[Cite as *Vengrow v. Vengrow*, 2010-Ohio-2568.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
KATHERINE VENGROW nka KATHERINE SUNDAY Appellee/Cross-Appellant v. JEFFREY VENGROW Appellant/Cross-Appellee	C.A. No. 24907 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2001-08-03301

DECISION AND JOURNAL ENTRY

Dated: June 9, 2010

CARR, Judge.

{¶1} Appellant/cross-appellee, Jeffrey Vengrow, appeals the judgment of the Summit County Court of Common Pleas, Domestic Relations Division, which modified his spousal support and child support obligations. Appellee/cross-appellant, Katherine Sunday, appeals from the same order. This Court affirms, in part, and reverses, in part.

I.

{¶2} Jeffrey Vengrow (hereinafter referred to as "Husband") and Katherine Vengrow, nka Katherine Sunday (hereinafter referred to as "Wife"), were divorced by decree filed February 25, 2003. The parties had three children. Their oldest son, Aaron, was born on January 1, 1984, and was emancipated at the time of the divorce. Their only daughter, Danika, was born on February 13, 1987, and was not emancipated at the time of the divorce but became emancipated upon her graduation from high school in May 2005. Their youngest son, Nathaniel, was born on May 30, 1989, and became emancipated on his birthday in 2008.

{¶3} The divorce decree stated that the parties had reached an agreement which provided that Husband would pay $3,100 per month in spousal support commencing November 1, 2002, and payable for 66 months. The spousal support award in the decree was based on Husband's income from salary of $120,000, income from a rental property, and no income received or imputed to Wife. The agreed upon decree further provided that Husband would pay $550 for each of their two minor children, for a total of $1,100 per month, commencing November 1, 2002. The support payments totaled $4,200 per month. The decree contained a specific provision that the spousal support obligation would be reviewed by the trial court after 24 months. The decree further provided that at the time the court reviewed the spousal support award after the passage of 24 months, the court was to consider Wife's actual income if it was greater than $20,000 per year or impute no less than $20,000 to Wife. Husband was also paying tuition, room and board for the parties' adult son, and therefore the bonus Husband received from his employer had not been used to determine the amount of spousal support.

{¶4} The trial court conducted a hearing in 2005 and subsequently issued an order on May 3, 2005. The agreed upon order modified Husband's obligation to pay child support and spousal support. The order provided that Husband was to have no obligation to contribute to the college education expenses for any of the parties' children. The order stated that, commencing January 1, 2005, and continuing until March 31, 2006, Husband's obligation to pay spousal support was modified to $2,642 per month and Husband's child support obligation was modified to a total of $781 per month. The Summit County CSEA was ordered to commence deducting the modified amount on May 1, 2005, and to terminate said deduction on May 31, 2006. The agreed upon modifications were based on several facts including that Husband's employment had terminated effective March 31, 2005, that he would continue to receive his salary through

March 31, 2006, and that $20,000 of income was imputed to Wife. The order also reflected the fact that Husband's obligation to support Danika would terminate upon her graduation from high school in May 2005. The order further provided that the trial court would conduct a hearing on February 27, 2006, "to determine [Husband's] remaining obligation for spousal support and child support commencing April 1, 2006, based upon [Husband's] income at that time."

{¶5} The trial court subsequently conducted a hearing on February 27, 2006, regarding support issues but never issued an order modifying Husband's obligations. The trial court noted that confusion developed between the court and counsel as to whether an agreement had been reached with regard to support issues. Husband continued to make child support payments of $390.50 per month from March 2006 until April 2008. He did not make spousal support payments past March 2006.

{¶6} The trial court conducted another hearing on July 23, 2008, regarding support issues. On July 10, 2009, the trial court issued a journal entry in which it ordered Husband to pay child support for Nathaniel in the amount of $781 per month commencing April 1, 2006, and payable until Nathaniel's 19th birthday on May 30, 2008; that Wife is granted judgment against Husband in the amount of $781, representing one payment of child support not made by Husband; and that Husband shall pay $653 per month plus 2% processing fee as for spousal support for a period of 25 consecutive months commencing August 1, 2009.

{¶7} Husband appeals from that order, raising three assignments of error. Wife appeals from the same order, raising one cross-assignment of error.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED BY MODIFYING THE APPELLANT'S CHILD SUPPORT OBLIGATION WHEN THAT ISSUE WAS NOT BEFORE THE COURT AND THE PARTIES STIPULATED REGARDING THE APPELLANT'S CHILD SUPPORT OBLIGATION."

{¶8} In his first assignment of error, Husband argues that the trial court erred in modifying his child support obligation when that issue was not before the court in light of stipulations made by the parties. This Court agrees.

{¶9} In support of his first assignment of error, Husband argues that the parties placed several stipulations on the record at the July 23, 2008 hearing. According to Husband, one of the stipulations was that he had completely paid his child support obligation through Nathaniel's emancipation, with the exception of April and May, 2008, for which he owed the total sum of $781. It follows, Husband argues, that the issue of child support payments was not properly before the trial court in light of this stipulation. Wife contends that while she stipulated in good faith to child support payments which Husband had made, she did not forgo the trial court's previous order which indicated that it would reconsider Husband's child support obligations based upon his actual income.

{¶10} This Court has stated that "[a] stipulation is defined as a voluntary agreement, admission, or concession, made in a judicial proceeding by the parties or their attorneys concerning disposition of some relevant point so as to eliminate the need for proof or to narrow the range of issues to be litigated." *Baum v. Baum* (Nov. 26, 1997), 9th Dist. No. 97CA0022, citing *Burdge v. Bd. of Cty. Commrs*. (1982), 7 Ohio App.3d 356, 358, quoting Black's Law Dictionary (5 Ed.1979). The First District has stated:

> "A stipulation between contesting parties evidences an agreement between them ***. To the extent that a stipulation jointly made represents an agreed statement of the facts material to the case, it is a substitute for the evidence which would otherwise have to be adduced in open court. Resultantly, when a stipulation of facts is handed up by the adversaries in a case, the trier of facts must accept what is set forth as a statement of settled fact that is undisputed and binding upon the parties to the agreement." *Newhouse v. Sumner* (Aug. 6, 1986), 1st Dist. No. C-850665, citing 50 Ohio Jurisprudence 2d (1961), stipulations, Sections 9-11.

{¶11} At the July 23, 2008 hearing regarding support issues, counsel for Wife stated, "Mr. Vengrow has paid and we have stipulated to the exhibit indicating that he has paid all of his child support and there is an overpayment of that four thousand six hundred some, less the *** seven eighty one that we have stipulated to. So, he's complied with that." A joint exhibit of the parties indicated that Husband had paid $390.50 per month in child support payments from April 1, 2006, through April 1, 2008. Counsel for both parties had previously agreed on the record that Husband still owed $781 dollars for two months of child support for Nathaniel. In light of the joint exhibit as well as the statements of the attorneys made on the record, it appears that the parties stipulated to the fact that Husband had satisfied his child support obligation with the exception of two payments totaling $781.

{¶12} In its July 10, 2009 journal entry, the trial court stated, "The parties stipulated that Defendant's child support obligation was terminated one month too soon and that Defendant owes Plaintiff $781 to completely satisfy his child support obligation for Nate." The July 10, 2009 journal entry contained the following two orders which dealt with child support:

> "1. The child support for Nate of $781 per month plus processing fee commencing April 1, 2006 and payable until Nate's 19th birthday on May 30, 2008 is approved and made an order of the court.
>
> "2. [Wife] is granted judgment against [Husband] in the amount of $781 representing one payment of child support not made by Defendant. This amount was stipulated to by the parties."

{¶13} The contents of the journal entry seem to indicate that the aforementioned orders were put in place to compensate for the fact that the trial court did not issue an order after the hearing which occurred on February 27, 2006. The second order appears to reflect the stipulation by the parties that Husband still owed $781 to completely satisfy his child support obligation. Given the nature of the second order, it appears the trial court put the first order in

place only because no previous order had been issued governing child support payments from April 2006 though May 2008.

{¶14} While it is not completely clear, it appears that the trial court attempted to incorporate the stipulated agreement between the parties in its journal entry but misstated several terms. The statements of the attorneys at the hearing, as well as the joint exhibit filed by the parties, indicates that Husband paid $390.50 per month in child support payments from April 1, 2006, through April 1, 2008. The parties seem to have agreed that Husband owed Wife $781, or two months worth of payments, to completely satisfy his child support obligation. To the extent that the trial court's order does not reflect the stipulated agreement of the parties, the case must be remanded. The first assignment of error is sustained.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED BY FAILING TO GRANT TO THE APPELLANT A CREDIT TOWARD HIS SUPPORT OBLIGATIONS IN THE AMOUNT OF $4,469.90 AS STIPULATED BY THE PARTIES."

{¶15} In his second assignment of error, Husband argues the trial court erred by failing to grant him a credit toward his support obligations in the amount of $4,469.90 as stipulated by the parties. This Court agrees.

{¶16} Husband argues that the parties stipulated that he had overpaid his support obligations in the amount of $4,469.90 as evidenced in joint exhibit 1. Wife does not deny that this stipulation was made. Rather, Wife contends that when the trial court modified Husband's child support and spousal support obligations, the "overpayment" was no longer accurate. Wife continues that the trial court could have referred this matter to the Summit County Child Support Enforcement Agency for an accounting based upon the modifications.

{¶17} The trial court did not issue an order indicating Husband was owed a credit based on overpayment. As noted above, counsel for Wife stated at the hearing that "Mr. Vengrow has paid and we have stipulated to the exhibit indicating he has paid all of his child support and there is an overpayment of that four thousand six hundred some, less the ***seven eighty one that we have stipulated to." The joint exhibit filed by the parties indicated a "Total Balance" of -$4,469.90 as of April 18, 2008. There is no dispute that the parties stipulated to an overpayment based upon the facts before them at the time of the hearing. On remand, the trial court should incorporate into its judgment entry an accurate statement of the credit owed to Husband after correctly stating the terms of Husband's remaining child support obligation.

{¶18} The second assignment of error is sustained.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ERRED BY EXTENDING THE TERM OF THE APPELLANT'S SPOUSAL SUPPORT OBLIGATION IN VIOLATION OF R.C. 3105.18(E)(1) AND THE SPECIFIC TERMS OF THE JUDGMENT ENTRY/DECREE OF DIVORCE FILED IN THIS MATTER."

{¶19} In his third assignment of error, Husband argues the trial court was without jurisdiction to extend the term of his spousal support obligation. This Court agrees.

{¶20} R.C. 3105.18(E) states:

> "(E) If a continuing order for periodic payments of money as alimony is entered in a divorce or dissolution of marriage action that is determined on or after May 2, 1986, and before January 1, 1991, or if a continuing order for periodic payments of money as spousal support is entered in a divorce or dissolution of marriage action that is determined on or after January 1, 1991, the court that enters the decree of divorce or dissolution of marriage does not have jurisdiction to modify the amount or terms of the alimony or spousal support unless the court determines that the circumstances of either party have changed and unless one of the following applies:
>
> "(1) In the case of a divorce, the decree or a separation agreement of the parties to the divorce that is incorporated into the decree contains a provision specifically

> authorizing the court to modify the amount or terms of alimony or spousal support.
>
> "(2) In the case of a dissolution of marriage, the separation agreement that is approved by the court and incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony or spousal."

{¶21} The Supreme Court of Ohio has held that a "decreeing court does not have continuing jurisdiction to modify a sustenance alimony award that was made for a fixed period of years *** unless the decreeing court expressly reserves jurisdiction to modify." *Ressler v. Ressler* (1985), 17 Ohio St.3d 17, 18. The high court explained, "[i]n so ruling we are promoting the concept that alimony decrees should possess a degree of finality and certainty." Id.

{¶22} Husband argues the trial court improperly modified the duration of the spousal support payments because it did not retain jurisdiction to do so in the original divorce decree. Wife argues the trial court was merely attempting to achieve equity by spreading the modification of Husband's spousal support obligation over 25 months, which reflected the payment schedule which should have been in place as a result of the second review hearing in February of 2006.

{¶23} A relevant portion of the trial court's February 25, 2003 judgment entry/decree of divorce states:

> "Commencing November 1, 2002, the Defendant shall pay to the Plaintiff the sum of $3,100.00 per month as and for spousal support for a period of 66 months. The wage deduction shall be pursuant to the terms of Paragraph 20 hereof.
>
> "Said spousal support shall be subject to modification as to amount, but not as to duration, based upon a substantial change in the circumstances of the parties.
>
> "The Court shall review and if necessary modify said spousal support after 24 months. At the time of review, the Court shall consider the Defendant's income, the Plaintiff's income and the Defendant's payment of college expenses for the children. At the time the Court reviews the spousal support award in 24 months, the Court shall consider the Plaintiff's actual income if it is greater than

> $20,000.00 per year or impute no less than $20,000.00 per year of income to the Plaintiff."

{¶24} Pursuant to the judgment entry/decree of divorce filed on February 25, 2003, the trial court reserved jurisdiction to modify the spousal support payments in regard to the amount but not the duration. Under the terms of the judgment entry, Husband's continuing spousal support payments commenced on November 1, 2002, and were to terminate 66 months later, in March 2008. After a review hearing in 2005, the trial court ordered a reduction in spousal support from $3,100 to $2,642 per month from the period of May 1, 2005, through March 31, 2006. As noted above, another review hearing occurred on February 27, 2006, regarding support issues but the trial court never issued an order modifying Husband's obligations. The record shows that Wife did not file a motion demanding that Husband continue to make spousal support payments during this period pursuant to the original divorce decree. The trial court held another hearing on July 23, 2008. Subsequently, on July 10, 2009, the trial court ordered, "Defendant shall pay Plaintiff $653 per month plus 2% processing fee as and for spousal support for a period of 25 consecutive months commencing August 1, 2009 and payable by wage assignment." In light of the confusion which was caused by the trial court's failure to issue an order after the hearing in February 2006, the trial court attempted to restructure the spousal support payment plan by extending the duration of support payments. The trial court had not reserved jurisdiction to modify the spousal support payments in regard to duration in its February 25, 2003 judgment entry. Thus, the trial court was without authority to extend the duration of support payments in its July 10, 2009 order. It follows that the third assignment of error is sustained.

CROSS-ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN IMPUTING INCOME OF $20,000 TO PLAINTIFF AFTER RECOGNIZING THAT SHE HAD NEVER EARNED INCOME OVER $3,502 PER YEAR FROM HER MASSOTHERAPY PRACTICE."

{¶25} In her cross-assignment of error, Wife argues that the trial court erred in imputing $20,000 of income to her when modifying Husband's spousal support obligations. This Court disagrees.

{¶26} Wife notes that the trial court expressly found that she earned $3,501 in 2006 and $1,378 in 2005. The trial court also found that Wife had been a "stay-at-home mom" and that she had not worked, except part time. According to Wife, this was due to the fact that Nathaniel has Asberger Syndrome and Wife could not leave him alone for extended periods of time. Wife argues that in light of these findings, it was error for the trial court to impute the arbitrary figure of $20,000 of income to her.

{¶27} Contrary to Wife's argument, the trial court's decision to impute $20,000 of income was not arbitrary in this case. As noted above, the decree of divorce, which reflected an agreement entered into by the parties, stated in a relevant part:

> "At the time the Court reviews the spousal support award in 24 months, the Court shall consider the Plaintiff's actual income if it is greater than $20,000.00 per year or impute no less than $20,000.00 per year of income to the Plaintiff."

The decree clearly indicated that at the time the trial court was to review spousal support in 2005, it was to either consider Wife's actual income if greater than $20,000 or impute no less than $20,000 per year of income to Wife. In modifying spousal support in its May 3, 2005 journal entry, the trial court imputed income of $20,000 per year to Wife "[p]ursuant to the Judgment Entry/Decree of Divorce." The trial court stated in its July 10, 2009 judgment entry that the aforementioned provision was placed in the original divorce decree to give Wife an incentive to

"work full time and earn money." Thus, in imputing $20,000 of income to Wife in the July 10, 2009 entry, the trial court was not making a determination in a vacuum based on Husband's and Wife's respective employment situations. Rather, the trial court was acting in accordance with the agreed upon divorce decree which mandated that no less than $20,000 per year of income be imputed to Wife if her actual income was less than $20,000. It should be noted that the trial court specifically found that imputing more than $20,000 of income to Wife would not be appropriate given the circumstances of the parties. It follows that Wife's cross-assignment of error is overruled.

III.

{¶28} Husband's first, second, and third assignments of error are sustained. Wife's cross-assignment of error is overruled. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is affirmed, in part, and reversed, in part, and the cause remanded for further proceedings consistent with this decision.

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 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 Appellee/Cross-Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

DAVID H. FERGUSON, Attorney at Law, for Appellant/Cross-Appellee.

LESLIE S. GRASKE, Attorney at Law, for Appellee/Cross-Appellant.