[Cite as *Buttolph v. Buttolph*, 2009-Ohio-6909.]

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

KIMBERLY J. BUTTOLPH	C. A. No. 09CA0003
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RAYMOND D. BUTTOLPH, JR.	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellant	CASE No. 03-DI-0429

DECISION AND JOURNAL ENTRY

Dated: December 30 2009

BELFANCE, Judge.

{¶1} Defendant-Appellant Raymond D. Buttolph, Jr. ("Father") appeals the decision of the Wayne County Court of Common Pleas, Domestic Relations Division. For reasons set forth below, we affirm in part and reverse in part.

FACTS

{¶2} Father married Plaintiff-Appellee Kimberly J. Buttolph ("Mother") in 1996. The parties have one minor child. The parties filed a petition for dissolution in September 2003. During the proceedings, Mother was represented by counsel but Father was not. A decree of dissolution was granted in November 2003, which adopted the parties' separation agreement and shared parenting plan. The parties agreed that Father would be excused from paying child support for twenty-four months, at which point the parties could mutually agree on a figure, or if necessary have the court resolve the issue. The shared parenting plan provided that Mother

would be the residential parent for school purposes and provided for the following concerning Father's parenting time:

> "[T]he standard order of companionship and parenting time, alternating weekends and one evening per week for a few hours would not be in the child's best interest, and they agree to work together to try and effect a more liberal and nurturing schedule. * * * Provided, the parties agree that Father shall have no less time than two days per week during the work week, and alternating weekends from Friday evening at 6 p.m. through Sunday evening at 6 p.m. This schedule shall be at a minimum, and additional companionship shall be arranged pursuant to mutual agreement of the parties, taking into account the needs and schedules of the child and both parents."

From the record it appears that prior to 2006 Mother and Father had a mutually agreeable, but variable schedule that included Father taking the child for a couple of days a week including overnights. Mother claims that changed in 2006 and that Father started requesting to spend less time with the child. However, at this point Mother was still permitting Father to have overnight visits with the child. In the fall of 2007, the child started kindergarten and Mother's girlfriend moved into Mother's home. Mother claims that she and Father agreed that Father would only spend one evening a week with the child not including overnight, as such was in the best interest of the child due to her school schedule. Father claims he never agreed to this, but that Mother just began refusing to let Father take the child overnight.

{¶3} In December 2007, Mother began to seek child support from Father. Father then filed a motion to modify custody and later filed two motions for contempt against Mother alleging that Mother failed to comply with the shared parenting plan. Mother moved the court to modify previous orders concerning "the allocation of parental rights and responsibilities, including but not limited to child support." Mother also filed a motion for contempt against Father claiming Father had not paid certain daycare and medical expenses. Father then dismissed his motion to modify custody. However, Mother then filed a motion asking the court

to issue an order "clarifying the meaning and intent of the parties' original Shared Parenting Plan, and/or in the alternative, establishing a parenting time schedule it believes is in the best interest of the minor child[.]"

{¶4} The magistrate held a hearing and issued a written report and proposed decision. The magistrate found the parties' shared parenting plan detailing Father's parenting time with the child to be confusing. However, the magistrate concluded that "any potential confusion" was "outweighed by [Mother's] determination that it is not in the child's best interest while attending school, that there be overnight parenting time during the week." The magistrate went on to state that neither Mother nor Father should be held in contempt and that Mother's motion for attorney fees should be denied. The magistrate ordered that Father would spend two evening a week with the child and provided that if the parties could not agree on the days, it would be Tuesdays and Thursdays until 8 p.m. The magistrate examined the child support figures computed by the Wayne County Child Support Enforcement Agency and concluded that an annuity Mother received for pain and suffering following a childhood accident should not be included in Mother's income for purposes of determining appropriate child support. The magistrate found that Father should pay Mother $366 per month from April 1, 2008, as well as money toward an arrearage. Both Father and Mother filed objections to the magistrate's decision and a transcript of the hearing.

{¶5} The trial court stated in a brief December 15, 2008 entry that "[t]he court finds the objections should be overruled." Father appealed from this entry and we issued an order questioning the finality of the trial court's entry as it failed to set forth the trial court's judgment and the resolution of the dispute, and we thus required the issuance of a final, appealable order. The trial court issued an additional judgment entry overruling the parties' contempt motions,

overruling Mother's motion for attorney fees, ordering Father to reimburse Mother for medical expenses and ordering Mother to provide an itemization of the medical expenses to Father, modifying the shared parenting plan to exclude overnight parenting time by Father during the week, and ordering Father to pay $366 per month in child support, as well as paying money toward the arrearage. The trial court overruled all of the parties' objections.

{¶6} It is from this entry that Father has appealed, raising one assignment of error.

STANDARD OF REVIEW

{¶7} We generally review a trial court's action with respect to a magistrate's decision for an abuse of discretion. See *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. In so doing, we review the trial court's action with reference to the nature of the underlying matter. Thus, when we are asked to review questions of law, our review is de novo. *Porter v. Porter*, 9th Dist. No. 21040, 2002-Ohio-6038, at ¶5.

MODIFICATION OF SHARED PARENTING PLAN

{¶8} In a portion of Father's sole assignment of error, Father argues that the trial court erred in modifying the parties' shared parenting plan. Mother asserts that the trial court did not err in modifying the shared parenting plan, or in the alternative alleges that the trial court did not modify the plan, but instead clarified its meaning. We conclude that the trial court did modify the shared parenting plan and erred when it did so for the following reasons.

{¶9} We do not believe that the trial court merely clarified the meaning of the shared parenting plan. As stated above, the parties' shared parenting plan provided that:

> "[T]he standard order of companionship and parenting time, alternating weekends and one evening per week for a few hours would not be in the child's best interest, and they agree to work together to try and effect a more liberal and nurturing schedule. * * * Provided, the parties agree that Father shall have no less time than two days per week during the work week, and alternating weekends from Friday evening at 6 p.m. through Sunday evening at 6 p.m. This schedule

> shall be at a minimum, and additional companionship shall be arranged pursuant to mutual agreement of the parties, taking into account the needs and schedules of the child and both parents."

Mother contends that the agreement does not provide Father with overnight visits during the week. Father contends that a "day" means a twenty-four-hour period and includes overnight.

> "When parties dispute the meaning of a clause in their separation agreement, a trial court must first determine whether the clause is ambiguous. A clause is ambiguous where it is subject to more than one interpretation. When a clause in a separation agreement is deemed to be ambiguous, a trial court has the responsibility to interpret it. A trial court has broad discretion in clarifying ambiguous language by considering the parties' intent and the equities involved. A trial court's decision interpreting ambiguous language in a separation agreement will not be overturned on appeal absent an abuse of discretion. However, where the terms of a separation agreement are unambiguous, a trial court may not clarify or interpret those terms." (Internal quotations and citations omitted.) *Waggoner v. Waggoner*, 2nd Dist. No. 2002-CA-126, 2003-Ohio-4719, at ¶16.

While the magistrate's decision concludes that the shared parenting plan is confusing and the intent of the parties is unclear, the trial court's decision does not mention any ambiguity in the plan. Instead, the trial court specifically stated that "[t]he shared parenting plan in effect shall be modified so that the parenting time of [Father] shall not be overnight during the school week unless specifically agreed to by the parties. If the parties are unable to agree on the two days per the school week, they shall be Tuesdays and Thursdays from one half hour after school until 8 p.m." Thus, because the trial court did not state that it found the language of the plan to be ambiguous, and thus in need of clarification, it is apparent that the trial court believed it was modifying the plan and not simply clarifying it. Furthermore, the trial court's journal entry contains an express determination that the shared parenting plan "shall be modified." Therefore we turn to examining whether the trial court's modification of the shared parenting plan was appropriate.

{¶10} R.C. 3109.04 provides the framework for both analyses involving modifications to a prior decree allocating parental rights and responsibilities for the care of children, R.C. 3109.04(E)(1)(a), and modifications to the terms of the plan for shared parenting, R.C. 3109.04(E)(2)(b). In *Gunderman v. Gunderman*, 9th Dist. No. 08CA0067-M, 2009-Ohio-3787, at ¶23, we examined both R.C. 3109.04(E)(1)(a) and R.C. 3109.04(E)(2)(b) and Supreme Court of Ohio precedent and concluded that when "a party files a motion to modify parenting time under a shared parenting plan, the party is seeking a reallocation of parental rights and responsibilities issued under a prior order or decree as opposed to a change in a term of the parties' shared parenting plan. Therefore such a motion must be considered under R.C. 3109.04(E)(1)(a)." As the trial court modified the parenting time under the original shared parenting plan, in this case, from the nearly fifty-fifty split that the parties operated under pursuant to the original plan, R.C. 3109.04(E)(1)(a) applies to this case. "When reviewing whether a trial court correctly interpreted and applied a statute, an appellate court employs the de novo standard as it presents a question of law." *Nigro v. Nigro*, 9th Dist. No. 04CA008461, 2004-Ohio-6270, at ¶6.

{¶11} "[B]efore a modification can be made pursuant to R.C. 3109.04(E)(1)(a), the trial court must make a threshold determination that a change in circumstances has occurred. See *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, syllabus. If a change of circumstances is demonstrated, the trial court must then determine whether the modification is in the best interest of the child. Id." *Gunderman* at ¶9. Pursuant to R.C. 3109.04(E)(1)(a):

> "[t]he court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting

> decree, and that the modification is necessary to serve the best interest of the child. * * * ."

{¶12} Here, neither the magistrate nor the trial judge made the requisite finding in either entry that there was a change of circumstances. Neither entry even mentions R.C. 3109.04 at all. Without finding a change in circumstances, a trial court cannot modify a shared parenting plan under R.C. 3109.04(E)(1)(a). *Fischer* at syllabus. We thus conclude Father's argument has merit.

CONTEMPT

{¶13} In the second portion of Father's assignment of error he asserts that the trial court erred in not holding Mother in contempt for violating the shared parenting plan. The magistrate concluded that "[b]ased upon the evidence presented, the Magistrate cannot recommend that [Mother] be found in contempt." While Father objected to several portions of the magistrate's decision, he did not object to the magistrate's conclusion that Mother should not be held in contempt. We conclude that Father forfeited this argument.

{¶14} "Rule 53 of the Ohio Rules of Civil Procedure governs proceedings before a magistrate and the trial court's duties in adopting or rejecting a magistrate's rulings. Rule 53(D)(3)(b)(iv) provides that, except for a claim of plain error, a party forfeits the right to assign error on appeal with respect to the trial court's adoption of any factual finding or legal conclusion "'unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).'" *Ilg v. Ilg*, 9th Dist. No. 23987, 2008-Ohio-6792, at ¶6. "The failure to raise this matter before the trial court deprived the court of an opportunity to correct any errors and forfeits the right to challenge those issues on appeal." Id. Therefore, Father cannot now assert this as error on appeal.

CHILD SUPPORT AND MOTHER'S ANNUITY

{¶15} In the last portion of Father's assignment of error he alleges that the trial court erred in ordering child support without evidence that it was in the child's best interest or that there was a change in circumstances. However, Father's brief only contains one sentence alleging that any award of child support was improper, and Father cites no law for this proposition. It is Father's duty to present an argument with citations to authorities and the record. See App.R. 16(A)(7). Thus, to the extent Father alleges that any award of child support was improper, we do not address it.

{¶16} However, within this same portion of Father's assignment of error, Father does sufficiently argue that Mother's annuity she receives monthly for pain and suffering from a childhood accident should have been included as gross income in determining the appropriate child support amount. We agree. Whether Mother's annuity should be included in her gross income for purposes of calculating child support is a question of law which we review de novo. See, e.g., *Porter* at ¶5.

{¶17} Here, the magistrate properly noted that "[t]he Revised Code provides that payments from annuities are income for purposes of child support calculations." Nonetheless, the magistrate concluded that the annuity should not have been included as income essentially because "[Mother] testified the annuity is for pain and suffering and is not income" and "[Father] presented no position" on the issue and did not try to include the annuity on the initial worksheet attached to the petition for dissolution. The trial court did not specifically mention whether the annuity should be included as gross income, but did conclude that Father should pay child support in the amount the magistrate found would be appropriate if the annuity was not included.

Moreover, the trial court specifically overruled Father's objections, one of which was that the annuity be included in child support calculations.

{¶18} For purposes of computing child support,

Gross income is broadly defined to include:

> "the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable, and includes income from salaries, wages, overtime pay, and bonuses to the extent described in division (D) of section 3119.05 of the Revised Code; commissions; royalties; tips; rents; dividends; severance pay; pensions; interest; trust income; *annuities*; social security benefits, including retirement, disability, and survivor benefits that are not means-tested; workers' compensation benefits; unemployment insurance benefits; disability insurance benefits; benefits that are not means-tested and that are received by and in the possession of the veteran who is the beneficiary for any service-connected disability under a program or law administered by the United States department of veterans' affairs or veterans' administration; spousal support actually received; and all other sources of income. 'Gross income' includes income of members of any branch of the United States armed services or national guard, including, amounts representing base pay, basic allowance for quarters, basic allowance for subsistence, supplemental subsistence allowance, cost of living adjustment, specialty pay, variable housing allowance, and pay for training or other types of required drills; self-generated income; and potential cash flow from any source." (Emphasis added.) R.C. 3119.01(C)(7).

However, gross income does not include the following:

> "(a) Benefits received from means-tested government administered programs, including Ohio works first; prevention, retention, and contingency; means-tested veterans' benefits; supplemental security income; supplemental nutrition assistance program; disability financial assistance; or other assistance for which eligibility is determined on the basis of income or assets;
>
> "(b) Benefits for any service-connected disability under a program or law administered by the United States department of veterans' affairs or veterans' administration that are not means-tested, that have not been distributed to the veteran who is the beneficiary of the benefits, and that are in the possession of the United States department of veterans' affairs or veterans' administration;
>
> "(c) Child support received for children who were not born or adopted during the marriage at issue;
>
> "(d) Amounts paid for mandatory deductions from wages such as union dues but not taxes, social security, or retirement in lieu of social security;

> "(e) Nonrecurring or unsustainable income or cash flow items;
>
> "(f) Adoption assistance and foster care maintenance payments made pursuant to Title IV-E of the 'Social Security Act,' 94 Stat. 501, 42 U.S.C.A. 670 (1980), as amended." R.C. 3119.01(C)(7).

Further, the Ohio Revised Code provides that:

> "'Nonrecurring or unsustainable income or cash flow item' means an income or cash flow item the parent receives in any year or for any number of years not to exceed three years that the parent does not expect to continue to receive on a regular basis. 'Nonrecurring or unsustainable income or cash flow item' does not include a lottery prize award that is not paid in a lump sum or any other item of income or cash flow that the parent receives or expects to receive for each year for a period of more than three years or that the parent receives and invests or otherwise uses to produce income or cash flow for a period of more than three years." R.C. 3119.07(C)(8).

{¶19} Given that the statute specifically provides that annuities constitute gross income and that an annuity is by definition recurring income, Mother's annuity falls squarely within the definition of gross income for purposes of calculating child support and does not fall within any of the excepted items. R.C. 3119.01(C)(7). The statutory definition of gross income is extremely broad and includes both taxable and non-taxable income and includes "potential cash flow from any source[]" that is not otherwise excluded. Id. Thus, the trial court erred in failing to include Mother's annuity as gross income for purposes of calculating child support. Accord *Naser v. Naser* (Oct. 13, 1987), 2nd Dist. No. CA 10341, at *1, *3 (concluding that a structured insurance settlement from a motorcycle accident was properly included by the trial court in making a child support determination).

{¶20} Mother argues that "[s]ince the parties excluded the annuity in the initial calculations and [Father] has done nothing to modify his position, he should not be heard to complain now since the court did not utilize the annuity for purposes of calculating a change in what transpired between now and then." Mother asserts this falls within the invited error doctrine. We disagree.

{¶21} "Under the invited error doctrine, a party is not 'permitted to take advantage of an error which he himself invited or induced the trial court to make.'" *State v. Carswell*, 9th Dist. No. 23119, 2006-Ohio-5210, at ¶21, quoting *State ex rel. Bitter v. Missig* (1995), 72 Ohio St.3d 249, 254. We do not see how Father "invited or induced" the trial court to exclude the annuity when he in fact objected to the magistrate's decision which did not include it. Id. Thus, we conclude Father's argument has merit.

CONCLUSION

{¶22} In light of the foregoing, we sustain Father's assignment of error in part and overrule it in part.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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 Wayne, 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 both parties equally.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
CONCURS, IN PART, AND DISSENTS, IN PART, SAYING:

{¶23} I agree with the majority's resolution of the issue regarding the modification of the parties' shared parenting plan. I respectfully dissent, however, in regard to the majority's consideration of the issue of child support. Because this Court is remanding the matter for the trial court's determination of whether a change of circumstances exists to support a modification of the shared parenting plan, the issue of child support is not yet ripe for our consideration.

APPEARANCES:

L. RAY JONES, Attorney at Law, for Appellant.

LON R.VINION, Attorney at Law, for Appellee.