

[Cite as *Tate v. Wells*, 2004-Ohio-4161.]

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
VAN WERT COUNTY**

SHELLY L. (WELLS) TATE

PLAINTIFF-APPELLANT

CASE NO. 15-04-06

v.

RONALD E. WELLS

OPINION

DEFENDANT-APPELLEE

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court, Domestic Relations Division**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: August 9, 2004

ATTORNEYS:

**EVA J. YARGER
Attorney at Law
Reg. #0042061
120 West Main Street
P. O. Box 525
Van Wert, Ohio 45891
For Appellant**

**KELLY RAUCH
Attorney at Law
Reg. #0069653
124 East Main Street
Van Wert, Ohio 45891
For Appellee**

SHAW, P.J.

{¶1} The plaintiff-appellant, Shelly Wells, now known as Shelly Tate, appeals the April 19, 2004 judgment of the Common Pleas Court, Domestic Relations Division, of Van Wert County, Ohio, modifying the previous shared parenting plan between Shelly and the defendant-appellee, Ronald Wells, and ordering Shelly to pay child support that accrued during the pendency of the proceedings.

{¶2} In 1996, Shelly and Ronald divorced. At the time of the divorce, the parties had three minor children, and they entered into a shared parenting plan. This plan designated Shelly as the residential parent during the school year and Ronald as the residential parent during the summer. In addition, Ronald was required to pay child support.

{¶3} Eventually, both parties remarried. However, on March 20, 2003, Shelly's new husband committed suicide at their home. Ronald came for the children, and a fight ensued between Shelly and Ronald. As a result, on March 25, 2003, Ronald filed an ex parte motion, requesting temporary custody of the children and reasonable child support. Ronald also filed a motion to modify the prior shared parenting plan on that same date. On March 28, 2003, Ronald was awarded temporary custody of the children. The trial court also ordered that Ronald's child support payments be terminated, effective March 21, 2003, and that

Shelly was to “pay as and for temporary child support an amount to be determined in the future in accordance with the child support guidelines set forth in R.C. 3119.021[.]”

{¶4} Shelly then filed a motion to dismiss the ex parte order of the court. She also filed a motion to dismiss Ronald’s motion for modification. Mediation of this matter was attempted but was unsuccessful. Thus, a hearing on the pending motions was held on November 20, 2003, before the domestic relations magistrate, and the matter was taken under advisement. On December 31, 2003, the magistrate issued his decision, ordering a modification of the shared parenting plan, which provided that the children would reside with each parent on a month-to-month basis. The magistrate also found that a deviation from the child support guidelines was warranted and ordered that neither party pay support to the other.

{¶5} Ronald filed objections to the magistrate’s decision, asserting that the magistrate failed to order Shelly to pay child support for the time period in which these motions were pending, during which the children were in his care. The trial court found Ronald’s objections to be well taken and modified the magistrate’s decision, ordering that Shelly pay child support for the period of March 28, 2003 to December 31, 2003, at the rate of \$472.80 per month plus processing fees. This appeal followed, and Shelly now asserts one assignment of error.

The trial court abused its discretion and lacked authority to retroactively modify the temporary support order in violation of the plaintiff/appellant's due process rights.

{¶6} The Revised Code permits a court in domestic relations cases to order “either or both parents to support or help support their child.” R.C. 3109.05. The Revised Code also provides a basic child support schedule and computation worksheets to determine the amount of support to be provided to a child. See R.C. 3119.021-3119.023. In addition, a court may make a temporary order regarding the support of a child during the pendency of an action. Civ.R. 75(N)(1). However, a party may make a written request for modification of a temporary support order. Civ.R. 75(N)(2). When such a request is made, the court is required to hold an oral hearing on the motion to modify the temporary support order. Civ.R. 75(N)(2).

{¶7} In reviewing matters concerning child support, the Ohio Supreme Court has held that an abuse of discretion standard is to be employed. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. Accordingly, the decision of a trial court in determining child support issues will not be reversed unless the court's decision is unreasonable, arbitrary, or unconscionable. *Id.*, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} Notably, Shelly does not contest the amount of support she was ordered to pay. Instead, she disputes whether the trial court improperly required

her to pay support retroactively. Specifically, Shelly maintains that the trial court erred in ordering her to pay child support for the nine months the children were in the care of Ronald while the motion for modification of the shared parenting plan was pending. In support of this position, she relies upon a decision from the Second District Court of Appeals, wherein that court reversed a decision of the trial court to modify a prior temporary order and apply that modification retroactively. See *Jackson v. Jackson* (2000), 137 Ohio App.3d 782. After reviewing *Jackson*, we find the facts of that case distinguishable from the case sub judice.

{¶9} In *Jackson*, the father of twins was originally ordered to pay \$150.00 per week as temporary support for his children during the pendency of the divorce proceedings between him and his wife, the twins' mother. *Id.* at 802. The father complied with the temporary orders of the court throughout the pendency of the action. *Id.* at 799. However, in the final divorce decree, the trial court ordered him to pay \$414.00 per child per month and ordered that this amount be paid from the date of the birth of the twins, placing him \$7,416.00 in arrears despite the fact that he obeyed the prior orders of the court. *Id.* The Second District held that a retroactive modification of a temporary support order was only permissible in cases where assets were concealed or misrepresented and that "in the absence of such circumstances, a subsequent modification retroactive to a previous temporary

order violates due process.” *Id.* at 801. Thus, the Second District found the trial court abused its discretion in awarding the increased amount retroactively. *Id.*

{¶10} In the case presently before this Court, the temporary orders specifically stated that Shelly was to pay temporary support in amount to be determined in the future. Unlike *Jackson*, she was not ordered to pay a certain amount only to have that amount increased at a later date and unexpectedly applied retroactively. Rather, she was on notice from the time the temporary orders were issued on March 28, 2003, that she would have to pay temporary support for the children while they were in Ronald’s care but was not provided with a certain amount. Thus, upon the issuance of that order, Shelly knew that this amount would be determined in the future. Despite this notice, no request was ever made for this amount to be determined and no evidence was provided regarding Shelly’s or Ronald’s income until the hearing was held on the motion to modify the shared parenting plan. In the interim, Shelly had ample time to prepare for this hearing and to prepare her finances to accommodate for support, as she knew her financial information and could have estimated the amount of support based upon the statutory guidelines.

{¶11} Furthermore, at the hearing, both Ronald and Shelly were afforded the opportunity to present evidence regarding their incomes, including their incomes during the pendency of this action. Based upon this information, the

court determined the amount of temporary support due. Thus, unlike *Jackson*, the court did not modify a prior temporary support order without affording the parties an opportunity to be heard. Instead, it merely delayed its determination of the amount of support to be paid until the necessary financial information was before it. Given these facts, Shelly was not deprived of due process in the determination of the amount to be awarded as temporary support, and the court did not abuse its discretion in determining the amount of temporary support Shelly should have paid during the pendency of this action and ordering her to pay this amount retroactively. Therefore, the assignment of error is overruled.

{¶12} For these reasons, the judgment of the Common Pleas Court of Van Wert County, Ohio, is affirmed.

Judgment affirmed.

BRYANT and ROGERS, JJ., concur.