[Cite as *Bodell v. Brown*, 2015-Ohio-526.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101632

JOHN H. BODELL

PLAINTIFF-APPELLANT

vs.

PATRICIA M. BROWN

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-03-290829

BEFORE: McCormack, J., Celebrezze, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: February 12, 2015

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TIM McCORMACK, J.:

{¶1} Plaintiff-appellant, John H. Bodell ("Husband"), appeals from the trial court's adoption of the magistrate's decision, as modified.[1] For the reasons that follow, we reverse the trial court's judgment.

Factual and Procedural History

{¶2} On August 10, 2004, the marriage of John H. Bodell and Patricia M. Brown ("Wife") was terminated by an agreed judgment entry of divorce. The entry provided for the support of three children in the amount of $1,200 per month at $400 per child, per month. As of September 2012, two children became emancipated, leaving one child subject to child support. Thereafter, Wife requested a child support adjustment through the Cuyahoga Job and Family Services, Office of Child Support Services ("CJFS-OCSS") (f.k.a. Cuyahoga Support Enforcement Agency).

{¶3} CJFS-OCSS reviewed the court child support order and recommended to the parties that the new child support payments Husband was required to pay Wife were $1,929.06 per month when private health insurance is provided, and $1,936.06 plus $82 per month cash medical support when private health insurance is not provided. In its recommendation, CJFS-OCSS determined Husband's income to be $235,000 and Wife's income to be $18,250. Prior to the agency issuing its recommendation, however, Wife filed a motion to modify child support. Thereafter, Husband filed a request for a court hearing. And on December 31, 2013, the magistrate conducted a hearing on Wife's motion and Husband's request for a hearing.

{¶4} On May 1, 2014, the magistrate issued his decision. In his decision, the magistrate made certain findings concerning the parties' incomes for purposes of calculating child support.

The magistrate found that Husband's gross annual income from employment "fluctuates considerably" because his compensation is based solely upon commissions. Thereafter, he determined that the appropriate method to determine Husband's income was to look at the average of his commissions over the three-year period preceding the effective date of any modification, or the current amount of his commission annualized as of the effective date of any modification, whichever is less. The relevant years included 2010, 2011, and 2012. The magistrate then concluded as follows:

> [Husband's] income for 2010 was $219, 348; his income for 2011 was $235,000; and his income for 2012 was $413, 486. The three year average is $289,278, which is less than his income for 2012. Therefore, the magistrate concludes that for purposes of calculating child support, [Husband's] income should be $289,278.
>
> [Wife's] gross annual employment income of $50,700 derived from three employers. She has rental income of $10,879, and income from dividends and interest in the amount of $3,523. Therefore, the magistrate concludes that [Wife's] income for the purposes of calculating child support should be $65,102.

{¶5} The magistrate further concluded that because the combined gross income of both parents is greater than $150,000 per year, under R.C. 3119.04, child support obligations must be determined on a case-by-case basis that involve considering the needs and the standard of living of the children and of the parents. In accordance with R.C. 3119.022 and 3119.023, the magistrate prepared a child support worksheet applicable for a combined gross income of $150,000, which established child support in the amount of $11,985.28 when private health insurance is being provided, and $12,166.18 when private health insurance is not being provided. And he stated that

> [a]fter considering the needs and the standard of living of the children who are the subject of this child support order and of the parents, the court finds that child

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[1] No appellee brief has been filed in this matter.

> support as calculated would be unjust or inappropriate and would not be in the best interest of the children, the [Husband], or the [Wife] for the following reasons: PARTIES' TESTIMONY AS TO ACTUAL NEEDS AND STANDARD OF LIVING OF THE MINOR CHILD.

{¶6} The magistrate then established child support in the amount of $1,230 per month when private health insurance is being provided and $1,245.08 when private health insurance is not being provided, plus $111 per month cash medical support. The magistrate found that Husband has accessible private health insurance through a group policy and the annual contributing cost to Husband is $2,313.

{¶7} Finally, the magistrate determined that, although the child resides primarily with the Wife, the Husband shall claim the child for purposes of the federal income tax exemption, in accordance with 26 U.S.C. 5000A.

{¶8} On May 14, 2014, Wife filed an objection to the magistrate's decision. Wife's sole objection was to the magistrate's awarding the federal tax exemption to Husband, stating that due to Husband's income, he would not qualify for the exemption. Wife did not file a transcript of the hearing that was conducted by the magistrate, stating in her objection that she cannot afford the cost of the transcript. Rather, Wife attached as an exhibit Husband's purported pay stub that Wife identifies as an exhibit "admitted into evidence." Husband states in his appellate brief that he did not oppose Wife's objection because he "did not disagree with [Wife's] request" for the tax exemption.

{¶9} On June 9, 2014, the trial court issued a judgment entry that stated as follows:

> After considering the magistrate's decision filed May 1, 2014, pleadings, exhibits, and in the absence of a transcript, defendant's objections filed May 14, 2014 are hereby sustained and the decision of the magistrate adopted as modified * * *.

In its judgment entry, the court reallocated the tax exemption to Wife, consistent with Wife's objection. The court further modified the magistrate's recommendation for child support, increasing the award to $1,800 per month when private health insurance is provided, and $1,815.08 when private health insurance is not being provided, plus $111 per month cash medical support. The court stated that "[t]he worksheet used to compute child support and cash medical support under R.C. 3119.022 and 3119.023 is attached * * *."

Standard of Review

{¶10} Trial courts are given broad discretion in determining whether to modify child support orders. *Abbey v. Peavy*, 8th Dist. Cuyahoga No. 100893, 2014-Ohio-3921, ¶ 9, citing *Woloch v. Foster*, 98 Ohio App.3d 806, 810, 649 N.E.2d 918 (2d Dist.1994). And on appeal, we review a trial court's decision adopting or rejecting a magistrate's decision for an abuse of the court's discretion. *In re A.L.*, 8th Dist. Cuyahoga No. 99040, 2013-Ohio-5120, ¶ 10, citing *Dancy v. Dancy*, 8th Dist. Cuyahoga No. 82580, 2004-Ohio-470, ¶ 10. An abuse of discretion 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 (1983).

Law and Analysis

{¶11} In his sole assignment of error, Husband contends that the trial court erred in modifying the magistrate's child support award where Wife did not provide a transcript for the trial court's review or object to the magistrate's award with respect to child support.[2] Husband

[2] The trial court also modified the magistrate's order as it related to the federal tax exemption. However, Husband states in his brief that he "did not disagree with [Wife's] request" for the tax exemption and therefore did not oppose her objection to the magistrate's decision in this regard. And Husband did not assign as error the trial court's modification of the magistrate's decision regarding the tax exemption. We therefore will not address that part of the court's order on appeal.

specifically argues that the trial court could not undertake an independent review of the record because it never reviewed the transcript of the proceedings before the magistrate.

{¶12} In accordance with Civ.R. 53, a party may file objections to the magistrate's decision. When a party objects to the factual findings of the magistrate, the objections "shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available" within 30 days of filing the objections, unless leave is provided by the court. Civ.R. 53(D)(3)(b)(iii). This rule has been construed to mean that a party may support its objections with an affidavit in lieu of a transcript only when the party demonstrates that a transcript is not available, and if the affidavit describes all the relevant evidence presented at the hearing, not just the evidence that the objecting party feels is significant. *In re E.B.*, 8th Dist. Cuyahoga No. 85035, 2005-Ohio-401, ¶ 11.

{¶13} When ruling upon objections, the trial court is required to make an independent review of the case. Civ.R. 53(D)(4)(d). In doing so, the trial court must decide "'whether the [magistrate] has properly determined the factual issues and appropriately applied the law, and where the [magistrate] has failed to do so, the trial court must substitute its judgment for that of the [magistrate].'" *Gobel v. Rivers*, 8th Dist. Cuyahoga No. 94148, 2010-Ohio-4493, ¶ 16, quoting *Inman v. Inman*, 101 Ohio App.3d 115, 118, 655 N.E.2d 199 (2d Dist.1995).

{¶14} The trial court's independent review "requires the * * * court to 'conduct a de novo review of the facts and an independent analysis of the issues to reach its own conclusions about the issues in the case.'" *In re A.S.*, 8th Dist. Cuyahoga No. 101339, 2014-Ohio-4936, ¶ 5, quoting *Radford v. Radford*, 8th Dist. Cuyahoga Nos. 96267 and 96445, 2011-Ohio-6263, ¶ 13. Absent a transcript, or affidavit of evidence properly filed in accordance with the rules, a trial court is limited to an examination of the magistrate's conclusions of law and recommendations,

accepting the magistrate's findings of fact, unless the trial court elects to hold further hearings. *In re C.L.*, 8th Dist. Cuyahoga No. 93720, 2010-Ohio-682, ¶ 8, citing *Wade v. Wade*, 113 Ohio App.3d 414, 418, 680 N.E.2d 1305 (11th Dist.1996); *Berthelot v. Berthelot*, 9th Dist. Summit No. 23561, 2007-Ohio-3884, ¶ 6 (limiting a trial court's review to the magistrate's legal conclusions, unless the trial court holds further evidentiary hearings). Therefore, in the absence of a transcript of proceedings, affidavit, or additional evidentiary hearing ordered by the court, a trial court abuses its discretion when it fails to adopt a finding of fact made by a magistrate. *Crislip v. Crislip*, 9th Dist. Medina No. 03CA0112-M, 2004-Ohio-3254, ¶ 5.

{¶15} Here, the magistrate analyzed the request for modification of child support under R.C. 3119.04. This statute provides that where the combined gross income of both parents is greater than $150,000 per year, the court shall determine the amount of the obligor's child support obligation "on a case-by-case basis and shall consider the needs and the standard of living of the children who are the subject of the child support order and of the parents." R.C. 3119.04(B); *Siebert v. Tavarez*, 8th Dist. Cuyahoga No. 88310, 2007-Ohio-2643, ¶31. The statute "neither contains nor references any factors to guide the court's determination in setting the amount of child support; instead, the court must determine child support on a case-by-case basis." *Siebert* at ¶ 31.

{¶16} Under R.C. 3119.04(B), the courts have more discretion in computing child support when the parents' combined income is greater than $150,000. *Macfarlane v. Macfarlane*, 8th Dist. Cuyahoga No. 93012, 2009-Ohio-6647, ¶ 17. In fact, this court has stated that R.C. 3119.04(B) "'leaves the determination entirely to the court's discretion, unless the court awards less than the amount of child support listed for combined incomes of $150,000.'" *Abbey*, 8th

Dist. Cuyahoga No. 100893, 2014-Ohio-3921, at ¶ 25, quoting *Cyr v. Cyr*, 8th Dist. Cuyahoga No. 84255, 2005-Ohio-504, ¶ 54, citing R.C. 3119.04(B).

{¶17} R.C. 3119.04(B), therefore, necessarily requires an inquiry into the facts and circumstances of each case, as developed through the parties' testimony, in order to determine exactly what the children's needs are and the lifestyle to which the parties are accustomed. *See Abbey* at ¶ 28. And where the court relies primarily on the child support calculation worksheet, and does not consider the testimony of the parties, the court abuses its discretion by failing to conduct a case-by-case analysis of the needs of the parties, in accordance with the statute. *See Wolf-Sabatino v. Sabatino*, 10th Dist. Franklin No. 12AP-1042, 2014-Ohio-1252, ¶ 17.

{¶18} Here, the record demonstrates that the parties' combined gross income of the parents is greater than $150,000 per year, and in accordance with R.C. 3119.04(B), the magistrate considered the particular facts of this case in reaching its decision on the amount of support. Indeed, the magistrate stated in his decision that he found the child support as calculated was "unjust or inappropriate and would not be in the best interest" of the parties *because of* the "parties' testimony as to actual needs and standard of living of the minor child."

{¶19} Therefore, without a transcript of the magistrate's hearing (or an affidavit of evidence or additional court-ordered evidentiary hearing), there is no evidence — a record — that the trial court reviewed the facts of the case. There is no record from the trial court that it had a factual basis for modifying the magistrate's decision regarding the child support awarded under R.C. 3119.04, absent the evidence in the record. Further, the exhibit attached to Wife's objection does not provide the court with evidence of the child's needs. Although Wife indicated that she could not afford the cost associated with preparing a transcript, there is no evidence in the record that she attempted to obtain an extension of time in which to obtain funds

to procure the transcript or that she prepared an affidavit of evidence in lieu of a transcript, as provided in Civ. R. 53. *See Gill v. Grafton Corr. Inst.*, 10th Dist. Franklin No. 09AP-1019, 2010-Ohio-2977 (where a transcript is unavailable due to a party's indigency, an affidavit of the evidence may be used in lieu of a transcript).

{¶20} We therefore find the trial court's order modifying the magistrate's decision with respect to the child support award to be an abuse of discretion. Husband's sole assignment of error is sustained.

{¶21} Judgment reversed.

It is ordered that appellant recover of said appellee 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 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.

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TIM McCORMACK, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MELODY J. STEWART, J., CONCUR