

[Cite as *In re C.A.S.*, 2016-Ohio-5633.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 104052 and 104054

**IN RE: C.A.S. AND A.S.
Minor Children**

[Appeal By Father]

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. CU 08140034 and CU 08140035

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

RELEASED AND JOURNALIZED: September 1, 2016

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1. The purpose of an accelerated appeal is to allow this court to render a brief and conclusory opinion. *State v. Priest*, 8th Dist. Cuyahoga No. 100614, 2014-Ohio-1735, ¶ 1.

{¶2} In this consolidated appeal, appellant-father (“father”), appeals the trial court’s decision modifying appellee-mother’s (“mother”) child support obligation by deviating downward and ordering mother to pay \$21.50 per month per child, for a total of \$43.00. For the reasons that follow, we reverse and remand for further proceedings consistent with this opinion.

{¶3} In March 2009, mother and father entered into an agreed judgment entry allocating their parental rights and responsibilities regarding their two children. The agreed judgment entry named father as residential parent and legal custodian of the children. It also referenced that the parents agreed to a shared parenting plan, but no written plan was established. The record supports that a standard shared parenting plan was implemented. The agreed judgment entry also provided that mother pay a total of \$287.18 per month, plus processing fee, to father for child support.

{¶4} On November 13, 2014, mother filed a motion to modify the allocation of parental rights and responsibilities, which included a motion to modify child support and income tax dependency exemption allocation. Mother requested that she be named

residential parent and legal custodian of the children or in the alternative, to modify the parenting time schedule. Her motion also requested that the court modify her child support obligation and allocation of the income tax dependency exemption.

{¶5} According to mother, the modifications were necessary because a change in circumstances exist. Specifically, mother alleged that the children were not being adequately cared for while in their father's care, father was using controlled substances, the children were missing regular meals and grooming, and that father failed to keep mother apprised of their children's medical and educational needs, and does not include her in decisions made regarding their children.

{¶6} The trial court appointed a guardian ad litem ("GAL") for the children during the pendency of this matter. On March 20, 2015, the guardian ad litem filed her report and recommendation with the court regarding the issue of allocation of parental rights and responsibilities. An updated report was filed on June 18.

{¶7} In September 2015, mother and father resolved the allocation of parental rights and visitation issues by coming to a mutual agreement and entering into a written shared parenting plan. Pursuant to the shared parenting plan, father remained the residential parent and legal custodian solely for school purposes, and parenting time was allocated and distinguished between school- year parenting time and summer parenting time.

{¶8} On September 3, 2015, the magistrate conducted a hearing on the remaining issues — child support and tax dependency exemption. The magistrate heard testimony from father, mother, and mother’s husband, each providing some testimony about current visitation, child care and healthcare expenses, extracurricular activity expenses, and income.

{¶9} The children’s GAL also participated in the hearing by questioning the witnesses and giving a closing statement. The GAL presented her opinion regarding the agreed shared parenting plan and mother’s remarriage and how these changes should impact and affect mother’s child support obligation. According to the GAL, mother’s support order could “deviate somewhat” due to mother’s increase in parenting time and added childcare in the summer.

{¶10} The magistrate issued a written decision on September 29, 2015. The magistrate determined that mother’s support obligation should be modified from \$271.34¹ to \$41.50 per month, inclusive of processing fee, and that this modification should be retroactive to September 3, 2015. According to the magistrate’s decision, the basis for the modification and downward deviation was due to the parties’ difference in income and the amount of parenting time now afforded to mother.

¹The record shows that mother’s original child support obligation to father was \$287.18 per month, plus processing fee.

{¶11} Mother and father each filed objections to the magistrate's decision. Mother contended that the effective date of the new support order should be retroactive to the day she sought modification, November 14, 2014. She further argued that the magistrate should have given her an additional credit for the child care expenses incurred during the exercise of her weeks of summer parenting time; thus claiming that either her obligation should be zero or that father should pay her child support.

{¶12} Father contended that the amount of parenting time mother was now afforded was not a significant change to warrant the modification of support. He further claimed that the magistrate erred in determining the deviation as downward because the support obligation of mother as calculated under the guidelines should actually be increased.

{¶13} On December 28, 2015, the trial court adopted the magistrate's decision, with a modification to the amount and the effective date of mother's new support order. In doing so, the trial court overruled father's objections, but sustained mother's objections for the sole purpose of clarifying that the mother's new total support obligation of \$43.00, inclusive of processing fee, was retroactive to November 13, 2014.

{¶14} Father now appeals raising as his sole assignment of error that the judgment of the trial court in deviating from the child support obligation of the mother as determined by the child support computation worksheet was an abuse of discretion. We agree.

{¶15} In this case, the trial court noted in its journal entry that under the original support order, mother's support obligation was \$271.34 per month.² It further found that upon strict adherence to the income calculations and the child support worksheet guidelines without modification, mother's current support obligation would be \$347.52 per month. However, the trial court upheld the magistrate's decision finding that a modification of child support, including the downward deviation was appropriate because (1) mother is now afforded "significantly" more time with the children under the new shared parenting plan, and (2) the difference between the parties' income is "substantial." Accordingly, the trial court ordered mother's new support obligation to be \$43.00 per month.

{¶16} The amount of child support calculated using the child support schedule is "rebuttably presumed" to be the correct amount of child support due. *Marker v. Grimm*, 65 Ohio St.3d 139, 601 N.E.2d 496 (1992). The party seeking to rebut the basic child support schedule calculation has the burden of presenting evidence that would demonstrate that the calculated award is unjust, inappropriate, and would not be in the best interest of the child. *Spencer v. Spencer*, 5th Dist. Stark No. 2005-CA-00263, 2006-Ohio-1913, ¶ 44; *Chittock v. Chittock*, 11th Dist. Ashtabula No. 97-A-0042, 1998 Ohio App. LEXIS 1448 (Apr. 3, 1998). The decision to deviate from the actual

²Again we note, the record shows that mother's original obligation to father was \$287.18 per month, plus processing fee.

obligation is discretionary and will not be reversed absent an abuse of discretion. *See In re Custody of Harris*, 168 Ohio App.3d 1, 2006-Ohio-3649, 857 N.E.2d 1235, ¶ 60-61 (2d Dist.).

{¶17} “‘Abuse of discretion’ is a term of art, describing a judgment neither comporting with the record, nor reason.” *Klayman v. Luck*, 8th Dist. Cuyahoga Nos. 97074 and 97075, 2012-Ohio-3354, ¶ 12, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678, 332, 148 N.E. 362 (1925). “‘A decision is unreasonable if there is no sound reasoning process that would support that decision.’” *Klayman at id.*, quoting *AAAA Ent., Inc. v. River Place Comm. Urban Redevelopment*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶18} R.C. 3119.24 states that in cases with shared parenting plans, the court “may” deviate from the amount that is calculated according to the child support schedule, but that the court must consider “extraordinary circumstances” and other factors or criteria set forth in R.C. 3119.23 if it deviates. Additionally, the trial court must enter in the journal that the amount would be unjust or inappropriate and would not be in the best interest of the child, and it must enter findings of fact to support its determination. R.C. 3119.24(B) sets forth a nonexclusive list of factors that might constitute “extraordinary circumstances of the parents,” including “(1) [t]he amount of time the children spend with each parent[.]” *See* R.C. 3119.24(B)(1).

{¶19} In this case, father testified that mother's original visitation was in accordance with the standard shared parenting plan. This testimony was not disputed. Under the new shared parenting plan, mother visits with the children during the school year every other weekend from Friday evening to Monday morning and then every Wednesday evening to Thursday morning. During summer vacation, mother has parenting time for approximately the middle eight weeks of summer with father receiving parenting time every other weekend from Friday evening to Monday morning and then every Wednesday evening to Thursday morning during that time.

{¶20} The parties disagreed with the actual number of days mother now is spending with the children under the new schedule. There was no evidence presented as to how the new plan specifically deviated from the old plan or the difference in the number of days mother is now spending with the children. However, the magistrate stated at the modification hearing that she recognized that the visitation was not a 50/50 split of time — mother's time was less than father's. The only obvious change we can glean from the record is the increase in parenting time during the summer to an eight-week parenting time and one extra overnight for the weekend visitation during the school year.

{¶21} While mother does receive additional parenting time during the summer, the record does not support that mother satisfied her burden of demonstrating that these additional days comprise significantly more parenting time than that provided by the prior

standard shared parenting plan. The appropriate time frame to consider is the change in parenting time from the old plan versus the new schedule, and whether the changes warrant a child support modification or deviation.

{¶22} Furthermore, mother did not present any evidence demonstrating that the deviation in the amount of child support would be in the children's best interests. *Albrecht v. Albrecht*, 12th Dist. Butler Nos. CA2014-12-240 and CA2014-12-245, 2015-Ohio-4916, citing *Theurer v. Foster-Theurer*, 12th Dist. Warren Nos. CA2008-06-074 and CA2008-CA-083, 2009-Ohio-1457, ¶ 69 (“[t]he party that attempts to rebut the basic child support guideline amount has the burden of presenting evidence which proves that the calculated award is unjust, inappropriate or not in the best interest of the child”). No testimony was presented that the amount was unjust or inappropriate. While mother did testify that she would now have childcare costs during the eight-week block of summer visitation, no testimony was presented that this additional expense warranted such a substantial deviation from the child support guidelines and worksheet.

{¶23} The trial court also found that the disparity in incomes warranted a downward deviation in the child support order. R.C. 3119.24 also allows a court to consider other relevant circumstances and additional factors found in R.C. 3119.23 in deciding whether to deviate from the child support guidelines. R.C. 3119.23(G) and (H) allows the court to consider the “disparity in income between the parties or households”;

and “benefits that either parent receives from remarriage or sharing living expenses with another person.”

{¶24} In this case, the trial court seemingly only compared father’s income to mother’s income when considering whether a disparity exists. The record demonstrates that father’s income is higher than mother’s income. However, reviewing the original child support worksheet prepared in 2009 and the current child support worksheet, we see no substantial difference between the parties’ income then and now. Mother testified that she was the sole earner of income prior to her marriage, yet was able to pay the original child support amount of approximately \$287.

{¶25} Now that mother is remarried, her household income has significantly changed. In fact, the trial court noted that under a strict adherence to the child support worksheet guidelines, mother’s support obligation would actually increase. Although mother’s husband is not obligated to support mother’s children, his income is household income where mother receives a benefit of shared living expenses, a factor that the trial court is permitted to consider in deciding whether to deviate from the child support worksheet. *Frahlich v. Frahlich-Lerch*, 9th Dist. Summit No. 19807, 2000 Ohio App. LEXIS 3798 (Aug. 23, 2000)(a new spouse’s income is not considered under the child support worksheet; only under a deviation analysis).

{¶26} Based on the record before this court, the trial court’s decision to deviate downward from the child support worksheet and ordering mother’s total support

obligation of \$43.00 was arbitrary. Despite our best efforts, we are unable to determine how the trial court arrived at the figure of \$43.00 when making its downward deviation. No evidence exists supporting the near 86% downward deviation in child support from mother's original child support order, or an 88% downward deviation in child support from mother's current support obligation under a strict adherence to the child support guidelines. Mother's new visitation schedule shows that mother's parenting time is still less than father's parenting time. Again, the record is unclear as to how many additional days mother receives under the new shared parenting plan as opposed to the prior standard shared parenting plan. Therefore, the significant downward deviation based on mother's purported substantial increase in parenting time is not supported by the record; thus the decision is unreasonable and arbitrary.

{¶27} Moreover, the implementation of the shared parenting agreement did not take effect until September 2015. Therefore, the trial court's decision to order the new support obligation retroactive to November 2014 — the date mother moved for modification — was arbitrary and an abuse of discretion because the purported substantial increase in parenting time was not in place in November 2014.

{¶28} Finally, mother's household income and benefit she receives as a result of her remarriage should have been taken into consideration when conducting a deviation analysis. The record does not support that this was performed.

{¶29} Accordingly, based on the record before this court and the evidence presented to the trial court, we find that the trial court abused its discretion in modifying mother's child support obligation by ordering a substantial downward deviation from the calculated amount under the child support worksheet guidelines. The case is remanded to the trial court for further proceedings to recalculate mother's child support obligation under the child support worksheet guidelines, while considering any and all relevant and applicable extraordinary circumstances, criteria, and factors found in R.C. 3119.23 and 3119.24.

{¶30} Judgment reversed and remanded.

It is ordered that appellant recover of appellee its 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 Juvenile Court 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

MELODY J. STEWART, J., and
MARY J. BOYLE, J., CONCUR