

[Cite as *Lurz v. Lurz*, 2010-Ohio-910.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93175

DAVID P. LURZ

PLAINTIFF-APPELLANT

VS.

CAROLYN S. LURZ

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-311026

BEFORE: Kilbane, P.J., Blackmon, J., and Sweeney, J.

RELEASED: March 11, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, David Lurz (“David”), appeals the trial court’s denial of his motion to receive credit toward his child support arrearage for direct payments he made to appellee, Carolyn Lurz (“Carolyn”). David argues that the trial court failed to properly recognize the parties’ out-of-court agreement, which led to an inequitable result. After a review of the record and the applicable law, we affirm.

{¶ 2} The following facts give rise to this appeal.

{¶ 3} On June 13, 2006, David filed for divorce. On June 28, 2006, Carolyn filed an answer and counterclaim.

{¶ 4} On September 27, 2006, the parties negotiated a temporary out-of-court agreement outlining certain financial rights and responsibilities as follows: David would pay back \$23,350 that he withdrew from the parties’ home equity line of credit; the parties would list the marital home for sale with a real estate agent; David would pay Carolyn \$2,010 constituting support for the month of August 2006, and \$2,010 every month thereafter, to be taken from the home equity line of credit; and that David would pay both the first and second mortgages on the marital home beginning on October 1 2006, from his own income. Neither party filed this agreement with the trial court.

{¶ 5} Both parties adhered to the agreement until August 9, 2007, when the parties filed an agreed entry with the trial court that provided David would pay Carolyn \$1,560 per month as temporary child support, which would be deducted directly from David's paycheck.

{¶ 6} Hearings were held on July 25 and 26, September 26, and October 1, 2007, with respect to the parties' complaint and counterclaim. On January 30, 2008, the magistrate issued his decision that determined the support David provided to Carolyn pursuant to their out-of-court agreement was exclusively funded by the home equity line of credit, which was marital property and sufficient only to cover spousal support. Therefore, David was ordered to pay Carolyn \$1,528.62 per month for child support for the period of June 28, 2006 through August 9, 2007, covering the time period in which the temporary out-of-court agreement was in effect. David was also ordered to pay an additional \$250 per month on this child support arrearage until paid in full. Further, the magistrate ordered that David pay Carolyn \$1,627.24 per month in child support and \$2,000 per month in spousal support for the next five years.

{¶ 7} Neither party filed objections to the magistrate's decision, and on May 16, 2008, the trial court issued a final divorce decree adopting the magistrate's decision in its entirety. The divorce decree also stated that

David could seek credit for direct child support payments made from his personal earnings in a postdecree motion.

{¶ 8} On June 12, 2008, David filed a motion seeking to be credited in his child support arrearage for direct child support payments he made from his personal earnings for the period that the out-of-court agreement was in effect — June 28, 2006 through August 9, 2007. On October 20, 2008, the trial court held a hearing for David to present evidence of his direct payments.

{¶ 9} On December 1, 2008, the magistrate issued a decision denying David's motion for credit of direct payments. The magistrate noted that David was entitled to a credit of any direct child support paid to Carolyn between June 28, 2006 and August 9, 2007; however, the magistrate found that the trial court only reserved jurisdiction to determine whether direct payments had been made, not in-kind contributions, which David attempted to present evidence of during the hearing. The magistrate also found that David commingled marital assets in his personal checking account from which he made payments and, therefore, it was impossible to determine which payments were from David's own funds and which payments were from marital assets.

{¶ 10} On December 11, 2008, David filed objections to the magistrate's decision arguing that his in-kind contributions should have been considered.

{¶ 11} On March 30, 2009, the trial court overruled the objections and adopted the magistrate's decision without opinion.

{¶ 12} David appealed, asserting three assignments of error for our review.

{¶ 13} ASSIGNMENT OF ERROR NUMBER ONE

“THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT MISINTERPRETED THE PRIOR COURT ORDER AND FAILED TO CREDIT APPELLANT FOR CHILD SUPPORT PAID.”

{¶ 14} David argues that the trial court specifically reserved jurisdiction to entertain postdecree motions to determine whether he had made direct or in-kind payments that should be credited against his child support arrearage stemming from between June 28, 2006 through August 9, 2007, and that the trial court erred in later denying his request to credit him for in-kind contributions. We disagree.

{¶ 15} The standard of review when reviewing a trial court's ruling on objections to a magistrate's decision is abuse of discretion. *In re M.S.*, Summit App. No. 24711, 2009-Ohio-5795, at ¶8, citing *In re B.G.*, Summit App. No. 24187, 2008-Ohio-5003, at ¶6-7. In order for this court to determine that the trial court abused its discretion, the trial court's attitude must be “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.

{¶ 16} In the divorce decree, the trial court specifically stated, “[i]n the event that Plaintiff seeks credit for *direct* temporary child support payments made from his personal earnings for the time period of the obligation set forth above, the issue shall be considered separately as a postdecree motion upon proper filing and service upon the Defendant.” (Emphasis added.)

{¶ 17} A trial court speaks through its journal entries. *State v. Brown*, 8th Dist. No. 92836, 2009-Ohio-6107, citing *State v. Hlavsa* (Oct. 19, 2000), 8th Dist. No. 77199. “Judgment entries are to be construed like other written instruments, giving the language of the instrument its ordinary meaning.” *Sauerwein v. Sauerwein* (Feb. 2, 1996), Lucas App. No. L-95-084, citing *Thompson v. Thompson* (Oct. 29, 1990), Pickaway App. No. 89CA31. The appellate court should examine the entire record to discern the meaning of the judgment entry when the judgment is unclear or ambiguous. *Sauerwein*, supra, citing *Hines v. Aetna Cas. and Sur. Co.* (Jan. 9, 1992), 8th Dist. No. 59600, citing *Hlavsa*, supra.

{¶ 18} In the instant case, the language of the divorce decree is clear. The divorce decree specifically mentions *direct* payments and does not state that it reserves jurisdiction to consider in-kind payments as David alleges. David’s postdecree motion is entitled “Motion to calculate temporary child

support, if any, and to credit plaintiff for *direct* payments made from his personal earnings for the period in question.” (Emphasis added.) Further, in the motion, David requests an “order crediting him with the *direct* payments he made from his personal earnings as temporary child support.” (Emphasis added.) The clear language of David’s own motion was only requesting credit for direct payments. Therefore, we cannot conclude that the trial court abused its discretion in overruling David’s objections to the magistrate’s decision.

{¶ 19} As this assignment of error lacks support in the record, it is overruled.

{¶ 20} ASSIGNMENT OF ERROR NUMBER TWO

“THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO RECOGNIZE THE PARTIES’ ENFORCEABLE OUT OF COURT AGREEMENT.”

{¶ 21} David argues that the temporary agreement executed by the parties on September 27, 2006, covered both spousal and child support through August 9, 2007, and that the trial court erred in ordering that he pay back child support for that period. After a review of the record, we disagree.

{¶ 22} While David argues that out-of-court agreements encompassing child support are enforceable, we need not reach the merit of that argument because the issue was not properly preserved for appeal. “If a party fails to

file objections to a magistrate's decision in accordance with Civ.R. 53, such claim or objection is waived for purposes of appeal, and the party may not then challenge the court's adoption of the magistrate's factual findings on appeal." *In re Guardianship of Bussey*, 8th Dist. No. 83249, 2004-Ohio-6617, at ¶19, citing *Aurora v. Sea Lakes, Inc.* (1995), 105 Ohio App.3d 60, 66, 663 N.E.2d 690. Pursuant to Civ.R. 53(D)(3)(b)(iv), "a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)."

{¶ 23} The issue David objects to was first addressed in the January 30, 2008 magistrate's decision, which specifically stated:

"The evidence presented showed that the parties reached an informal agreement, although signed but never journalized regarding the temporary parenting time schedule and temporary support. For most of the pre-trial portion of this case the Husband paid the Wife's household living expenses from sources of marital funds other than his wages."

{¶ 24} The magistrate concluded that the \$2010 in monthly support that David paid Carolyn from July 2006 through May 2007 was paid by the home equity line of credit, which was marital property.

{¶ 25} The magistrate also found that because Carolyn was receiving money to pay the household expenses during the time period of the parties' informal agreement, that David would be deemed current with respect to his

spousal support obligations, but that he was in arrears for child support payments during that time period. The magistrate stated that Carolyn was entitled to receive child support in the amount of \$1,528.62 per month for the period of June 28, 2006 through August 9, 2007.

{¶ 26} David's argument that the trial court failed to consider the parties' out-of-court agreement is disingenuous. The magistrate specifically considered the amounts paid under the agreement, and David never filed an objection to the magistrate's decision.

{¶ 27} Therefore, this assignment of error is overruled.

{¶ 28} ASSIGNMENT OF ERROR NUMBER THREE

“THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT CAUSED AN INEQUITABLE RESULT TO APPELLANT AND A WINDFALL TO APPELLEE.”

{¶ 29} David argues that he strictly adhered to the parties' out-of-court agreement, which he maintains encompassed both spousal and child support, and it would be inequitable to now require him to pay additional child support for the months the out-of-court agreement was in effect. However, we find that this assignment of error lacks merit for the same reasons that David's second assignment of error fails.

{¶ 30} The January 30, 2008 magistrate's decision specifically concluded that the out-of-court agreement sufficiently covered spousal support but not

child support during that period. David attempts to argue that the result encompassed in the December 1, 2008 magistrate's decision was inequitable; however, the magistrate was only to determine the amount David was to be credited for direct payments, not whether the out-of-court agreement contemplated both spousal and child support. That issue was resolved in the January 30, 2008 magistrate's decision, to which David filed no objection. Therefore, he cannot now challenge this issue. Civ.R. 53(D)(3)(b); *O'Brien v. O'Brien*, 8th Dist. No. 86430, 2006-Ohio-1729, at ¶13-18, citing *State ex. rel. Booher v. Honda of Am. Mfg.*, 88 Ohio St.3d 52, 53-54, 2000-Ohio-269,723 N.E.2d 571.

{¶ 31} This assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR