[Cite as *Kemp v. Kemp*, 2009-Ohio-6089.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
JEANNE KEMP, KNA GAGE	:	Hon. Sheila G. Farmer P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00035
MICHAEL KEMP	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Domestic Relations Division, Case No. 2003-DR-00101
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 16, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DAVID S. AKE 101 Central Plaza South, Suite 600 Canton, OH 44702	KEVIN R. L'HOMMEDIEU 53 W. Case Dr. Hudson, OH 44236

Gwin, J.

{¶1} Defendant-appellant Michael Kemp appeals a judgment of the Court of Common Pleas of Stark County, Ohio, which modified his child support obligation he pays to plaintiff-appellee Jeanne Kemp, kna, Gage, for the parties' minor child. Appellant assigns three errors to the trial court:

{¶2} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW DISCOVERY OR AN EVIDENTIARY HEARING REGARDING DEVIATION FROM THE CHILD SUPPORT GUIDELINES.

{¶3} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN MODIFYING KEMP'S CHILD SUPPORT OBLIGATION RETROACTIVELY.

{¶4} "III. THE TRIAL COURT'S DOWNWARD DEVIATION IN KEMP'S CHILD SUPPORT OBLIGATION WAS INSUFFICIENT GIVEN THE COST OF VISITING MAKENNA IN CALIFORNIA."

{¶5} The record indicates the parties entered into a shared parenting plan at the time of their divorce on September 11, 2003. The shared parenting plan provided for appellant to pay $25.00 per month in child support.

{¶6} On June 22, 2005, appellee filed a motion to modify and/or terminate the shared parenting plan because she intended to relocate to California with the child. On July 25, 2005, appellant also filed a motion for modification and/or termination of the shared parenting plan. Both parties sought to be named sole custodian of the child. After a multi-day trial, the court terminated the shared parenting plan and granted appellee sole custody. The judgment entry directed both parties to submit proposed child support guideline worksheets within 14 days. Appellee submitted a timely

proposed child support worksheet, but the clerk of courts did not automatically provide the filing to the magistrate. Appellant did not file a proposed child-support worksheet, but instead, filed objections to the magistrate's decision. The court overruled the objections, and appellant brought the matter before this court. We affirmed in *Kemp v. Kemp,* Stark App. No. 2007-CA-00045, 2007-Ohio-6116, and the Supreme Court did not accept the matter for review. *Kemp v. Kemp,* 117 Ohio St. 3d 144, 2008-Ohio-1279, 833 N.E. 2d 458.

{¶7} On February 6, 2007, appellee filed a request for child support calculation. She reiterated her motion in May, 2008. Appellant requested a new trial on the amount of child support, but the magistrate found given that because the support issues stemmed from 2006, no new evidentiary hearing was required. Appellant submitted financial documents at the hearing, and on November 13, 2008, the magistrate issued her decision.

{¶8} The magistrate found appellee is voluntarily unemployed, and imputed income to her based on her last gross yearly earnings of $39,957.00. The magistrate found in 2007, appellee had submitted documents showing appellant grossed $72,751.79 in 2006.

{¶9} The magistrate specified the order considers only the parties' 2006 incomes. The magistrate found appellee was willing to have her last gross earnings imputed, while appellant's income had increased significantly. The magistrate found the order was only intended to address the child support which should have commenced when the child relocated to California. The magistrate also found testimony at the

earlier trial indicated that appellant would have another child in his home about the time the change in child support was to commence.

{¶10} The magistrate stated she considered the actual time appellant would have with the child. She also considered the fact that both parties have airfare travel expenses for the child, and appellant has additional travel expenses for himself. The magistrate concluded it was in the child's best interest to allow a 10% deviation to adjust for appellant's additional cost for visitation. The magistrate also found the child support should properly have commenced on April 1, 2007, the first month following the final denial of the appellate stay which permitted appellee to take the child to California.

{¶11} Appellant filed objections to the magistrate's decision, and the trial court made extensive findings of fact. The court found it had discretion to choose a different effective date, but found no compelling reason to do so. The court noted appellee had filed her guideline worksheet as originally ordered by the magistrate, and had it not been for a miscommunication between the clerk of courts and the magistrate, the magistrate would have ruled on the matter in 2006.

{¶12} The trial court found in April, 2007, mother was legally able to move the child to California, and the shared parenting plan was effectively terminated. The shared parenting was the reason for the $25.00 child support order, and the court found it makes logical sense to modify the child support order effective on the date chosen by the magistrate, April 1, 2007.

{¶13} The trial court found the magistrate's 10% deviation from the child support guidelines was insufficient given the circumstances and the financial arrangements the parties had made for transportation. The court found the expenses would exceed the

$721.00 per year deviation the magistrate had allowed, and selected a figure of $2,450.00 as an appropriate yearly deviation. The court found the full guideline child support would be unjust, inappropriate, and not in the child's best interest, while a deviation of $2,450.00 is in the child's best interest. The court ordered appellant to pay $50.00 per month on the arrearage that has accumulated since April 2007.

{¶14} Our standard of reviewing decisions of a domestic relations court is generally the abuse of discretion standard, see *Booth v. Booth* (1989), 44 Ohio St. 3d 142. The Supreme Court made the abuse of discretion standard applicable to alimony orders in *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217; to property divisions in *Martin v. Martin* (1985), 18 Ohio St. 3d 292; to custody proceedings in *Miller v. Miller* (1988), 37 Ohio St. 3d 71; and to decisions calculating child support, see *Dunbar v. Dunbar,* 68 Ohio St 3d 369, 533-534, 1994-Ohio-509, 627 N.E.2d 532. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable, *Blakemore,* supra, at 219. When applying the abuse of discretion standard, this court may not substitute our judgment for that of the trial court, *Pons v. Ohio State Med. Board,* (1993), 66 Ohio St.3d 619, 621.

I

{¶15} In his first assignment of error, appellant argues the court abused its discretion by refusing to allow discovery or an evidentiary hearing regarding deviation from the child support guidelines. Appellee replies appellant could have conducted discovery at any time from July of 2005.

{¶16} We find, given that the child support award was intended to cover the time period from 2007, it was appropriate for the magistrate to consider documentation

related to that time period, rather than current data. If either party feels this amount is no longer proper, he or she can move the court to modify it. We find the trial court did not err in determining it was appropriate to use the 2007 information to perform the 2007 calculations.

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

II

{¶18} In his second assignment of error, appellant urges the trial court erred in making the child support modification retroactive. An order modifying child support cannot be retroactive earlier than the date a motion for modification of child support is made. *Tobens v. Brill* (1993), 89 Ohio App.3d 298, 304, 624 N.E.2d 265. See also *Meyer v. Meyer*, Licking App. No. 2006CA00145, 2008-Ohio-436 at paragraph 38 ("*** this retroactivity determination is left to the sound discretion of the trial court.")

{¶19} Given the facts and circumstances of this case, we find the trial court did not abuse its discretion in choosing to make the child-support modification retroactive to the date the shared parenting terminated.

{¶20} The second assignment of error is overruled.

III

{¶21} In his third assignment of error, appellant argues the downward deviation in the child-support obligation was insufficient given the cost of travel to and from California.

{¶22} We find the trial court did not abuse its discretion in selecting $2,450.00 as an appropriate deviation. The court has jurisdiction to adjust this amount upon a motion of either party.

{¶23} The third assignment of error is overruled.

{¶24} For the foregoing reasons, the judgment of the Court of Common Pleas, of Stark County, Domestic Relations Division, Ohio, is affirmed.

By Gwin, J.,

Farmer, P.J., and

Hoffman, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. WILLIAM B. HOFFMAN

WSG:clw 1106

[Cite as *Kemp v. Kemp*, 2009-Ohio-6089.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JEANNE KEMP, KNA GAGE Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MICHAEL KEMP	:	
Defendant-Appellant	:	CASE NO. 2009-CA-00035

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, of Stark County, Domestic Relations Division, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. WILLIAM B. HOFFMAN