

[Cite as *Dietrich v. Dietrich*, 2010-Ohio-3608.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93786

NICOLE DIETRICH

PLAINTIFF-APPELLEE

vs.

MARK DIETRICH

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-299137

BEFORE: Stewart, P.J., Dyke, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: August 5, 2010

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MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Mark Dietrich, appeals the judgment of the trial court that found that he had overpaid his child support obligation to plaintiff-appellee, Nicole Dietrich, but refused to order appellee to make a lump sum repayment. For the reasons stated below, we reverse.

{¶ 2} The parties were married in 1997 and had three children together, one of whom is permanently disabled with cerebral palsy. During the marriage, appellant worked full time as a United States postal worker and appellee stayed home to care for the children. The parties were divorced on April 21, 2006. The divorce decree adopted a shared parenting plan and ordered appellant to pay child support to appellee in the amount of \$889.86

per month. Appellant was also responsible for providing medical insurance coverage for the children.

{¶ 3} Shortly after the divorce, appellee returned to full-time employment as a nurse. On August 22, 2006, appellant filed a motion to modify child support based upon the change in appellee's financial position due to her employment. He claimed that appellee was now earning as much or more than he was. A hearing on appellant's motion was held on January 8, 2008.

{¶ 4} On the day of the hearing, the parties entered into a settlement agreement that provided that appellant's child support obligation was terminated as of January 1, 2007. The agreed judgment entry was journalized on January 15, 2007 and reserved to the trial court jurisdiction to determine, at a later time, the amount of child support for the period of August 22, 2006 through December 31, 2006.

{¶ 5} On November 14, 2008, appellant filed three motions: (1) to modify the provision regarding unreimbursed medical expenses; (2) to set and determine child support; and (3) to determine the amount of overpayment. The trial court granted the first motion, finding the obligation for unreimbursed medical expenses should be split equally between the parties. The court granted the second motion and determined a set amount of child support due for August 22, 2006 through December 31, 2006. The third

motion was granted only in part. The court found that, as a result of the modified child support due for that time period, appellant had overpaid his child support obligation by \$10,395.01. However, the court refused to order appellee to repay the amount and, at appellee's request, ordered instead:

{¶ 6} “Since neither party testified nor submitted evidence to determine how to collect the overpayment the Court can only set and determine the correct overpayment of child support owed from Plaintiff to the Defendant to be \$10,395.01 as of April 29, 2009. Due to the excessive financial hardship that each party is facing and the prospect that each will have to contribute financially beyond the age of the majority to the support of [the child] who is a disabled child pursuant to the Supreme Court case of *Castle v. Castle*, 15 Ohio St.3d 279, 473 NE 2d 803 (1984) [sic], the overpayment shall be liquidated and retained as a support overpayment as a potential setoff against future unreimbursed medical and support payment.”

{¶ 7} Appellant timely appeals and raises as a single error for review that the trial court erred in deciding not to grant him a lump-sum money judgment against appellee for the amount of his overpayment. He argues that once the court determined the amount of overpayment as a sum certain, he was entitled to a judgment for the full amount, just as a payee of child support is entitled to a lump-sum judgment for an arrearage. He further argues that the court's focus on “how to collect the overpayment” is irrelevant.

He maintains that once the overpayment amount is reduced to judgment, the laws regarding execution of judgment govern how it may be collected.

{¶ 8} The trial court has broad discretion to fashion an order relating to child support. Therefore, an appellate court reviews a trial court's judgment on child support under an abuse of discretion standard. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. "The term '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* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 9} Appellant is correct that where a child support arrearage is found, the court can order the amount reduced to judgment, upon which execution may issue. *Smith v. Smith* (1958), 168 Ohio St. 447, 156 N.E.2d 113. Alternatively, the court can amortize the arrearage by ordering monthly installment payments be made in addition to current support. *Helton v. Helton* (1994), 102 Ohio App.3d 733, 658 N.E.2d 1.

{¶ 10} Similarly, where a child support overpayment is found, the trial court has discretion in ordering repayment. The court can order the full amount liquidated and repaid within a stated time. *Garrett v. Garrett* (Oct. 19, 2000), 10th Dist. No. 99AP-1050 (obligee ordered to "liquidate the overpayment by other means within two years of the court's entry").

Alternatively, the overpayment can be ordered liquidated over time by applying it as a credit toward the obligor's current support obligation. *Fugate v. Fugate* (July 3, 1990), 2nd Dist. No. 12028. Or, as appellee argues, the trial court can order the payment liquidated and retained by obligee as set-off against future unreimbursed medical expenses. *Sgro v. Sgro*, 8th Dist. No. 80815, 2002-Ohio-4788.

{¶ 11} We are unpersuaded by appellee's argument that the decision in *Sgro* is on point. In that case, this court allowed the former wife to keep a spousal support overpayment of \$2,717.60 as a setoff against future unreimbursed medical expenses for the couple's minor children. However, unlike in the instant case, the former wife was unemployed at the time, the former husband was responsible for all uninsured and/or unreimbursed medical expenses including co-payments and/or deductibles, the court found that the former husband could not be counted on to pay the cost of the minor children's medical care, and the court made a specific finding that unreimbursed medical expenses for the minor children would *timely* arise under the applicable medical insurance plan. Under those facts, this court found that permitting the former wife to retain the overpayment and to apply it against the former husband's future obligations was not unreasonable.

{¶ 12} In the instant case, the undisputed overpayment amount is significantly greater than that in *Sgro*. Additionally, because appellant's

child support obligation terminated on January 1, 2007, there is no present or ascertainable future child support obligation against which the trial court to order a credit or set-off. The trial court did not hold a hearing on appellant's motions; the motions were decided on the parties' stipulations and documentary evidence of their earnings. Neither side presented factual evidence relating to financial hardship or to any current obligations owed by appellant for his share of medical payments. There was also no evidence that there are obligations that appellant will be obligated to pay in the near future, or that appellant cannot be counted upon to meet his future obligations as they arise, including that of continued support for the parties' disabled child.

{¶ 13} The only finding by the trial court is that *both* parties are facing "excessive financial hardship" due to the prospect that each will have to contribute financially beyond the age of the majority to support their disabled child. However, because the court took no evidence relating to current obligations or hardship, any assumption by the court relating to the possibility of future obligations or hardship is purely speculative. Therefore, since the record reflects that both parties stipulated to the overpayment and agreed to its amount, appellant is entitled to a return of his money. Accordingly, we find the trial court abused its discretion when it ordered appellee to retain the \$10,395.01 overpayment as a potential set-off against

the possibility of future medical expenses or support obligations. Appellant's single assignment of error is sustained.

{¶ 14} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas — Domestic Relations Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE _____

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR