

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

Wendy Gerity

Court of Appeals No. F-12-012

Appellee

Trial Court No. 08DV000126

v.

Patrick Gerity

DECISION AND JUDGMENT

Appellant

Decided: April 26, 2013

* * * * *

Daniel P. McQuade, for appellee.

Patrick Gerity, pro se.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas that denied appellant Patrick Gerity’s motion to modify his child support obligation. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} The parties were married in 1988 and have six minor children. The marriage was terminated by final decree of divorce in 2009. At that time, the parties reached an

agreement concerning the custody and support of their children as reflected in the separation agreement and property settlement (“agreement”) which was adopted by the trial court and made part of the divorce decree. Pursuant to the agreement, appellee Wendy Gerity was designated primary residential parent and custodian of the children. The agreement provided that appellant would pay child support of \$227.25 per week, based on appellant’s annual income of \$38,583.82 and appellee’s imputed annual income of \$14,248.

{¶ 3} It is undisputed that the agreement included language requiring appellant to authorize the payment of his child support obligation from the proceeds of his marital portion of his OPERS pension that was to be placed in appellant’s IRA as set forth elsewhere in the agreement. Payment of child support from appellant’s IRA is to continue until such time as one of the following contingencies occurs: the account is exhausted, appellant returns to gainful employment thereby effectuating a withholding through his employer, or his child support obligation terminates. The foregoing arrangement was reached in light of appellant’s impending incarceration and resulting inability to pay child support through regular employment. When appellant’s motion to modify child support was filed on May 7, 2012, he had been incarcerated in Ohio for over three years.

{¶ 4} By judgment entry filed June 18, 2012, the trial court denied appellant’s motion, finding it “not to be in the interest of justice, nor in the interest of his children.”

{¶ 5} Appellant sets forth the following assignment of error:

The trial court abused its discretion in denying Appellant's motion to modify his child support.

{¶ 6} Absent an abuse of discretion, a child support award will not be disturbed on appeal. *Dunbar v. Dunbar*, 68 Ohio St.3d 369, 371, 627 N.E.2d 532 (1994). An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1984). A two-step analysis is used to determine a request for modification. First, a change of circumstances must be found to exist. *Cheek v. Cheek*, 2 Ohio App.3d 86, 440 N.E.2d 831 (1st Dist.1982); R.C. 3113.215(B)(4). After a finding that some relevant circumstance has changed since the last support order, the court must then determine the appropriate amount of support. *Cheek, supra*.

{¶ 7} In support of his sole assignment of error, appellant asserts that a modification is required because his pension account is diminishing and he has no income other than his prison earnings of \$18 to \$24 per month. Appellant argues that his child support obligation should be modified pursuant to his present and changed circumstances.

{¶ 8} Incarceration which results from voluntary criminal acts does not constitute a change of circumstances which justifies modification of a child support order. *Cole v. Cole*, 70 Ohio App.3d 188, 590 N.E.2d 862 (6th Dist.1990). In *Williams v. Williams*, 10th Dist. No. 92AP-438, 1992 WL 246020 (Sept. 24, 1992), the court stated:

A parent cannot, by intentional conduct or mere irresponsibility, seek relief from this duty of support. Defendant, who by his own wrongful conduct placed himself in a position that he is no longer available for gainful employment, is not entitled to relief from his obligation to support his child. Incarceration was a foreseeable result of his criminal conduct and is thus deemed a voluntary act in and of itself.

As this court stated in *Cole, supra*, an incarcerated parent should be treated like any other noncustodial parent liable for any money owed on a child support obligation; incarceration alone does not warrant a finding of a change in circumstances. Further,

[t]he only person to benefit if support is suspended would be appellant.

The child support system was not established for this purpose but was created to meet the ongoing needs of the children of divorced parents.

Thus, the focus should be, as always, on the child and his or her best interest. Any arrearages which accrue during appellant's incarceration can be paid after his release * * *. *Id.* at 193.

{¶ 9} Determining whether appellant's incarceration and the depletion of his IRA would constitute a change of circumstances is a matter within the sound discretion of the trial court. Here, the trial court had before it only the fact of incarceration as a result of a criminal conviction. We note that at the time the separation agreement was entered into, appellant was aware of his impending imprisonment. Based upon the foregoing, we find that appellant's incarceration does not rise to a level of change of circumstances

sufficient to warrant a modification of child support. Accordingly, the trial court's denial of appellant's motion to modify child support was not unreasonable, arbitrary or unconscionable and therefore was not an abuse of discretion. Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 10} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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