly wage, and, like the part-time job in Ohio, appears to be a temporary phenomenon, until Lisa becomes a registered

nurse. Lisa testified that no comparable respiratory therapist jobs are available in her community, and William did not offer evidence to the contrary. Accordingly, the trial court did not abuse its discretion in failing to impute $30,000 to Lisa for purposes of calculating child support.

{¶ 36} William's First Assignment of Error is overruled.

III

{¶ 37} William's Second Assignment of Error is as follows:

{¶ 38} "THE TRIAL COURT ERRED IN RULING THAT LISA'S CHILD SUPPORT OBLIGATION COMMENCE AUGUST 15, 2007."

{¶ 39} Under this assignment of error, William contends that the trial court should have made Lisa's child support obligation effective as of June 11, 2007, when he filed the motion for change of custody, rather than August 15, 2007, when the actual change of custody occurred. The trial court did eliminate William's child support obligation effective June 30, 2007, but chose a slightly later date to begin Lisa's child support obligation.

{¶ 40} William made this argument when he objected to the magistrate's decision, but the trial court did not find it persuasive. The trial court reasoned that even though William had physical custody of the children in June 2007, legal custody did not change until mid-August 2007. The trial court concluded that it would be neither just nor appropriate for the legal custodian to pay support.

{¶ 41} In *Goddard-Ebersole v. Ebersole*, Montgomery App. No. 23493, 2009-Ohio-6581, we held that the trial court had erred in modifying support retroactive to a date that was five months later than the date the motion for

modification was filed. Id. at ¶ 9. We noted authority indicating that absent special circumstances, modification should generally be made as of the date a motion for modification is filed. Id. at ¶ 8. We stressed that " 'Any other holding might produce an inequitable result in view of the substantial time it frequently takes the trial court to dispose of motions to modify child-support obligations.' " Id. at ¶ 8 (citations omitted).

{¶ 42} The reversal in *Goddard-Ebersole* was based on the trial court's failure to explain why it decided to award support as of a date that was later than the date the motion for support was filed. Id. at ¶ 10. In contrast, the trial court in the case before us did provide a reasonable explanation for assessing child support in mid-August, rather than two months earlier, when the motion was filed. Essentially, the trial court found that William's having actual custody of the children earlier than the date of the change of legal custody was a result of the parties' informal arrangement of the times the children would be with each parent, and that these arrangements are presumed to have been factored into the child support ordered. We may not have made the same decision, but that does not mean the court's decision was arbitrary, unconscionable, or unreasonable. Again, we only review child support decisions for abuse of discretion. *Woloch,* 98 Ohio App.3d at 810.

{¶ 43} William's Second Assignment of Error is overruled.

IV

{¶ 44} William's Third Assignment of Error is as follows:

{¶ 45} "THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING WILLIAM TO PAY 72% OF UNINSURED MEDICAL, DENTAL AND OPTICAL

EXPENSES."

{¶ 46} Under this assignment of error, William contends that the trial court erred in ordering him to pay 72% of the uninsured medical, dental, and optical expenses for the minor children. William's argument is explicitly based on the trial court's alleged error in failing to impute $30,000 in income to Lisa. Because we have already rejected that contention, William's Third Assignment of Error is overruled.

V

{¶ 47} William's Fourth Assignment of Error is as follows:

{¶ 48} "THE TRIAL COURT ERRED IN PERMITTING LISA TO SATISFY HER $5,466 CHILD SUPPORT ARREARAGE BY PAYING IT AT THE RATE OF $50 PER MONTH."

{¶ 49} Under this assignment of error, William contends that the trial court erred in citing "financial hardship" as a reason for letting Lisa pay only $50 per month on her child support arrearage. The arrearage was caused by the award of support retroactive to the date that William was granted legal custody.

{¶ 50} William contends that the trial court ignored Lisa's testimony that she had been saving the $750 spousal support she had been receiving, because she wanted to pay back what she owed for child support. William also notes that Lisa had approximately $28,000 in the bank from her share of the sale of the marital residence.

{¶ 51} R.C. 3123.21(A) provides that an order to collect support due and any arrearage "shall be rebuttably presumed to provide that the arrearage amount

collected with each payment of current support equal at least twenty percent of the current support payment." R.C. 3213.21(B) qualifies this presumption by permitting the court "to consider evidence of household expenditures, income variables, extraordinary health care issues, and other reasons for a deviation from the twenty per cent presumption."

{¶ 52} In deviating from the twenty percent presumption, the trial court noted that Lisa's living expenses exceed her income and that she is supplementing her income by using savings. The court concluded that paying twenty percent of the current child support obligation would create a financial hardship, and ordered only an additional payment of $50 per month.

{¶ 53} "It is well established that 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. Evidence in the record indicates that Lisa's living expenses exceed her income, and that she has already used a substantial portion of her savings to support herself while attending nursing school. Accordingly, the trial court acted reasonably in deciding to allow a small payment on the arrearage.

{¶ 54} William's Fourth Assignment of Error is overruled.

VI

{¶ 55} William's Fifth Assignment of Errors is as follows:

{¶ 56} "THE TRIAL COURT ERRED IN NOT REQUIRING LISA TO PAY INTEREST ON THE CHILD SUPPORT."

{¶ 57} Under this assignment of error, William contends that if Lisa is allowed

to pay such a minimal amount on the arrearage, interest at the legal rate should have been awarded, beginning with the date of the trial court's decision on support.

{¶ 58} R.C. 3123.17(A)(2) allows trial courts to assess interest on payment of arrearages where the obligor's default is willful. The trial court did not find that the Lisa's default was willful. In fact, Lisa was not even in "default," because she had no obligation to pay child support until the court entered its order. The arrearage was caused by the lapse of time between the date William received legal custody and the decision on support, not by Lisa's actions. The trial court did not err, therefore, in failing to order interest on the arrearage.

{¶ 59} William's Fifth Assignment of Error is overruled.

VII

{¶ 60} William's Sixth Assignment of Error is as follows:

{¶ 61} "THE TRIAL COURT ABUSED ITS DISCRETION IN NOT AWARDING BOTH DEPENDENT TAX EXEMPTIONS TO WILLIAM FOR THE YEAR 2007."

{¶ 62} Under this assignment of error, William contends that the trial court should have awarded him tax exemptions for both dependents for the year 2007, because Lisa left the children in June 2007 to go to Idaho, and did not contribute to their support for the last six months of the year. The court did award William both exemptions for the year 2008, but concluded that the tax exemptions should be split for 2007, because both parents had the children in their legal custody for part of the year.

{¶ 63} R.C. 3119.82 provides that the court may allow a parent who is not the residential parent and legal custodian to claim children as tax dependents only if it is

in the children's best interests. The court is to consider any net tax savings, the relative financial needs and circumstances of the children and parents, the amount of time each parent spends with the children, either parent's eligibility for tax credits, and any other relevant factors.

{¶ 64} In *Streza v. Streza*, Lorain App. No. 05CA008644, 2006-Ohio-1315, the Ninth District Court of Appeals noted that the plain language of R.C. 3119.82 "does not require that the trial court state its reasons on the record for awarding the exemption." Id. at ¶ 12. Nonetheless, the Ninth District Court of Appeals reversed the trial court decision, because the record indicated that the trial court failed to take the tax consequences to the parties into account. Id. In particular, the Ninth District Court of Appeals focused on case law interpreting the analogous predecessor statute [R.C. 3113.21(C)(1)(e)]. This case law held that "a net tax savings will result 'through allocation to the noncustodial parent only if the noncustodial parent's taxable income falls into a higher tax bracket than the tax bracket of the custodial parent.' " Id. at ¶ 13, quoting *Singer v. Dickinson* (1992), 63 Ohio St.3d 408, 415. Based on undisputed evidence that the custodial parent earned a substantially higher salary, and the lack of evidence indicating that the trial court considered the factors in R.C. 3119.82, the Ninth District Court of Appeals concluded that the trial court had abused its discretion by dividing the tax exemptions between the parents. Id.

{¶ 65} In the case before us, each parent had legal custody of the children for about half of the year for which the dependency tax exemptions were split. At the hearing, Lisa acknowledged that she did not know if she would receive a benefit by

claiming the children for federal and state tax purposes, although it seems likely that she would receive a benefit, either as an exemption of her taxable income, an earned income tax credit, or both. The tax exemptions had been split during the prior years, when Lisa was the custodial parent. William stated, in contrast, that he would benefit by having both exemptions. The evidence was also undisputed that William earned a substantially higher salary ($65,000 as opposed to $18,000), at all relevant times. William also supported the children financially and they lived with him full-time for about six months in 2007. During the same time, Lisa failed either to pay child support or to see the children, other than on a sporadic basis.

{¶ 66} R.C. 3119.82 requires that a trial court, in designating which parent may claim the children as dependents for federal income tax purposes, shall consider "any net tax savings, the relative financial circumstances and needs of the parents and children, the amount of time the children spend with each parent, the eligibility of either or both parents for the federal earned income tax credit or other state or federal tax credit, and any other relevant factor concerning the best interest of the children." The statute does not require that the trial court restrict its consideration solely to net tax savings, and it does not dictate the weight that net tax savings should receive in the trial court's deliberation.

{¶ 67} The record supports a conclusion that the trial court, in the person of the magistrate who rendered the initial decision, did give at least limited consideration to "any net tax savings," since the magistrate referred to Lisa's testimony that she did not know if she would benefit from claiming a child as a dependent, as well as William's testimony that he would benefit from having the

exemptions. That the trial court appears to have given this factor little weight is unsurprising, in view of the dearth of evidence presented, by either party, to quantify the effects of dependency exemptions on the parties' federal income tax.

{¶ 68} We conclude that the decision to award Lisa one of the tax exemptions for the year 2007 is not an abuse of discretion.

{¶ 69} William's Sixth Assignment of Error is overruled.

VIII

{¶ 70} William's Seventh Assignment of Error is as follows:

{¶ 71} "THE TRIAL COURT ABUSED ITS DISCRETION IN REDUCING WILLIAM'S SPOUSAL SUPPORT OBLIGATION EFFECTIVE NOVEMBER 1, 2007 INSTEAD OF APRIL 2007."

{¶ 72} Under this assignment of error, William contends that the trial court should have reduced his spousal support obligation as of April 2007, instead of November 1, 2007. William argues that the trial court reduced his spousal support obligation due to Lisa's relationship with Bennett. William notes that Lisa began a boyfriend/girlfriend relationship with Bennett in May 2007, and had a duty to advise him of her cohabiting relationship. According to William, Lisa's choice to live in the "middle of nowhere," and without a precise address, prevented him from being able to hire an investigator to determine her true circumstances. Lisa's secrecy also allegedly prevented William from acting more promptly.

{¶ 73} The trial court did not make a finding on cohabitation, which would have allowed termination of the spousal support obligation. The court simply stated that there is a question of cohabitation, and that Bennett's contribution to household

expenses, along with William's reduced salary, are changes in circumstance that provide jurisdiction to modify the divorce decree. The court then reduced the spousal support obligation, effective as of the date that William filed his motion to terminate support.

{¶ 74} Spousal support decisions are reviewed for abuse of discretion. *Norbut v. Norbut*, Greene App. No. 06-CA-112, 2007-Ohio 2966, at ¶ 14. The trial court did not abuse its discretion in reducing support as of the date the motion was filed, rather than an earlier date. Parties may be entitled to orders modifying support retroactive to the date their motions are filed, but they are not entitled to retroactive modification to a date before the requests for modification or termination are filed. See, *e.g.*, *Merkle v. Merkle* (1996), 115 Ohio App.3d 748, 754.

{¶ 75} In *Harbert v. Harbert* (Oct. 17, 1997) Greene App. No. 96-CA-0161, * 2, we noted that this rule is not absolute, and that a date earlier than the filing date may apply in limited situations. We stated that:

{¶ 76} "The court may order a modification retroactive to the change of circumstances that warrants it when the amount, terms, or duration of the support in the prior order is expressly made conditional upon that change of circumstances. Then, due process is satisfied because the adverse party has been put on notice and been given an opportunity to contest the basis for change before a motion to modify is served on him. Likewise, when an obligor fails to comply with an order requiring him to notify the obligee of a change of circumstances, the court may make its modification retroactive to the date that the change occurred." Id.

{¶ 77} In other words, if Lisa's support were conditioned on not sharing

household expenses (as opposed to cohabitation), or if Lisa had a court-ordered duty to notify William of a change of circumstances, modification to a date earlier than the filing of William's motion might possibly satisfy due process concerns. Id. The decree in the case before us has no such requirements. Instead, the decree states only that William's spousal support obligation will terminate on the death of either party, or Lisa's remarriage, or if Lisa cohabitates as defined by Ohio law. Lisa did not have an obligation to notify William of her living situation, and her support was not contingent on her living alone. Although Lisa's claim of a platonic relationship might be suspect, William failed to offer evidence to dispute Lisa's statement that she and Bennett are only roommates. Accordingly, the trial court did not abuse its discretion by reducing spousal support effective as of the date William filed his motion, rather than some unspecified earlier date when Lisa moved to Idaho or began living with Bennett.

{¶ 78} William's Seventh Assignment of Error is overruled.

IX

{¶ 79} All of William's assignments of error having been overruled, the judgment of the trial court is Affirmed.

. . . . . .

DONOVAN, P.J., and KLINE, J., concur.

(Hon. Roger L. Kline, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

Copies mailed to:

Keith Kearney

Charles D. Lowe
Hon. Denise Cross