[Cite as *Hamby v. Hamby*, 2015-Ohio-1042.]

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

SHANA HAMBY	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26506
	:	
v.	:	T.C. NO. 03DR1161
	:	
ERICK HAMBY	:	(Civil Appeal from Common
	:	Pleas Court, Domestic Relations)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___20th___ day of ____March____, 2015.

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FROELICH, P.J.

{¶ 1} Erick Hamby appeals from a judgment of the Montgomery County Court of Common Pleas, Domestic Relations Division. Mr. Hamby and his former spouse, Shana Hamby, n.k.a Shana Newell, had agreed to certain changes to their shared parenting arrangement and to the payment of child support by Mr. Hamby as a result of those

changes, but they had been unable to agree on the amount of child support; this matter was submitted to the court. Mr. Hamby's appeal relates to the trial court's order regarding the amount of child support and its effective date.

{¶ 2} For the following reasons, the judgment of the trial court will be affirmed in part, reversed in part, and remanded for further proceedings.

{¶ 3} In January 2005, the parties entered into a shared parenting agreement for their twin daughters, who were then one-year-old. For several years, the parties' shared parenting agreement divided their parenting time so as to accommodate their work schedules as police officers; when problems with the schedule arose and the girls approached school-age, the shared parenting agreement was modified to a "week on, week off" alternating week schedule. Neither party was required to pay child support under these shared parenting arrangements.

{¶ 4} In September 2012, Ms. Newell filed a motion to terminate shared parenting. In December 2012, Mr. Hamby filed a motion for modification of the shared parenting arrangement. While these motions were pending, Mr. Hamby filed a motion to terminate shared parenting. In May 2014, the magistrate conducted a hearing on the motions.

By the time of the hearing, the parties had reached an agreement to modify shared parenting. The agreement provided that Mr. Hamby would have parenting time every other weekend from Friday after school until Tuesday morning, that he would have parenting time from Tuesday after school until Wednesday morning on the weeks he did not have weekend parenting time, and that parenting time during the summer would be on an alternating-week schedule. Because Ms. Newell had the children more than half

the time under the new arrangement, the parties agreed that Mr. Hamby would pay child support to Ms. Newell. They also agreed to a downward deviation from the child support guidelines, because the shared parenting agreement provided Mr. Hamby with more time with the children than a standard parenting order. However, the parties could not agree on the amount of the deviation.

{¶ 5} The magistrate adopted the parties' revised parenting plan and found that the evidence justified a 13% downward deviation from the guideline child support amount. This deviation resulted in a support payment by Mr. Hamby of $315 (rather than $362) per month per child.

{¶ 6} The parties also did not specify a date when the child support payments would begin, but their agreement stated that child support would be effective with the filing of the agreed judgment entry. The judgment was filed on June 5, 2014. Mr. Hamby argued that the payments should start at the beginning of the 2014-2015 school year, because the agreement was entered at the beginning of the summer break and the variation in the parties' actual parenting time would not occur until late summer. Ms. Newell asserted that the magistrate's use of the date of its decision as the effective date of the order was reasonable under the child support statutes. The parties did not implement the new shared parenting schedule while the objections were pending.

{¶ 7} The magistrate noted that Mr. Hamby's argument "appear[ed] logical," but stated that the consideration of the summer parenting time was built into the child support calculation and that "the actual change in custody is commencing with this order." Although the magistrate's order was filed on June 5, 2014, and the trial court adopted the magistrate's decision on the same date, the decision stated that support payments would

begin on June 16, 2014.

{¶ 8} Both parties filed objections and supplemental objections to the magistrate's decision. Mr. Hamby's objections related to the amount of the downward deviation and the commencement in June 2014. He argued that the revised parenting arrangement did not actually reflect any change until the beginning of the school year and, further, that the support order should not go into effect until the trial court ruled on his objections. Ms. Newell's objections related to the day of the week on which the parties would change custody during the summer months. Her arguments reflected an attempt to maximize the parents' time with the children on their days off of work and are not relevant to this appeal.

{¶ 9} On November 6, 2014, the trial court found Mr. Hamby's objections not to be well taken; it found that 1) the 13% downward deviation from the child support guidelines was appropriate, 2) the child support was not stayed by Mr. Hamby's filing of objections, and 3) Mr. Hamby's argument that child support should not begin until the start of the school year was without merit. Additionally, it modified the effective date of the order from June 16, 2014, to June 5, 2014, the date of the magistrate's decision which incorporated the parties' agreement. When the court overruled the objections, it stated that "the stay created by the filing of objections to the Magistrate's Decision * * * has created an arrearage which shall be paid in the amount of $50 per month." The court did not state the total amount of the arrearage.

{¶ 10} The trial court also concluded that Ms. Newell's objection was well-taken, and it modified the day of the week on which summer exchanges of the children would occur.

{¶ 11} Mr. Hamby raises two assignments of error on appeal. Because both assignments relate to the child support award, we will address them together.

{¶ 12} The assignments of error state:

> **The trial court erred and abused its discretion when it ordered the Appellant to pay child support effective June 5, 2014.**
>
> **The trial court erred and abused its discretion when it applied only a thirteen percent downward deviation from guideline child support to Appellant's child support obligation.**

{¶ 13} Mr. Hamby did not object to the trial court's use of June 5, 2014, rather than June 16, as the effective date of the order. However, he contends that the court's order making child support effective June 5, 2014 was "unjust and inequitable, and not in the best interest of the minor child [sic]." Mr. Hamby makes two arguments about when the child support obligation should have started: 1) because the parties' agreement provided for alternate-week parenting throughout the summer, child support should have started in August 2014, when school began, or 2) the child support obligation should have gone into effect in November 2014, when the court ruled on the parties' objections and the new shared parenting plan went into effect.

{¶ 14} The trial court agreed with the parties that child support calculated based on the child support guidelines was "unjust, inappropriate, and not in the best interest of the children" due to Mr. Hamby's extended parenting time, which increased his utility and food expenses. Mr. Hamby had sought a 25% downward deviation, but the court found that a downward deviation of 13% was appropriate.

{¶ 15} Neither the trial court nor the magistrate provided detailed reasoning for the

conclusion that 13% was an appropriate deviation. The magistrate cited "additional time father has with the girls" in deducting $1,131, as a "deviation," from Mr. Hamby's column on the child support worksheet; the trial court stated that "[t]he evidence presented does not justify a greater deviation." In other respects, the factors entered into the child support calculation were remarkably similar: both parents are Dayton police officers, receiving the same base salary, and each has one other child in his or her household. The evidence showed that Ms. Newell worked substantially more overtime than Mr. Hamby (amounting to income in excess of $10,000) during each of the previous three years.

{¶ 16} Under R.C. 3119.22, the court may order an amount of child support that deviates from the amount of child support that would otherwise result from the use of the child support guidelines and the applicable worksheet if the court determines that the actual annual obligation would be unjust or inappropriate and would not be in the child's best interest. *Owais v. Costandinidis,* 2d Dist. Greene No. 2007 CA 89, 2008-Ohio-1615, ¶ 41. In making this determination, the court must consider the factors set forth in R.C. 3119.23, which include "extended parenting time" by the obligor. R.C. 3119.23(D). "The decision to deviate from the actual annual obligation is discretionary and will not be reversed absent an abuse of discretion." *Owais* at ¶ 41; *Qi v. Yang*, 2d Dist. Greene No. 2012-CA-24, 2012-Ohio-5542, ¶ 14. An abuse of discretion implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 17} Although the trial court did not provide a specific explanation for its use of 13% as the amount of deviation that was justified, Mr. Hamby likewise did not provide any

specific basis for his view that 25% was a more appropriate number. The "increased housing expenses," utilities, "increased food expenses," "and the like" on which Mr. Hamby relied in making his request were not detailed in his testimony and are not easily subject to precise calculation. We cannot conclude that the trial court abused its discretion in awarding the deviation that it did.

{¶ 18} Mr. Hamby also argues that the support order should not have gone into effect in June 2014, immediately upon the filing of the parties' agreement and the magistrate's decision, because the parties revised parenting plan did not take effect until his objections were overruled in November 2014. Mr. Hamby proposes two alternate dates for the commencement of child support.

{¶ 19} The date chosen for the effective date of child support is reviewed under an abuse of discretion standard. *In re P.J.H.*, 196 Ohio App.3d 122, 2011-Ohio-5970, 962 N.E.2d 389, ¶ 18 (2d Dist.). It will often be the date the motion was filed, taking into consideration how long it can take for proceedings on such a motion to be resolved, but it can be "some other date that coincided with an event of significance in relation to the grounds for child support that was ordered." *P.J.H*. at ¶ 20. In the majority of cases, the change in circumstances that gives rise to the requested modification of child support, such as a change in a parent's job or income, already exists when the motion is filed; under these circumstances, a trial court acts reasonably in using the date of the motion as the effective date of the modified child support award. However, in cases such as this one, where a change in parenting time precipitates the award of child support, there would seem to be no basis to use the date of the motion, rather than the date that the new parenting plan becomes effective, for the commencement of the child support obligation.

{¶ 20} First, Mr. Hamby argues that he should not have been obligated to pay child support until November 2014, when the trial court ruled on the parties' objections to the magistrate's decision and when the parties "started exercising parenting time under the amended shared parenting plan." Mr. Hamby asserts in his brief that "[t]he parties continued to follow the week to week parenting time schedule until November of 2014 while the objections were pending." Ms. Newell does not dispute this fact, but she contends that she "had no control" over Mr. Hamby's decision to file objections and that he should not be "rewarded" for such a filing by delaying the start of the child support obligation.

{¶ 21} In its November 2014 judgment, the trial court found that Mr. Hamby's argument that the child support obligation should "not be effective" until his objections were resolved was "not well taken." It stated: "The objections that created the stay do not relate to the amount of time the children spend with each parent, which is the primary basis for the order of child support."

{¶ 22} In this case, on June 5, 2014, the trial court entered judgment contemporaneously with the filing of the magistrate's decision by signing that decision and stating that, if no objections were filed, the decision would be the permanent order of the court. *See* Civ.R. 53(D)(4)(e)(i). However, Civ.R. 53(D)(4)(e)(i) also provides that "the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to" the magistrate's decision, as previously adopted. The Rule does not support the trial court's apparent conclusion that the portions of a judgment to which the objections do not relate (i.e., the revised parenting plan) may go into effect

while the objections are pending, while the portions to which objections have been filed (i.e., the amount of child support and the start date) are stayed. The entire judgment is stayed while the objections are pending, absent some action by the trial court to specify a different arrangement during this period. Thus, the trial court erred in not accepting Mr. Hamby's argument that the child support should not be effective until the court ruled on his objections.

{¶ 23} We also observe that, insofar as the parties had not yet effectuated the change in parenting time embodied in their agreement, there was no equitable basis for the trial court to conclude that Mr. Hamby should have been paying child support from August (the start of school) through November 2014. The parties' prior arrangement, during which each had the children half of the time and no child support was paid by either party, was the status quo and remained in effect while the objections were pending. At the beginning of the 2014-2015 school year, the parties might have agreed, with the approval of the court, to effectuate the new, unequal parenting time upon which they had agreed and which they apparently believed to be in the children's best interests; Mr. Hamby might reasonably have been ordered to pay child support during this period, subject to adjustment, if necessary, when the court ruled on the objection related to the appropriate child support amount. But these are not the facts before us. The trial court abused its discretion in concluding that the child support obligation became effective in June 2014, when the revised parenting plan, which created the reason for the child support payments, did not take effect until November 2014. Absent a court order or an attempt on Ms. Newell's part to have the revised plan go into effect in August, we reject Ms. Newell's suggestion that the trial court might reasonably have ordered Mr. Hamby to

pay child support for any period during which the revised parenting arrangement was not yet in effect, to prevent him from being "rewarded" for filing objections, which he was entitled to do.

{¶ 24} Second, and alternatively, Mr. Hamby argues that he should not have been obligated to pay child support during the summer of 2014, because the parties had equal parenting time in the summer. With respect to the summer of 2014, this argument is subsumed by our holding that the child support was stayed while Mr. Hamby's objections were pending, because the modified parenting plan had not yet been implemented. However, for the purpose of clarity in future years, when the parties will again have a period of equal parenting time during the summer, we note that there is nothing improper about the payment of child support throughout the year, even where the amount of parenting time during the year varies due to school breaks or other factors, where the court has stated that the "consideration of summer parenting time [was] built in to the child support calculation." Moreover, for administrative reasons, it would be impractical to modify the child support calculation to reflect such recurring variations in the schedule.

{¶ 25} Mr. Hamby's first assignment of error, related to the effective date of the child support obligation, is sustained. His second assignment of error, related to the amount of deviation from the child support guidelines, is overruled.

{¶ 26} The judgment of the trial court will be affirmed with respect to the amount of child support. It will be reversed with respect to the start date of the child support obligation and Mr. Hamby's obligation to pay an arrearage for the period prior to the court's November 6, 2014 judgment. The matter will be remanded for correction of the

trial court's orders related to the child support arrearage and start date.

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DONOVAN, J. and WELBAUM, J., concur.

Copies mailed to:

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