[Cite as *Pace v. Pace*, 2010-Ohio-3573.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

VINCENT R. PACE, II

Plaintiff-Appellee

-vs-

LISA S. PACE

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 10 AP 02 0008

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 1992 TC 03 0159

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 2, 2010

APPEARANCES:

For Plaintiff-Appellee

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Suite 309
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For Defendant-Appellant

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Wise, J.

{¶1} Appellant Lisa S. Pace appeals the decision of the Court of Common Pleas, Tuscarawas County, which issued various post-decree orders pertaining to child support and contempt of court. Appellee Vincent R. Pace II is appellant's former spouse. The relevant facts leading to this appeal are as follows.

{¶2} Appellant and appellee were divorced in Tuscarawas County in 1994. At that time, shared parenting was ordered concerning the parties' two minor children, C.P. and I.P. However, in 1995, the court named appellant as the residential parent of both children; said custody orders have remained in effect since that time.

{¶3} On January 16, 2009, appellee filed post-decree motions for contempt, damages and attorney fees. Appellee alleged therein that beginning with the tax year 2002, appellant had taken one of the children, C.P., as a dependent for income tax purposes when the exemption for C.P. had been designated to appellee by court order.

{¶4} On February 25, 2009, appellant filed a motion seeking reimbursement from appellee for an undetermined amount for medical bills incurred by her over a period of approximately thirteen years.

{¶5} On March 27, 2009, appellant filed a second motion, therein requesting a reallocation of the dependency tax exemption for C.P. and requesting a modification of child support.

{¶6} On April 13, 2009, appellant filed a third motion, therein seeking a contempt finding against appellee for failure to provide health insurance coverage for the two children.

{¶7} The aforesaid motions of both parties proceeded to a hearing before the domestic relations magistrate on May 21, 2009.

{¶8} On July 28, 2009, the magistrate issued a nunc pro tunc decision awarding appellee the sum of $10,014.07 for appellant's improper use of the dependency tax exemption for tax years 2002 through 2007. On the other hand, the magistrate also found that appellee should have paid $5,056.00 as his 45% share of uninsured medical expenses for a period covering 1997 through the date of the hearing. The magistrate thus awarded appellee the net figure of $4,958.07 ($10,014.07 minus $5,056.00). In regard to modification, the magistrate increased appellee's child support obligation by $162.92 per month to $501.92 per month. The magistrate ordered that the prior withholding order of $339.00 per month be left in place, thus setting off the $162.92 per month difference against the aforesaid award of $4,958.07. Because C.P. was the younger of the two children of the marriage and because he was close to emancipation, the magistrate ordered appellant to make direct payments to appellee of $162.92 per month after emancipation and until the balance of the $4,958.07 was liquidated. The magistrate further awarded appellee the dependency exemption for 2009 and to appellant in 2010. However, the magistrate refused to render any contempt findings and attorney fee awards, finding "…neither party comes to Court with clean hands."

{¶9} On August 6, 2009, appellee filed objections to the magistrate's decision. On August 12, 2009, appellant filed her own objections to the decision.

{¶10} On January 22, 2010, the trial court issued a judgment entry modifying the magistrate's decision in several aspects. The court first reduced the aforecited award to

appellee from $10,014.07 to $7,505.96, by disallowing the claim for tax years 2002 and 2003. The court also transferred the 2009 dependency exemption from appellee to appellant. Secondly, appellant was found in contempt of court and ordered to jail for thirty days, with purge conditions requiring monthly payments to appellee. Specifically, however, no contempt findings were made against appellee. The court next rejected the $5,056.00 award to appellant for the medical claims. Finally, the court ordered appellant to pay $3,000.00 in attorney fees to appellee.

{¶11} On February 19, 2010, appellant filed a notice of appeal. She herein raises the following three Assignments of Error:

{¶12} "I. THE TRIAL COURT ERRED IN NOT ORDERING PLAINTIFF, VINCENT R. PACE II, TO PAY BACK TO DEFENDANT, LISA PACE, THE $5,056.00 SHE HAD PAID FOR HIS PORTION OF THE UNINSURED MEDICAL EXPENSES FOR THE TWO CHILDREN'S SURGERIES AND MEDICAL BILLS.

{¶13} "II. THE TRIAL COURT ERRED IN NOT IMPUTING INCOME TO PLAINTIFF, VINCENT R. PACE II, FOR CHILD SUPPORT CALCULATION PURPOSES.

{¶14} "III. THE TRIAL COURT ERRED IN FINDING LISA PACE IN CONTEMPT AND AWARDING ATTORNEY FEES OF $3,000.00."

I.

{¶15} In her First Assignment of Error, appellant contends the trial court erred in denying her request that appellee pay back to her the sum of $5,056.00 in claimed uninsured children's medical expenses. We disagree.

{¶16} As an appellate court, our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base his or her judgment. See *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280, 376, 376 N.E.2d 578. We further note the trier of fact is in a far better position to observe the witnesses' demeanor and weigh their credibility. See, e.g., *Taralla v. Taralla*, Tuscarawas App.No. 2005 AP 02 0018, 2005-Ohio-6767, ¶ 31, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. Generally, a judgment supported by competent and credible evidence going to all the elements of the case must not be reversed by a reviewing court as being against the manifest weight of the evidence. *Masitto v. Masitto* (1986), 22 Ohio St.3d 63.

{¶17} It appears undisputed that appellee was ordered to pay 60% of the uninsured medical expenses for the parties' children, pursuant to the original divorce decree, while appellant was to be responsible for the other 40%. In November 1995, pursuant to a subsequent order, the percentages were modified to 45% responsibility for appellee and 55% responsibility for appellant. Although the magistrate concluded in her decision of July 28, 2009 that appellee would be liable to appellant for $5,056.00, representing appellee's 45% share of uninsured medical expenses, the trial court did not adopt that portion of the decision because it found the bills had not been "timely submitted" to appellee. See Judgment Entry, January 22, 2010, at 6-7. Appellant maintains that neither the divorce decree nor the 1995 post-decree order contains language mandating a time-frame for appellant to present the children's medical bills to appellee.

{¶18} We find the trial court implicitly relied on the doctrine of laches in denying reimbursement of the medical bills. "Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Baughman v. State Farm Mut. Auto. Ins. Co.*, 160 Ohio App.3d 642, 828 N.E.2d 211, 2005-Ohio-1948, ¶ 10. Issues of waiver, laches, and estoppel are fact-driven, and will not be reversed absent an abuse of discretion. *Riley v. Riley*, Knox App.No. 2005-CA-27, 2006-Ohio-3572, ¶ 27, citing *Dodley v. Jackson*, Franklin App. No. 05AP11, 2005-Ohio-5490.

{¶19} At the hearing before the magistrate, appellant conceded that she had never presented the bills in question to appellee or informed him that they were accruing. Appellant essentially testified that she had tried early on to give appellee a medical bill, but he ignored it, leading to a lawsuit by a collector against her. Tr. at 69. After that, she effectively gave up hope and instead focused on protecting her credit. Id. Years later, the trial court was thereby faced with the all-too-familiar post-decree situation of one parent's earnest claim for reimbursement of dependent medical expenses against the other parent's equity-based assertion of lack of presentation or knowledge of such expenses. Upon review of the record, we are unable to conclude the trial court abused its discretion in its application of laches in resolving this issue.

{¶20} Appellant's First Assignment of Error is overruled.

II.

{¶21} In her Second Assignment of Error, appellant contends the trial court erred in declining to impute income to appellee in its modification of the child support obligation. We disagree.

{¶22} The imputation of income is a matter "to be determined by the trial court based upon the facts and circumstances of each case." *Rock v. Cabral* (1993), 67 Ohio St.3d 108, paragraph one of the syllabus. A determination with respect to these matters will only be reversed upon a showing of abuse of discretion. *Id.* In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 317.

{¶23} R.C. 3119.01(C)(5) defines "income," for purposes of calculating child support, as follows:

{¶24} "(5) 'Income' means either of the following:

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

{¶26} "(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."

{¶27} In turn, R.C. 3119.01(C)(11) defines "potential income" as follows:

{¶28} " 'Potential income' means both of the following for a parent who the court pursuant to a court support order, or a child support enforcement agency pursuant to an administrative child support order, determines is voluntarily unemployed or voluntarily underemployed:

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

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

{¶31} "(ii) The parent's education;

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

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

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

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

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

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

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

{¶39} "(x) Any other relevant factor.

{¶40} "(b) Imputed income from any nonincome-producing assets of a parent, as determined from the local passbook savings rate or another appropriate rate as determined by the court or agency, not to exceed the rate of interest specified in division (A) of section 1343.03 of the Revised Code, if the income is significant."

{¶41} Appellant herein maintains that appellee voluntarily left a job paying more than $67,000.00 annually for one paying less than $45,000.00. Nonetheless, the trial court utilized the lower figure for appellee's guidelines worksheet income. Appellee indeed testified that he was not fired from the higher-paying job, but simply that he left for unspecified "personal reasons." Tr. at 64. We note R.C. 3119.01 does not provide an explicit definition of "underemployment." Accordingly, under an abuse of discretion

standard of review, we are not inclined to substitute our judgment regarding appellee's income level for that of the trial court in these circumstances.

{¶42} Appellant's Second Assignment of Error is therefore overruled.

III.

{¶43} In her Third Assignment of Error, appellant contends the trial court erred in finding her in contempt and granting attorney fees in favor of appellee in the amount of $3,000.00. We disagree.

{¶44} Our standard of review regarding a finding of contempt is limited to a determination of whether the trial court abused its discretion. *Wadian v. Wadian*, Stark App.No. 2007CA00125, 2008-Ohio-5009, ¶ 12, citing *In re Mittas* (Aug. 6, 1994), Stark App.No. 1994 CA 00053. Likewise, an award of attorney fees lies within the sound discretion of the trial court. *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359, 481 N.E.2d 609. In contempt actions in domestic relations cases, a trial court may award attorney fees in the absence of supporting evidence when the amount of work and time spent on such a case is apparent. *Labriola v. Labriola* (Nov. 5, 2001), Stark App.No.2001 CA00081, citing *Wilder v. Wilder* (Sept. 7, 1995), Franklin App.No. 94AAPE12-1810.

{¶45} There appears to be little factual dispute in this matter that appellant received at least two written requests from appellee, with forms enclosed, to sign and return the IRS 8332 documents for the dependency exemption. The trial court found that appellant had simply refused to sign them and found no rationalization for such refusal. See Judgment Entry at 4-5. We hold the contempt finding and award of attorney fees were within the trial court's discretion.

{¶46} Appellant's Third Assignment of Error is overruled.

{¶47} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Tuscarawas County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ SHEILA G. FARMER

JUDGES

JWW/d 0708

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

VINCENT R. PACE, II	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
LISA S. PACE	:	
	:	
Defendant-Appellant	:	Case No. 10 AP 02 0008

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ SHEILA G. FARMER_____

JUDGES