[Cite as *Collette v. Baxter*, 2009-Ohio-5151.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

PATRICIA COLLETTE, fka BAXTER	C. A. No. 24519
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RONALD E. BAXTER	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 96-04-0969

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Patricia Collette and Ronald Baxter dissolved their marriage in 1996. They have four adult children, but continue to support their son Michael, who is disabled. Michael lives with Ms. Collette, who provides his care. Between September 2005 and April 2006, both parties moved to modify child support. Mr. Baxter also moved for an accounting of support, to establish a trust for his support payments, and to require Michael to seek vocational training. Ms. Collette also moved to show cause and for attorney fees. The trial court found that Mr. Baxter's income had increased while Ms. Collette's income had decreased. It granted her motions, denied his motions, and increased his support obligation. Mr. Baxter has appealed, arguing that the court incorrectly calculated the parties' income and Michael's expenses, incorrectly found him in contempt, incorrectly declined to monitor Ms. Collette's use of child support, and incorrectly denied his motion for new trial. This Court affirms because the trial court exercised proper

discretion when it calculated the parties' income, determined the amount of child support, ordered Mr. Baxter to reimburse Ms. Collette for Michael's out-of-pocket medical expenses, and denied his request for an accounting of her use of the support, its contempt finding is supported by the evidence, and Mr. Baxter deprived the court of jurisdiction to consider his motion for new trial by appealing its judgment entry.

FACTS

{¶2} In August 1996, Michael suffered a traumatic brain injury in a bicycle accident. The parties previously stipulated that he is a disabled child who is entitled to continued parental support under *Castle v. Castle*, 15 Ohio St. 3d 279 (1984). Mr. Baxter is president of a home security business. Ms. Collette cares for Michael full-time. While Ms. Collette occasionally has worked part-time, she has not been able to maintain outside employment because of Michael's needs.

{¶3} In December 2000, Ms. Collette moved for modification of child support. In April 2005, the court found that Mr. Baxter was voluntarily underemployed. Specifically, it found he was underpaying himself as president of the security company. Taking into consideration the average salary of other chief executives in his industry and the other benefits he was receiving from his company, it determined that his income should be $175,000. It ordered him to pay $2852 per month for child support and $634 per month for Michael's medical expenses. Mr. Baxter appealed, but this Court affirmed the decision. *Collette v. Baxter*, 9th Dist. No. 23195, 2006-Ohio-6555, at ¶1.

{¶4} In September 2005, Mr. Baxter moved to modify child support. He also moved for an accounting of the support, to have Ms. Collette pay child support, to establish a trust for Michael's support, to require Michael to pursue vocational training and employment, and to

require Michael to periodically report to the court regarding his progress. Ms. Collette, meanwhile, moved to show cause, for attorney fees, and for interest on Mr. Baxter's arrearages. In April 2006, she also moved for modification of child support.

{¶5} In April and June 2007, the trial court held a hearing on the parties' motions. On November 17, 2008, it entered judgment granting Ms. Collette's motions and denying Mr. Baxter's motions. It found that Mr. Baxter's income for child support purposes was $313,000 per year and that Ms. Collette's income was $2900. It found that Ms. Collette proved a substantial change in circumstances and that Michael needed as much financial support as possible. It, therefore, increased Mr. Baxter's support obligation to $3750 per month. Because Mr. Baxter had a history of not reimbursing Ms. Collette for Michael's out-of-pocket medical expenses, it added $205 to his monthly obligation for those expenses. In addition, because it found Mr. Baxter in contempt for not reimbursing Ms. Collette for past medical expenses, it ordered him to pay half of her attorney and expert witness fees.

{¶6} On December 1, 2008, Mr. Baxter moved for a new trial. He appealed the trial court's judgment the following day. On December 15, 2008, the court denied his motion for new trial, and, on March 30, 2009, he filed an amended notice of appeal. He has assigned seven errors on appeal.

INCOME DETERMINATION

{¶7} Mr. Baxter's first assignment of error is that the trial court incorrectly determined the parties' income for purposes of the child support calculation. This Court reviews the trial court's determination of child support for an abuse of discretion. *Hyder v. Hyder*, 9th Dist. No. 06CA0014, 2006-Ohio-5285, at ¶21. A trial court abuses its discretion if its "attitude is

unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219 (1983).

{¶8} Mr. Baxter has argued that the court's finding that he "enjoys the lifestyle of a wealthy man" was incorrect and demonstrates that its attitude was unreasonable. To the extent he has argued that the court's finding is not supported by the record, this Court applies the civil-manifest-weight-of-the-evidence standard of review. See *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶24 ("Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.") (quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St. 2d 279, syllabus (1978)). But see *Huntington Nat'l Bank v. Chappell*, 9th Dist. No. 06CA008979, 2007-Ohio-4344, at ¶17-75) (Dickinson, J., concurring)). Considering Mr. Baxter testified that the value of his home is a million dollars, there is some evidence in the record to support the court's finding.

{¶9} Mr. Baxter has also argued that the court did not explicitly find he is voluntarily underemployed before imputing income to him. Section 3119.01(C)(5)(b) of the Ohio Revised Code provides that the "[i]ncome" of a parent who is unemployed or underemployed is "the sum of the gross income of the parent and any potential income of the parent." The "[p]otential income" of a parent who the court "determines is voluntarily unemployed or voluntarily underemployed" includes "[i]mputed income that the court . . . determines the parent would have earned if fully employed." R.C. 3119.01(C)(11)(a).

{¶10} This Court's decisions have been inconsistent regarding whether the trial court must make an explicit finding of voluntary unemployment or underemployment before it may impute income to a party. *Ramskogler v. Falkner*, 9th Dist. No. 22886, 2006-Ohio-1556, at ¶13

(concluding explicit finding is necessary); *Collette v. Baxter*, 9th Dist. No. 23195, 2006-Ohio-6555, at ¶9 (concluding implicit finding was sufficient). It is not necessary to resolve the conflict between those cases at this time because, even if the trial court had to explicitly find that Mr. Baxter is voluntarily underemployed before imputing income to him, it satisfied that requirement. In its decision, the court noted that, in its previous order, it had found Mr. Baxter was "voluntarily underpaying himself." It also found that he had not proven anything had changed since its previous ruling. Accordingly, Mr. Baxter's argument is without merit.

{¶11} Mr. Baxter has also argued that it was improper for the trial court to rely on the testimony of Ms. Collette's financial expert because his opinion was based on the parties' economic information for 2006. According to him, the 2006 information was not relevant. Ms. Collette, however, moved to modify the child support order in April 2006. "When a party moves to modify an existing child-support order . . . the trial court is limited to determining the child support obligation as of the time the motion was filed." *Berthelot v. Berthelot*, 154 Ohio App. 3d 101, 2003-Ohio-4519, at ¶10. Evidence regarding the parties' monthly income for 2006, therefore, was relevant to show whether there had been a change in circumstances since the court's previous order. See R.C. 3119.79(A) (providing that, if recalculation of the amount of child support required indicates a difference of at least ten percent, there has been a change in circumstances substantial enough to require modification of the support order).

{¶12} Mr. Baxter has next argued that the trial court incorrectly relied on the testimony of Ms. Collette's expert. The expert testified that the revenue of Mr. Baxter's company was $3,500,000. He said that, according to an industry survey, the chief executive of a security business typically earns 6.1% of its revenues. For Mr. Baxter that would be around $215,000, which is much greater than the $75,000 salary he was receiving. He said that, between 2000 and

2006, the salary of the other employees had gone up thirteen to thirty-four percent, which was consistent with the growth of the company. He also said that Mr. Baxter had been receiving about $40,000 a year in perks. He said that, considering the value of the company and taking "an absolute conservative approach," the business could afford to pay Mr. Baxter a salary of $255,000. He further said that his calculation did not include the $58,000 that the security company was paying toward the mortgage on Mr. Baxter's house.

{¶13} Mr. Baxter has argued that Ms. Collette's expert was not credible because he only looked at what his reasonable compensation should have been for 2006 instead of his actual earnings for 2003, 2004, or 2005. According to Mr. Baxter, the expert also should have considered that his company performs worse than the industry average. He has further argued that the expert failed to consider that his company had lost its top sales person and that its growth had been up and down between 2000 and 2006.

{¶14} Although Mr. Baxter's expert said that Ms. Collette's expert should have used a lower percentage than the industry study suggested to calculate Mr. Baxter's reasonable compensation, he conceded that he only examined Mr. Baxter's actual earnings and did not estimate what a reasonable salary would be. Having reviewed the record, this Court concludes there was competent, credible evidence to support the trial court's income findings. Mr. Baxter's argument is without merit.

{¶15} Mr. Baxter has further argued that the court should have considered Ms. Collette's assets in determining the parties' income. He has argued that she could divest herself of her real estate investments and realize a 12% rate of return, generating over $78,000 per year.

{¶16} The definition of "[g]ross income" under Section 3119.01(C)(7) of the Ohio Revised Code includes "potential cash flow from any source." The court acknowledged that it

could include Ms. Collette's non-income producing assets as part of her income, but determined it would be inequitable since it had not imputed a rate of return on Mr. Baxter's non-income producing equity in the security company. Considering that the court found that Ms. Collette had tried, but had been unable to sell her properties and that their expenses were causing her economic distress, its decision not to include them in her income was a proper exercise of discretion. Mr. Baxter's first assignment of error is overruled.

EXTRAORDINARY EXPENSES

{¶17} Mr. Baxter's second assignment of error is that the trial court incorrectly considered extraordinary expenses that Michael had not incurred. He has argued that the court failed to consider that Michael no longer has some of the expenses that Ms. Collette said he would have at the time of the last support order. He, therefore, has argued that there was no need for the court to deviate from the child support schedule.

{¶18} The court found that Mr. Baxter's income was $313,000 and Ms. Collette's was $2900. Section 3119.04(B) of the Ohio Revised Code provides that, "[i]f the combined gross income of both parents is greater than one hundred fifty thousand dollars per year, the court, with respect to a court child support order, . . . 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." This Court has held that, "[if] the income of the parents is greater than $150,000, the appropriate standard for the amount of child support is 'that amount necessary to maintain for the children the standard of living they would have enjoyed had the marriage continued.'" *Maguire v. Maguire*, 9th Dist. No. 23581, 2007-Ohio-4531, at ¶12 (quoting *Berthelot v. Berthelot*, 154 Ohio App. 3d 101, 2003-Ohio-4519, at ¶24).

{¶19} The trial court found that, if the parties had stayed married, "Michael would be denied nothing that would assist him, and [Ms. Collette] would be staying home and caring for him." It concluded that "[t]he need for [Ms. Collette] to stay at home and care for Michael is a sufficient justification to deviate upward from the child support guidelines to assist her in supporting Michael." Considering Ms. Collette's and Michael's expenses, including Michael's out-of network medical expenses, physical therapy, education classes, housing, food, clothing, and many other expenses, it determined that an annual child support obligation of $45,000 would place Michael "well within the standard of living which [he] would have enjoyed had his parents remained married."

{¶20} Ms. Collette testified that Michael sees the doctor who spearheads his treatment two to three times a month. The doctor, however, is out-of-network. She said he also receives physical therapy and botox treatments, is a member of a fitness center, and takes classes at a community college. She said that, because he cannot be left alone for long periods of time, she needs to hire someone to watch him if she leaves the house. She also said that, because he picks his clothes apart, she has to buy new clothes frequently, including new shoes each month. Moreover, because he has a brace on one foot that makes his shoe sizes different, she has to buy two pairs of shoes each time.

{¶21} While Ms. Collette may have been incorrect about some of the expenses Michael would have the last time the court considered child support, its finding regarding Michael's needs in 2006 was not against the manifest weight of the evidence. The court did not improperly exercise its discretion when it ordered Mr. Baxter to pay $3750 per month in child support. His second assignment of error is overruled.

MEDICAL EXPENSES

{¶22} Mr. Baxter's third assignment of error is that the court incorrectly ordered him to pay 99% of Michael's medical expenses. He has not offered any argument, however, in support of the assignment. This Court will not develop an argument for an appellant who fails to make one for himself. See App. R. 16(A)(7). His third assignment of error is overruled.

{¶23} Mr. Baxter's fourth assignment of error is that the court incorrectly failed to credit him for paying Michael's extraordinary medical expenses. He has argued that the previous support order required him to pay expenses that had not yet been incurred and that did not materialize. He has also argued that part of the reason the court deviated upward in its prior support order was because of Michael's medical expenses. According to him, even though medical expenses were the reason for the higher support obligation, the court found him in contempt for not reimbursing Ms. Collette for medical expenses Michael had incurred on top of what he was already paying.

{¶24} In its April 2005 order, the trial court determined that "guideline child support would not be just" because "Michael requires full time care," noting that he requires speech, physical, and occupational therapy. It concluded that he "needs as much financial support as possible" to pay for those expenses and provide him with the heightened standard of living that he would have had if the parties had remained married. The court specifically noted that the support it was ordering included $500 per month for Dr. Cole and $634 for therapy. It also ordered Mr. Baxter to pay his share of any expenses above those limits and for any extraordinary bills. The parties had defined extraordinary medical expenses as any non-covered expenses incurred each year after Ms. Collette paid the first $100. The court directed Ms. Collette to file a motion if she wanted Mr. Baxter to reimburse her "for unpaid out-of-pocket expenses incurred

for the benefit of Michael which [Mr. Baxter] has failed to pay his share of since December 2000." Ms. Collette moved to be reimbursed for those expenses in November 2005.

{¶25} Ms. Collette testified that her previous estimate that Dr. Cole charged $500 per month and that Michael's therapy cost $634 per month was still accurate. She also said that Mr. Baxter had not reimbursed her for any of her out-of-pocket medical expenses. Although Mr. Baxter has argued that her estimate regarding those expenses was too high, he has not directed this Court to any evidence in the record to support his claim.

{¶26} Although the court incorporated some of Michael's medical expenses into its 2005 support award, it did not say that Mr. Baxter did not have to pay any other medical expenses. It specifically left open the possibility that he would have to reimburse Ms. Collette for the out-of-pocket medical expenses Michael had incurred since 2000. It calculated the amount of the 2005 support award based, not only on some of Michael's recurring medical expenses, but also on the standard of living he would have enjoyed had the parties remained married. Mr. Baxter, therefore, has failed to show that the court exercised improper discretion when it directed him to reimburse Ms. Collette for Michael's extraordinary medical expenses.

{¶27} Mr. Baxter has also made several arguments unrelated to his assignments of error. He has argued that he has been marginalized from Michael's life, noting that he asked the court to appoint a guardian ad litem and for a visitation order. In its decision, the court acknowledged that Mr. Baxter had moved for appointment of a guardian ad litem and a visitation order, but refused to consider those motions because he did not serve them on Ms. Collette. He has not shown that its decision was incorrect.

{¶28} Mr. Baxter has also argued that Ms. Collette is not getting Michael all the help that she could and is not acting in his best interest. He, therefore, has argued that his child

support payments should be paid either directly to Michael or placed in trust to ensure that they are being used for Michael's benefit.

{¶29} At the time of their dissolution, the parties entered into a shared parenting plan, providing that Ms. Collette would be the primary residential parent of their minor children. Since Michael is physically and mentally handicapped, it is as if he never reached the age of majority. *Wiczynski v. Wiczynski*, 6th Dist. No. L-05-1128, 2006-Ohio-867, at ¶23; *Abbas v. Abbas*, 128 Ohio App. 3d 513, 517 (1998). Ms. Collette testified that Michael is "in every single possible thing he could be in" and that she had not refused any publicly available therapy or service for him. This Court concludes that Mr. Baxter has not shown that the court incorrectly denied his motion to establish a trust. His fourth assignment of error is overruled.

CONTEMPT OF COURT

{¶30} Mr. Baxter's fifth assignment of error is that the trial court incorrectly found him in contempt of court for not reimbursing Ms. Collette for Michael's medical bills because Ms. Collette did not request reimbursement. He has noted that the court's April 2005 order provided that Ms. Collette "shall file an appropriate motion . . . should she desire reimbursement . . . for unpaid out-of-pocket expenses incurred for the benefit of Michael . . . ." He has argued that it was improper for the court to find him in contempt because she never filed such a motion.

{¶31} Because the court found Mr. Baxter in contempt, it ordered him to pay half of Ms. Collette's attorney fees and expenses. Since the alleged contempt occurred outside of court and the court's sanction was intended to punish instead of remedy a situation, it involves indirect criminal contempt. See *Estate of Harrold v. Collier*, 9th Dist. No. 07CA0074, 08CA0024, 2009-Ohio-2782, at ¶12-13. "Indirect criminal contempt must be proven beyond a reasonable doubt." *Id*. at ¶17. "The opposing party has the burden to prove the existence of a valid court order, the

alleged contemnor's knowledge of the order, and a violation of it." *Id*. "Criminal, indirect contempt also requires a showing that the alleged contemnor intended to defy the court." *Id*. "A contemnor is presumed to intend the reasonable, natural, and probable consequences of his acts." *Id*. (quoting *State v. Daly*, 2d Dist. No. 2007 CA 26, 2007-Ohio-5170, at ¶51).

{¶32} As this Court has previously noted, Ms. Collette moved for reimbursement of Michael's out-of-pocket medical expenses in November 2005. Moreover, the April 2005 order also directed Mr. Baxter to "pay his respective share of all . . . bills qualifying under the 'extraordinary' classification as defined in the parties Shared Parenting Plan . . . within thirty days of receiving written notice from [Ms. Collette] of the outstanding bills and a representation of the amount he is responsible for paying . . . ." In November 2005, Ms. Collette submitted an affidavit stating that she had incurred $8188 in out-of-pocket medical expenses for Michael since December 2000. In its November 2008 judgment, the trial court found that, as of July 26, 2007, her out-of-pocket medical expenses since 2000 were $16,190. Ms. Collette testified that she "sent those bills to [Mr. Baxter]," and he has not contested the court's finding that he has not paid anything for Michael's out-of-pocket medical expenses since before 2000. Accordingly, because Mr. Baxter admitted not paying for any of the extraordinary medical expenses Michael incurred after April 2005, even though the court's judgment ordered him to do so, this Court concludes that there is sufficient evidence in the record to support the trial court's finding of contempt. Furthermore, the court's contempt finding is not against the manifest weight of the evidence. Mr. Baxter's fifth assignment of error is overruled.

ACCOUNTING OF CHILD SUPPORT

{¶33} Mr. Baxter's sixth assignment of error is that the trial court incorrectly declined to provide for monitoring of Michael's support to ensure that it is used for him. According to Mr.

Baxter, although courts generally do not allow monitoring of child support, an exception exists for "*Castle* children." He has failed to cite any authority, however, that supports his argument. His sixth assignment of error is overruled

NEW TRIAL

{¶34} Mr. Baxter's seventh assignment of error is that the trial court incorrectly denied his motion for new trial. In his motion, Mr. Baxter argued that the court's decision was stale because 17 months had passed between the hearing and its decision.

{¶35} The day after he moved for a new trial, Mr. Baxter appealed the court's judgment. The filing of a notice of appeal divests a trial court of jurisdiction "except upon issues not inconsistent with the jurisdiction of the appellate court to review, affirm, modify or reverse the judgment." *Karson v. Ficke*, 9th Dist. No. 01 CA 3252-M, 2002-Ohio-4528, at ¶7 (citing *State ex rel. State Fire Marshal v. Curl*, 87 Ohio St. 3d 568, 570 (2000)). This Court has held that a motion for new trial under Rule 59 of the Ohio Rules of Civil Procedure "is inconsistent with a notice of appeal of the judgment sought to be vacated or retried." *Majnaric v. Majnaric*, 46 Ohio App. 2d 157, 159 (1975). In addition, Mr. Baxter did not ask this Court to stay these proceedings and confer jurisdiction on the trial court to consider his motion for new trial. See *Karson*, 2002-Ohio-4528, at ¶8. Accordingly, the court was without jurisdiction to rule on his motion. *Id*. Mr. Baxter's seventh assignment of error is overruled.

CONCLUSION

{¶36} The trial court exercised proper discretion when it calculated the parties' income, determined Mr. Baxter's support obligation, ordered him to reimburse Ms. Collette for Michael's out-of-pocket medical expenses, and denied his request for an accounting of support. Its finding of contempt is supported by sufficient evidence and is not against the manifest weight of the

evidence. Its denial of Mr. Baxter's motion for new trial is inconsequential because it did not have jurisdiction to rule on it. The judgment of the Summit County Common Pleas Court, Domestic Relations Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

JOHN DOHNER, attorney at law, for appellant.

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