[Cite as *Baxter v. Thomas*, 2015-Ohio-2148.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101186

PATRICIA A. BAXTER

PLAINTIFF-APPELLEE/
CROSS-APPELLANT

vs.

VINCENT R. THOMAS

DEFENDANT-APPELLANT/
CROSS-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-07-317518

BEFORE: Boyle, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: June 4, 2015

FOR APPELLANT

Vincent R. Thomas, pro se
334 West Marion Street
Munhall, Pennsylvania 15120

ATTORNEYS FOR APPELLEE

Anne C. Fantelli
Joseph G. Stafford
Stafford & Stafford Co., L.P.A.
55 Erieview Plaza
5th Floor
Cleveland, Ohio 44114

Guardian Ad Litem

Megan J. Corsi
1370 Ontario Street
Suite 748
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} This is an appeal and a cross-appeal from post-decree orders of the domestic relations court. Finding no merit to the appeal, we affirm.

Procedural History and Facts

{¶2} After approximately 13½ years of marriage, Patricia Baxter ("Baxter") and Vincent Thomas ("Thomas") (collectively "the parties") divorced on January 20, 2009. They have two children together from their marriage, one born on January 24, 2000, and one born on November 18, 2005. Under the parties' divorce decree, which incorporates a separation agreement and parenting plan, Thomas agreed to pay monthly child support in the amount of $1,450, plus a 2 percent processing fee. The parties used $80,000 as the amount of Thomas's income and agreed to an upward deviation from the child support worksheet attached to the parenting plan.

{¶3} The parenting plan designated Baxter as the residential parent and set forth Thomas's parenting time.

{¶4} One year following the divorce decree, on February 26, 2010, Thomas moved to modify child support and then subsequently filed several other post-decree motions, including a motion to modify the allocation of parental rights and responsibilities and a motion for a temporary restraining order. Baxter, who remarried in May 2010, also filed several post-decree motions, including a motion to relocate with the minor children in May 2011, and a motion to dissolve the temporary restraining order. Baxter's husband lived and worked in LaPorte, Indiana.

{¶5} Upon Thomas's motion, a guardian ad litem ("GAL") was appointed for the children. During the May 2011 hearing, the GAL testified as to her recommendation that the children be permitted to relocate to LaPorte, Indiana, noting that the father was unemployed and looking for jobs outside of Ohio.

{¶6} On August 17, 2011, the trial court issued an "Interim Order," allowing Baxter to relocate the children to LaPorte, Indiana, where Baxter and the children currently reside. After the children relocated to Indiana, Thomas filed numerous contempt motions related to midweek visitation and weekend visitation. In April 2012, Thomas moved from Ohio to Munhall, Pennsylvania, where he resides with his mother. In August 2012, Thomas stopped paying his child support obligation, resulting in Baxter filing a motion to show cause and a motion for attorney fees.

{¶7} The trial court held several days of hearings, starting in May 2010 and continuing in June 2010, May 2011, June 2011, August 2011, and concluding in February 2013. Thomas, who was represented by counsel at the time of the divorce decree and during some of the post-decree litigation, proceeded pro se after his attorneys were granted leave to withdraw as counsel on May 4, 2011.

{¶8} On October 16, 2013, the magistrate, who presided over the hearings, issued a decision on over 50 pending motions, including motions to modify child support, motion to modify the allocation of parental rights and responsibilities, and motions to show cause and for attorney fees.

{¶9} In his decision, the magistrate recommended that Thomas's child support

obligation be reduced as a result of Baxter's significant increased income, reducing the award by approximately $388 or $522 (depending on if private health insurance is being provided). The magistrate, however, refused to reduce the monthly amount to the degree advanced by Thomas. Specifically, the magistrate rejected Thomas's claim that zero income should be used in the worksheet to calculate his support obligation. Instead, the magistrate relied on the $80,000 that Thomas had previously agreed to as part of the divorce decree for purposes of computing his monthly support obligation. The magistrate implicitly found that Thomas was voluntarily unemployed.

{¶10} The magistrate further recommended, however, that Thomas not be found in contempt for his failure to pay child support, noting that "any failure on [Thomas's] part in making his child support payments are due to his inability to find employment." As for Thomas's motion to show cause against Baxter for her alleged withholding of visitation, the magistrate recommended denying Thomas's motion, noting that the visitation issues arose after Baxter moved to Indiana and finding that "it would be impossible for [Baxter] to comply with the previous visitation schedule as the parties, with this court's permission, were living approximately 272 miles apart."

{¶11} The magistrate also recommended denying Thomas's motion to reallocate parental rights and responsibilities, finding that "it is in the best interests of the children for [Baxter] to remain the residential parent." The magistrate further found that the previous visitation schedule was no longer workable and recommended that Thomas be awarded the following parenting time: (1) entire winter/holiday break, (2) entire spring

break, (3) eight weeks in the summer, and (4) the Wednesday of Thanksgiving break until the Sunday following Thanksgiving. As for the holidays and days of special meaning identified in the parties' parenting plan, the magistrate recommended that "if [Thomas] wants to exercise his parenting time on the holiday/days of special meaning as contained in the previous parenting plan, that he must do so in Laporte, IN and must give [Baxter] two weeks notice of his intent to do so."

{¶12} Both Thomas and Baxter filed objections to the magistrate's decision.

{¶13} On November 18, 2013, Thomas filed a supplemental brief to his motion to stay the support order that he previously filed on February 4, 2013. In his brief, Thomas stated that he "has just recently been able to secure quarter-time employment working 10 to 15 hours per week at $15 per hour, or $7,800 to $11,700 annually." As a result of this new employment, he again requested that his child support obligation be modified using his new income level.

{¶14} On January 30, 2014, Thomas moved the court to change venue, attacking the integrity of the trial court, opposing counsel, and the guardian ad litem. Relying on Civ.R. 3(C)(4), Thomas argued that the matter should be transferred to Portage County Domestic Relations Court, where the court is not as "dysfunctional."

{¶15} On March 3, 2014, the trial court issued its judgment entry, sustaining only Baxter's objection as to the child support worksheet, thereby taking out the deduction for spousal support and marginal out-of-pocket medical expenses paid by Thomas and including the marginal out-of-pocket expenses paid by Baxter. Otherwise, the trial court

overruled all other objections filed by the parties and adopted the magistrate's decision.

{¶16} From this order, both parties appeal. Thomas raises 12 assignments of error and Baxter raises five cross-assignments of error, which are set forth in Appendix A, and will be addressed in turn.

I. Thomas's Assignments of Error

Motion to Modify Child Support

{¶17} In his first four assignments of error, Thomas attacks the trial court's decision regarding his motion to modify child support. He argues that the trial court erred in the following four ways: (1) imputing him income of $80,000 (as opposed to zero), (2) failing to make the new child support order retroactive to the date of his filing, (3) "failing to integrate permissible deviations into the child support provision," and (4) "obstructing [his] right to an administrative modification of support and access to the appeals court."

A. Standard of Review

{¶18} Trial courts are given broad discretion in determining whether to modify child support orders. *Woloch v. Foster*, 98 Ohio App.3d 806, 810, 649 N.E.2d 918 (2d Dist.1994). Therefore, a trial court's decision regarding a motion to modify a child support order will not be overturned absent an abuse of discretion. *Pauly v. Pauly*, 80 Ohio St.3d 386, 390, 686 N.E.2d 1108 (1997), citing *Booth v. Booth*, 44 Ohio St.3d 142, 144, 541 N.E.2d 1028 (1989).

{¶19} In this appeal, Thomas challenges the trial court's judgment overruling his objections and adopting the magistrate's decision. Civ.R. 53(D)(4)(d) provides in relevant part that:

> If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law.

{¶20} When reviewing an appeal from a trial court's adoption of a magistrate's decision under Civ.R. 53(D)(4)(d), we must determine whether the trial court abused its discretion in adopting the decision. *Lindhorst v. Elkadi*, 8th Dist. Cuyahoga No. 80162, 2002-Ohio-2385, ¶ 20, citing *Mealey v. Mealey*, 9th Dist. Wayne No. 95CA0093, 1996 Ohio App. LEXIS 1828 (May 8, 1996).

{¶21} "Abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *In re C.K.*, 2d Dist. Montgomery No. 25728, 2013-Ohio-4513, ¶ 13, citing *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985). A decision is unreasonable if there is no sound reasoning process that would support that decision. *Id.*, citing *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). When applying the abuse of discretion standard, a reviewing court may not simply substitute its own judgment for that of the trial court. *Adams v. Adams*, 3d Dist. Union No. 14-13-01, 2013-Ohio-2947, ¶ 15, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

B. R.C. 3119.79

{¶22} Under R.C. 3119.79(A), "[w]hen considering a motion to modify a child support order, the trial court must recalculate the amount of support required to be paid pursuant to the statutory child support guideline schedule and the applicable worksheet using the parties' updated financial information." *Bonner v. Bonner*, 3d Dist. Union No. 14-05-26, 2005-Ohio-6173, ¶ 10. Further, "[a] deviation of ten percent in the amount to be paid between the original support order and the recalculated amount under the current circumstances is deemed to be a 'change of circumstances substantial enough to require a modification of the child support amount.'" *Id.*, quoting R.C. 3119.79(A).

{¶23} At the time of the divorce decree and original child support order, Thomas agreed to pay an upward deviation from the calculated statutory child support guideline. Specifically, instead of paying a monthly amount of $1,280.83 (plus a 2 percent processing fee) — the amount required under the statutory child support guideline using Thomas's stated income of $80,000 — Thomas agreed to pay $1,450 (plus a 2 percent processing fee) each month for the support of his two children. As a result, a change of circumstances alone is not sufficient to warrant a modification. Instead, where a party voluntarily agrees to pay child support in an amount exceeding the statutory child support guideline schedule, "a trial court granting a motion for modification must find both (1) a change of circumstances, and (2) that such a change of circumstances 'was not contemplated at the time of the issuance of the child support order.'" *Bonner* at ¶ 11, quoting R.C. 3119.79(C).

C. Imputed Income and Voluntary Unemployment

{¶24} In his first assignment of error, Thomas argues that the trial court erred in imputing him $80,000 in income for purposes of deciding his motion to modify child support. He contends that the trial court should have relied on his actual income of zero, which he had at the time of filing the motion and "throughout most of the proceedings," or his subsequent income earned through his part-time employment. We disagree.

{¶25} In deciding Thomas's motion to modify child support, the trial court is required to consider the "income" of the parties. *L.B. v. T.B.*, 2d Dist. Montgomery No. 24441, 2011-Ohio-3418, ¶ 14. While there is no dispute that Thomas was earning no income at the time that he filed his motion, a trial court must consider a parent's potential income if the court finds the obligor to be voluntarily unemployed or underemployed. *See Schley v. Gillum*, 5th Dist. Delaware No. 11CAF10 0098, 2012-Ohio-2787, ¶ 13-16.

{¶26} Here, the trial court refused to accept Thomas's claim that his income should be set at zero. Instead, we can glean from the magistrate's findings that he found Thomas to be voluntarily unemployed and imputed him income of $80,000 — the same amount of income that Thomas agreed to for the original order.

{¶27} 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*, 67 Ohio St.3d 108, 112, 616 N.E.2d 218 (1993). A determination with respect to these matters will only be reversed upon a showing of abuse of discretion. *Id.*

{¶28} For a "parent who is unemployed or underemployed," R.C. 3119.01(C)(5)(b) defines "income" for purposes of calculating child support as "the sum of the gross income of the parent and any potential income of the parent." *Id.* In turn, R.C. 3119.01(C)(11)(a) defines "potential income" to include "imputed income that the court or agency determines the parent would have earned if fully employed as determined from" the following factors:

> the parent's prior employment experience, education, and physical and mental disabilities, if any; the availability of employment and the prevailing wage and salary levels in the geographic area; the parent's special skills and training; whether there is evidence that the parent has the ability to earn the imputed income; the age and special needs of the child for whom child support is being calculated under this section; the parent's increased earning capacity because of experience; and any other relevant factor.

Justice v. Justice, 12th Dist. Warren No. CA2006-11-34, 2007-Ohio-5186, ¶ 9, citing R.C. 3119.01(C)(11)(a).

{¶29} The record reflects that Thomas agreed to an imputed income of $80,000 at the time of the divorce decree, despite being unemployed since November 2007. He testified that he had a job offer for $80,000 around that time but elected not to take it. The record further reveals that Thomas's employment history reflected earnings in excess of $80,000. Additionally, Thomas's education achievements include a bachelor's degree, a masters of business administration, and a juris doctor. The record further reflects that Thomas does not have any disabilities that prevent him from obtaining full-time employment.

{¶30} Recognizing Thomas's prior employment history, his previous earning capacity, education, the absence of any physical or mental disabilities, and the fact that Thomas previously agreed to an imputed income of $80,000, the magistrate imputed $80,000 income to Thomas for purposes of calculating his new child support obligation. While Thomas testified at length of the difficulty in finding a job in his field (financial industry), the magistrate found his testimony regarding his job search to be "less than credible" — a determination that we must defer to. *See Basista v. Basista*, 6th Dist. Wood No. WD-13-081, 2014-Ohio-2828, ¶ 5 ("trial court, as the trier of fact, is in the best position to weigh the evidence and determine the credibility of the witnesses at trial"). Specifically, the magistrate stated, "While Defendant has testified at length about his job search, the Magistrate finds his testimony less than credible. It is inexplicable that a person with Defendant's background and education could not find any employment in over four years."

{¶31} Based on the evidence presented at the hearings, we cannot say that the trial court abused its discretion by refusing to apply zero income and imputing $80,000 to Thomas. Notably, aside from his self-serving testimony as to the difficulty of the job market and his numerous applications, Thomas failed to present any objective evidence that weighs against the imputation of $80,000. *See e.g. August v. August*, 3d Dist. Hancock No. 5-13-26, 2014-Ohio-3986, ¶ 43, quoting *Wilburn v. Wilburn*, 169 Ohio App.3d 415, 2006-Ohio-5820, 863 N.E.2d 204, ¶ 38 (9th Dist.) (recognizing that "it is not the trial court's duty to investigate or develop evidence not presented by the parties" and

it "may presume any factor not substantiated by evidence is immaterial to its determination").

{¶32} Thomas further claims that the trial court should have relied on his stated part-time earnings that he submitted to recalculate his child-support obligation after the magistrate issued a decision. We disagree. Apart from the questionable evidentiary value of the evidence submitted, we do not find that Thomas's stated obtainment of a new part-time job changes the trial court's analysis. Indeed, "potential income" applies to both unemployed and underemployed parents. R.C. 3119.01(C)(5)(b). Having found that Thomas is capable of full-time employment, the trial court reasonably imputed $80,000 as opposed to Thomas's later request of $7,800 to $11,700.

{¶33} Accordingly, based on the record before us, we find that the trial court did not abuse its discretion in imputing income of $80,000 for purposes of calculating Thomas's new child support obligation.

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

D. Date of Retroactive Reduction of Support

{¶35} In his second assignment of error, Thomas argues that the trial court abused its discretion by failing to make its new child support order retroactive to the date he filed his motion to modify support.

{¶36} Generally, "parties to a child support modification order are entitled to have the order relate back to the date upon which the motion for modification was filed, as 'any other holding could produce an inequitable result in view of the substantial time it

frequently takes to dispose of motions to modify child support obligations.'" *State ex rel. Draiss v. Draiss*, 70 Ohio App.3d 418, 420, 591 N.E.2d 354 (9th Dist.1990), quoting *Murphy v. Murphy*, 13 Ohio App.3d 388, 469 N.E.2d 564 (10th Dist.1984). However, in the event of special circumstances, the trial court does not abuse its discretion in selecting a date that coincided with an event of significance in relation to the grounds for the modification that was ordered. *See In re P.J.H.*, 196 Ohio App.3d 122, 2011-Ohio-5970, 962 N.E.2d 389 (2d Dist.); *Bell v. Bell*, 2d Dist. Montgomery No. 23714, 2010-Ohio-5276.

{¶37} Here, although the trial court granted Thomas's motion to modify child support, its decision was based entirely upon the significant increase in Baxter's income — not upon a reduction in Thomas's income. The record reflects that Baxter's income nearly doubled based on new employment that she obtained in Indiana — a change of circumstance (10 percent increase) that was not originally contemplated at the time of the original support order. Accordingly, we find that the trial court did not abuse its discretion in applying the reduction in child support retroactive to the time of Baxter's new employment.

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

E. Downward Deviation

{¶39} In his third assignment of error, Thomas argues that the "lower court erred by failing to integrate permissible deviations into the child support provision." He

contends that the court should have ordered an amount (not specified) less than the statutory child support amount calculated using the child support worksheet.

{¶40} "There is a rebuttable presumption that the annual obligation calculated using the child support worksheet is the amount of child support that should be awarded." *Irish v. Irish*, 9th Dist. Lorain No. 10CA009810, 2011-Ohio-3111, ¶ 16, citing R.C. 3119.03 and *Marker v. Grimm*, 65 Ohio St.3d 139, 601 N.E.2d 496 (1992) (construing previous, analogous version of R.C. 3119.79). The party who seeks to rebut the presumption and asks the court to deviate has the burden of proof. *Murray v. Murray*, 128 Ohio App.3d 662, 671, 716 N.E.2d 288 (12th Dist.1999). Specifically, that party must provide facts from which the court can determine that the actual annual obligation is unjust or inappropriate and would not be in the children's best interest. *Id.*

{¶41} If the trial court determines that the presumption has been overcome by the evidence, it may deviate from the annual obligation amount. *See* R.C. 3119.22. In the absence of a shared parenting plan, such as the instant case, R.C. 3119.23 sets forth the factors that the court may consider in determining whether a deviation is warranted. Thomas relies on the following factors in support of his claim that the court abused its discretion in refusing to award a deviation: (1) extended parenting time, (2) disparity in income between parties or households, (3) benefits that either parent receives from remarriage or sharing living expenses with another person, (4) the relative financial resources, other assets and resources, and needs of each parent, and (5) any other relevant factor. *See* R.C. 3119.23(D), (G), (H), (K), and (P). Specifically, he argues that the

Baxters' combined income equals "$110,000, if not more," which substantially outweighs his low income and depleted assets. He further points to his reduced parenting time as grounds for a reduction. We find his arguments, however, unpersuasive.

{¶42} Although imputed, Thomas's income is $80,000 — not zero. Further, Thomas was also found to be voluntarily unemployed, which is clearly the driving force behind his depleted assets. Thomas speculates as to the combined income of the Baxters and fails to identify evidence in the record supporting his claim. Under the facts of this case, we simply cannot say that the trial court abused its discretion in refusing to deviate from the statutory guidelines for child support. *See Sommers v. Sommers*, 5th Dist. Stark No. 2009CA00188, 2010-Ohio-1831 (finding a trial court did not abuse its discretion in refusing to apply a downward deviation to father's child support obligation, even where father's income was imputed and father had arrearages).

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

F. Obstructing Justice

{¶44} In his fourth assignment of error, Thomas argues that the lower court effectively denied him due process of law by its excessive delay in ruling on his motion to modify child support. Although not entirely clear, he appears to attack the decision of the Cuyahoga County Child Support Enforcement Agency (CSEA) in refusing to decide his motion to modify child support while his other motion was pending in the trial court.

{¶45} Although Thomas could have filed his motion exclusively with CSEA, he chose not to and sought a modification in the domestic relations court. There is no

requirement for CSEA to decide his motion when he had the same motion pending in the domestic relations court. Specifically, O.A.C. 5101:12-60-05.1(G) provides that

> the CSEA is not required to administratively review or adjust a child support order when either party elects to proceed through court, either through self-representation or through private counsel, or an action has been filed with the court by either party that may have an impact on the administrative review.

Moreover, Thomas never filed an objection related to this issue in the proceedings below. He has therefore forfeited this argument on appeal. *See Akin v Akin*, 9th Dist. Summit Nos. 25524 and 25543, 2011-Ohio-2765, ¶ 46, citing Civ.R. 53(D)(3)(b)(iv).

{¶46} The fourth assignment of error is overruled.

Interim Order

{¶47} In his fifth assignment of error, Thomas argues that the lower court erred and abused its discretion by permitting the minor children to be relocated based on a defective interim order. Thomas, however, is not challenging the trial court's final order that designates the mother as the residential parent in Indiana. Nor does he raise any argument pertaining to the children's best interest in remaining with their mother in Indiana. In his argument, Thomas states that "[o]bviously, it is too late for the minor children to make-up the time that they could have had with their father because of the lower court's defective interim order; however, it is not too late for this appeals court to set a precedent[.]"

{¶48} Thomas therefore essentially concedes that his argument is a moot point in this case, especially since the trial court ultimately issued a final order, but he nonetheless

asks this court to address the issue for "precedential" value. As an appeals court, however, we will not indulge in advisory opinions. *Ramadan v. Metrohealth Med. Ctr.*, 8th Dist. Cuyahoga No. 93981, 2011-Ohio-67, ¶ 94, citing App.R. 12(A)(1)(c). Indeed, there is no relief that we can provide to Thomas under this assignment of error, and we therefore overrule it as moot. *See Bamber v. Catholic Dioceses of Cleveland*, 8th Dist. Cuyahoga No. 86894, 2006-Ohio-4883, ¶ 20 ("An appellate court is not required to render an advisory opinion on a moot question or abstract proposition or to rule on a question of law that cannot affect matters at issue in a case.").

Location for Exchange of Children

{¶49} In his sixth assignment of error, Thomas argues that, "in the absence of a motion by either party, the lower court erred and abused its discretion by designating a location to exchange the minor children for holidays and special days of meaning that is arbitrary."

{¶50} Given that both parents moved outside of Ohio and currently reside approximately 409 miles apart, the magistrate recommended the following amendment with respect to the parties' parenting order:

> If [Thomas] wants to exercise his parenting time on the holidays/days of special meaning as contained in the previous Parenting Plan, that he must do so in LaPorte, Indiana and must give the Plaintiff two (2) weeks notice of his intent to do so.

Thomas complains that this exchange is unreasonable and unfairly biased against him. He urges this court to declare that provision invalid and replace it with the clause that

governs exchanges for his extended parenting time, namely, the exchange at "Exit 118 on Interstate 90/Ohio Turnpike."

{¶51} While we recognize that the trial court has placed a greater burden on Thomas for the sake of exercising these one-day special holidays, we cannot say that the court abused its discretion. Here, the magistrate clearly considered the limited duration of the visit along with the burden upon the minor children to travel hundreds of miles. We further note, as discussed later, the trial court balanced any inconvenience imposed upon Thomas for exercising these special holidays by awarding Thomas significant parenting time in the summer and during the children's breaks from school, which will include some of these special holidays.

{¶52} The sixth assignment of error is overruled.

Enforcement of Orders

{¶53} In his seventh assignment of error, Thomas argues that the trial court erred and abused its discretion by not equally enforcing its existing orders. He argues that, despite Baxter not complying with the parties' parenting plan, as incorporated in their divorce decree, the trial court failed to find her in contempt and therefore did not enforce the agreement. Conversely, he contends that the trial court continuously enforced the parties' agreement as to child support, resulting in the local CSEA penalizing him. Thomas argues that Baxter should be subject to a similar punishment for failing to abide by the parties' parenting plan.

{¶54} Aside from Thomas's broad accusations, he fails to support his argument with citation to the record and legal authority in support of his claims. An appellate court may disregard an assignment of error pursuant to App.R. 12(A)(2) "if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)." *Rodriguez v. Rodriguez*, 8th Dist. Cuyahoga No. 91412, 2009-Ohio-3456, ¶ 4.

{¶55} App.R. 16(A)(7) requires that Thomas include the following in his brief: "An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies."

{¶56} Moreover, it is not the duty of an appellate court to search the record for evidence to support an appellant's argument as to any alleged error. *Rodriguez* at ¶ 7. Indeed, "'[i]f an argument exists that can support this assignment of error, it is not this court's duty to root it out.'" *Citta-Pietrolungo v. Pietrolungo*, 8th Dist. Cuyahoga No. 85536, 2005-Ohio-4814, ¶ 35, quoting *Cardone v. Cardone*, 9th Dist. Summit Nos. 18349 and 18673, 1998 Ohio App. LEXIS 2028 (May 6, 1998).

{¶57} To the extent that he is arguing that the trial court abused its discretion in failing to grant his motion to show cause and hold Baxter in contempt for withholding visitation, we cannot agree. The record reveals that the visitation issues arose only after the court granted Baxter permission to move to Indiana. The visitation issues were also further complicated by Thomas's own relocation from Ohio to Pennsylvania. We find

no basis to conclude that the trial court abused its discretion in refusing to hold Baxter in contempt. Nor do we find any merit to Thomas's broad claim that the trial court arbitrarily enforced its orders.

{¶58} The seventh assignment of error is overruled.

Guardian Ad Litem's Scope of Duties

{¶59} In his eighth assignment of error, Thomas contends that the trial court should have limited the role of the GAL to solely accompanying the minor children at an in-camera interview pursuant to R.C. 3109.04(B)(1). But contrary to Thomas's assertion on appeal, his motion for the court to appoint a GAL was not for the limited purpose of accompanying the children during the in-camera interview with the court. While Thomas moved for an in-camera interview under R.C. 3109.04(B)(1), he also separately moved for the appointment of a GAL, arguing that a GAL "would assist the court in its allocation of parental rights and responsibilities." Thomas cannot complain on appeal as to an action that the trial court undertook upon his own motion. *Don Mitchell Realty v. Robinson*, 2d Dist. Montgomery No. 22031, 2008-Ohio-1304, ¶ 20. Indeed, based on Thomas's motion, the trial court properly appointed a GAL, who fulfilled her responsibilities in compliance with Sup.R. 48. Although Thomas had a subsequent change of heart regarding the GAL (upon proceeding pro se), this is irrelevant to his challenge of the GAL's responsibilities.

{¶60} As for Thomas's request for an advisory opinion as to whether a GAL may be appointed solely for the limited purpose of conducting an in-camera interview under

R.C. 3109.04(B)(1), we decline to address this issue as it is not before us. *See Ramadan*, 8th Dist. Cuyahoga No. 93981, 2011-Ohio-67, ¶ 94.

{¶61} The eighth assignment of error is overruled.

GAL's Conflict of Interest

{¶62} In his ninth assignment of error, Thomas casts bald assertions against the GAL, claiming that (1) she failed to properly represent the interests of the children based on her biased attitude favoring Baxter; and (2) her own financial interest of running up her attorney fees constituted a conflict of interest. Thomas, however, fails to comply with App.R. 12 and 16 by separately setting forth the basis for his argument with citation to the record and supporting legal authority.

{¶63} We further note that there is absolutely no evidence in the record to support these accusations. As stated by Baxter, "the GAL charging for her services is not a conflict of interest." Notably, Thomas fails to identify a single charge or action taken by the GAL to support his claim of her "running up attorney fees." Nor does Thomas provide any support of his claim of the GAL having a biased attitude. The GAL's recommendation that Baxter remain the residential parent and that the children be permitted to relocate was based on the best interests of the children. The mere fact that her recommendation is not favorable to Thomas is not evidence of an inherent bias in favor of Baxter.

{¶64} Accordingly, the ninth assignment of error is overruled.

Removal of Trial Judge and Magistrate and
Disqualification of Baxter's Trial Counsel

{¶65} In his tenth assignment of error, Thomas attacks the integrity and competence of the trial judge and magistrate and urges this court to remove them from any further proceedings. This court, however, lacks any authority to remove a trial judge from the proceedings below. *See* R.C. 2701.03. Indeed, such authority rests solely with the Chief Justice of the Supreme Court of Ohio. *Id.* And while this court has the authority to review a trial court's denial of a party's motion to disqualify a magistrate under Civ.R. 53, Thomas nonetheless has failed again to comply with App.R. 12(A)(2) and 16(A)(7) by separately setting forth his argument with citation to the record and supporting legal authority. His bald assertions against the magistrate, including his personal view that the magistrate does not like him, are not sufficient grounds for this court to sustain this assignment of error.

{¶66} Similarly, Thomas fails to comply with the appellate rules with respect to his 11th assignment of error. He alleges that Baxter's trial counsel and the trial judge engaged in ex parte communications that evidence a conflict of interest and warrant the disqualification of Baxter's trial counsel. He, however, offers no evidence to corroborate this allegation or any legal authority to support the relief that he seeks.

{¶67} Accordingly, we overrule the 10th and 11th assignments of error.

Venue

{¶68} In his final assignment of error, Thomas attacks the neutrality of the Cuyahoga County Domestic Relations Court and argues that the trial court should have

granted his motion to change venue pursuant to Civ.R. 3(C)(4), which states the following:

> Upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within this state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending.

{¶69} But "Civ.R. 3(C)(4) does not encompass a change of venue based upon the alleged bias or prejudice of a trial judge." *Butler Cty. Joint Vocational School Dist. Bd. of Edn. v. Andrews*, 12th Dist. Butler No. CA200610245, 2007-Ohio-5896, ¶ 17, citing *Williams v. Williams*, 12th Dist. Butler No. CA96-01-015, 1996 Ohio App. LEXIS 5649 (Dec. 16, 1996). Rather, the exclusive remedy under such circumstances is to file an affidavit of bias and prejudice with the Chief Justice of the Ohio Supreme Court pursuant to R.C. 2701.03. *Id.*

{¶70} Moreover, Thomas fails to separately set forth the grounds for his motion to transfer venue and why the trial court abused its discretion in denying such motion based on facts in the record; instead, he directs this court to "please read" his motion. It is not our job to search the record and find case law supporting appellant's argument. *See Rodriguez*, 8th Dist. Cuyahoga No. 91412, 2009-Ohio-3456, ¶ 7.

{¶71} Accordingly, the final assignment of error is overruled.

II. Baxter's Cross-Assignments of Error

{¶72} Baxter raises five cross-assignments of error. All of these assignments of error are also reviewed under an abuse of discretion. We therefore cannot substitute our judgment for the trial court and must affirm unless the decision is "unreasonable, arbitrary

or unconscionable." *Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140; *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990). With this standard of review in mind, we turn to each of Baxter's stated cross-assignments of error.

Thomas's Parenting Time

{¶73} In her first and second cross-assignments of error, Baxter argues that the trial court abused its discretion by awarding Thomas the entire winter holiday break and eight weeks of summer parenting time with the children. She argues that such an award is punitive and does not serve the best interest of the minor children. We disagree.

{¶74} It is within a trial court's discretion to determine matters of parenting time. *Marinella v. Marinella*, 2d Dist. Montgomery No. 25449, 2013-Ohio-2932, ¶ 14, citing *Appleby v. Appleby*, 24 Ohio St.3d 39, 41, 492 N.E.2d 831 (1986). And based on the record before us, we simply cannot say that the trial court's decision regarding Thomas's parenting time is unreasonable. Baxter's relocation to Indiana and Thomas's subsequent relocation to Pennsylvania effectively rendered the parties' previous allocation of parenting time "unworkable." Consequently, Thomas no longer benefits from midweek parenting time or alternating weekends with the children. Thus, given that Baxter is the residential parent and enjoys the benefit of having the minor children the greater number of weeks during the year, we find it reasonable that the trial court awarded Thomas the entire winter holiday break as well as eight weeks in the summer. The distance of the parties' residences and the children's interest in spending time with their father support such an award. And while the children will not celebrate Christmas with their mother as

they are accustomed to doing, we cannot say that this alone renders the award of parenting time an abuse of discretion. Further, we find no basis to conclude that the award does not serve the children's best interest.

{¶75} We note, however, that there is nothing in the trial court's order that prevents the parties from separately agreeing to allow Baxter more parenting time in the summer or during the winter break, especially since the court awarded Thomas two more weeks in the summer than he requested.

{¶76} The first and second cross-assignments of error are overruled.

Contempt of Court

{¶77} In her third cross-assignment of error, Baxter argues that the court abused its discretion in failing to find Thomas in contempt of court for his failure to pay his child support obligation. Baxter argues that the undisputed evidence of Thomas's failure to pay any child support since August 24, 2012, along with the evidence of his refusal to obtain employment, mandated a contempt finding. We disagree.

{¶78} With respect to a trial court's decision on a motion to show cause why a party should not be held in contempt, an appellate court cannot reverse unless the trial court abused its discretion. *See State ex rel. Ventrone v. Birkel*, 65 Ohio St.2d 10, 417 N.E.2d 1249 (1981). Further, "if contempt proceedings are invoked solely by the person aggrieved by disobedience of the court's order, a refusal to punish for contempt is largely within the discretion of the trial court * * *." *Akin*, 9th Dist. Summit Nos. 25524 and

25543, 2011-Ohio-2765, at ¶ 44, quoting *Thomarios v. Thomarios*, 9th Dist. Summit No. 14232, 1990 Ohio App. LEXIS 59, *2 (Jan. 10, 1990).

{¶79} In recommending that Thomas not be found in contempt for his nonpayment of child support, the magistrate found that Thomas "has substantially complied with making his child support payments for the time period when he was liquidating his share of the marital assets (i.e. retirement accounts awarded to him)." The magistrate further found that "any failure on [Thomas's] part in making his child support payments are due to his inability to find employment."

{¶80} Upon review, we find that the trial court did not abuse its discretion in failing to find Thomas in contempt of court. The trial court heard Thomas testify and believed that he had been looking for employment (albeit in a limited fashion). The trial court clearly believed that Thomas's failure to find employment resulted in his inability to pay child support . Indeed, the record reveals that Thomas fully complied with the payment of child support when he had assets to do so. Although other courts may have decided differently, we find no abuse of discretion.

{¶81} The third cross-assignment of error is overruled.

Award of Attorney Fees

{¶82} In her fourth cross-assignment of error, Baxter argues that the trial court erred and abused its discretion in failing to award her attorney fees relating to her motion to show cause and motion for attorney fees filed May 9, 2012, and in defense of Thomas's numerous motions filed since the 2011 hearing dates.

{¶83} R.C. 3105.73(B) governs the award of attorney fees for post-decree motions and proceedings and provides as follows:

> In any post-decree motion or proceeding that arises out of an action for divorce, dissolution * * * the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets.

{¶84} The statute specifically vests the trial court with discretion to determine whether to award attorney fees. Thus, "[a] court's decision on a request for attorney fees will not be overruled absent an attitude that is unreasonable, arbitrary, or unconscionable." *Dunbar v. Dunbar*, 68 Ohio St.3d 369, 371, 627 N.E.2d 532 (1994).

{¶85} Given that the trial court denied Baxter's motion to show cause, we find that the trial court also reasonably denied her motion to recover attorney fees incurred in prosecuting the motion to show cause. Indeed, "under well-settled law, non-prevailing parties are generally precluded from recovering attorney fees and litigation expenses." *Adams*, 3d Dist. Union No. 14-13-01, 2013-Ohio-2947, at ¶ 24, citing *Hubbard v. Hubbard*, 3d Dist. Defiance No. 4-08-37, 2009-Ohio-2194, ¶ 11. Moreover, the record evidences a mutual inability of the parties to resolve matters without court intervention and that each party played some role in the post-decree disputes. Accordingly, based on our review of the record, we conclude that the trial court's decision not to award attorney fees was neither unreasonable, arbitrary, nor unconscionable.

{¶86} The fourth cross-assignment of error is overruled.

Equal Allocation of the GAL Fees

{¶87} In her final cross-assignment of error, Baxter argues that the trial court abused its discretion in requiring her to equally share in the payment of the GAL fees. She contends that Thomas should have been ordered to pay a larger percentage of the fees because (1) he requested the GAL, (2) he filed an excessive amount of motions requiring more of the GAL's time, and (3) he was not as cooperative with the GAL.

{¶88} A trial court's appointment of a GAL and award of fees must be upheld absent an abuse of discretion. *Swanson v. Schoonover*, 8th Dist. Cuyahoga Nos. 95213, 95517, and 95570, 2011-Ohio-2264, ¶ 23, citing *Gabriel v. Gabriel*, 6th Dist. Lucas No. L-08-1303, 2009-Ohio-1814, ¶ 15. A trial court is given considerable discretion in these matters. *Robbins v. Ginese*, 93 Ohio App.3d 370, 372, 638 N.E.2d 627 (8th Dist.1994).

{¶89} As discussed above, the GAL was appointed in this case to assist the court in its determination of the children's best interest with regard to several matters, including Thomas's motion to modify the allocation of parental rights and responsibilities as well as Baxter's motion to relocate. Further, our review of the record reveals that Baxter did not object to the appointment of a GAL, even if she was not the party who initially requested one. We simply cannot say that the trial court abused its discretion by requiring the parties to equally share in the costs of the GAL fees.

{¶90} Baxter's final assignment of error is overruled.

{¶91} Judgment affirmed.

It is ordered that appellee and appellant share the 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 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.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR

Appendix

Thomas's 12 Assignments of Error**:**

I. The lower court erred by failing to acknowledge the respondent/appellant's actual income to calculate child support.

II. The lower court abused its discretion by failing to make its new child support order retroactive to the filing date of respondent/appellant's motion to modify support.

III. The lower court erred by failing to integrate permissible deviations into the child support provision.

IV. The lower court abused its due process discretion to the point of obstructing the respondent/appellant's right to an administrative modification of support and access to this appeals court.

V. The lower court erred and abused its discretion by permitting the minor children to be relocated based on a defective interim order.

VI. In the absence of a motion by either party, the lower court erred and abused its discretion by designating a location to exchange the minor children for holidays and

special days of meaning that is arbitrary.

VII. The lower court erred and abused its discretion by not equally enforcing its existing orders.

VIII. The lower court erred and abused its discretion by appointing a guardian ad litem with responsibilities beyond the scope of an in-camera interview.

IX. The lower court erred and abused its discretion by failing to recognize the guardian ad litem's conflicts of interest with the plaintiff/appellee and her own financial self-interest.

X. The lower court erred by failing to recognize its conflict of interest with the respondent/appellant.

XI. The lower court erred by failing to recognize the conflict of interest that counsel for the plaintiff/appellee has with the court.

XII. The lower court abused its discretion by creating a venue prejudicial to the respondent/appellant.

Baxter's Five Cross-Assignments of Error:

I. The trial court erred and/or abused its discretion in the determination of Vincent R. Thomas' parenting time, specifically by awarding Vincent R. Thomas the entire winter/holiday break.

II. The trial court erred and/or abused its discretion by awarding Vincent R. Thomas' eight (8) weeks of summer parenting time with the children.

III. The trial court erred and/or abused its discretion by failing to find Vincent R. Thomas in contempt of court for his failure to pay his child support obligation.

IV. The trial court erred and/or abused its discretion by failing to award Patricia A. Baxter, any attorney fees related to her motion to show cause filed May 9, 2012 and in defense of Vincent R. Thomas' motions filed since the 2011 hearing dates.

V. The trial court erred by its equal allocation of the guardian ad litem fees.