

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

E.W.

Court of Appeals Nos. L-11-1301  
L-11-1302

Appellee

Trial Court No. 07168352

v.

T.P.

**DECISION AND JUDGMENT**

Appellant

Decided: December 7, 2012

\* \* \* \* \*

Christopher M. Jan, for appellee.

Laurel A. Kendall, for appellant.

\* \* \* \* \*

**SINGER, P.J.**

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, Juvenile Division, finding appellant in contempt for failure to pay child support and denying appellant's motion to reduce his child support obligation. Because we conclude that the trial court did not err in the admission of evidence, but did abuse its

discretion in finding appellant in contempt when he established an inability to pay, we affirm in part and reverse in part.

{¶ 2} Appellant, T.P. (“father”), and appellee, E.W. (“mother”), are the biological parents of two minor children; the older child was born in Toledo, Ohio and the younger was born in Las Vegas, Nevada. The parties never married, and appellee eventually filed for and received a child support order from a Nevada court in 2004, ordering appellant to pay a total of \$550 per month for both children. The parties returned to Toledo a short time after the order was issued and lived separately. The Nevada child support order was registered in Lucas County, Ohio, in May 2007.

{¶ 3} In November 2010, the Lucas County Child Support Enforcement Agency (“CSEA”), filed a motion to show cause against father, on behalf of mother. For various reasons, the matter was continued over the next year and was finally scheduled for hearing before a magistrate on September 9, 2011. One day prior to the hearing, father filed a pro se motion to modify his child support and to adjust arrears. The motion to show cause was heard as scheduled, with father represented by counsel. During the hearing, father attempted to have a signed doctor’s note, stating that he was unable to work due to depression and mental health issues, admitted into evidence. The doctor was allegedly out of the country and unavailable to testify at the hearing. The magistrate denied admission of the note.

{¶ 4} Evidence was presented that father had been a police officer with the Toledo Police Department but had lost that job in 1995. Mother testified that prior to losing that

position, father had voluntarily checked himself into a clinic to be treated for depression. After that he eventually worked as a paralegal in Toledo and in Las Vegas, after moving there in 2001 to be near mother and their first child. Father and mother lived together in Las Vegas, and the second child was born. Mother testified that father was incarcerated from March 2008 to December 2009, allegedly for failure to pay child support for another child and for obstruction of justice. Since that time he had made only sporadic and reduced child support payments of \$10 to \$35 from 2007 to 2011. Mother testified that she knew nothing of father's current depression or treatment, and opined that he was able to work more than the self-employment truck hauling job.

{¶ 5} During the show cause hearing, other than the doctor's note, father did not present any other evidence and refused to answer any substantive questions presented by CSEA counsel, stating that he was exercising his Fifth Amendment right to remain silent. CSEA argued that appellant is articulate and employable, but purposely chooses to remain unemployed.

{¶ 6} After the show cause hearing was completed, the CSEA attorney and father's appointed counsel were released by the magistrate. At the magistrate's inquiry, both parties, neither represented by counsel, agreed to continue with a hearing on appellant's motion for modification. The magistrate conducted questioning of the parties regarding their incomes and employment. Father provided more detailed testimony. The magistrate again denied admission of the doctor's note regarding father's inability to

work, but heard his own testimony regarding his depression and mental health treatment, and the effect on his employment.

{¶ 7} On September 30, 2011, the magistrate issued his decision finding father to be in contempt for failure to pay child support as ordered. The magistrate recommended a sentence of 30 days incarceration, but included a purge provision that appellant make all support payments for a 60 day period, with an additional payment of \$500 to be paid before January 4, 2012. Father was also ordered to seek work.

{¶ 8} As to the motion to modify, the magistrate found father to be voluntarily underemployed, imputed an additional \$5,000 per year income to him, but modified the child support order to \$157.95 per month, plus poundage, for both children, effective as of September 8, 2011, the date the motion to modify was filed. Each party was ordered to provide medical insurance for the children. Attached to the motion to modify decision was a separate full page entitled “Findings of Fact from Child support modification hearing on 9/9/11.” Thereafter, father filed a “Motion for Clear and More Definite Findings of Fact and Conclusions of Law” concerning both decisions on the motion to show cause and the motion to modify. Two days later, October 14, father also filed objections to the magistrate’s decisions on both the motion to show cause and his motion to modify child support.

{¶ 9} On October 25, 2011, upon independent review, the court issued two decisions adopting the magistrate’s decisions as to the contempt action and appellant’s motion to modify child support. The court specified orders regarding the contempt

finding, purge conditions, modification of child support, and medical insurance provisions for the children.

{¶ 10} Appellant father now appeals from those two October 25, 2011 judgments, arguing the following three assignments of error:

Assignment of Error No. 1: The trial court erred by failing to consider the note from Appellant's doctor stating that he is unable to work, which was proffered into evidence for both hearings, but objected to for the show cause hearing. The court erred in not finding that evidence of a party's ability to work is relevant for a child support proceeding, (Evid R 401) because it tends to make the determination of an obligor's earning potential to be more probable than it would be with the evidence.

Assignment of Error No. 2: The trial court abused its discretion by finding that Appellant is in contempt for failure to pay the full burden of his child support order, when he makes small, regular payments of child support; when he has sought medical help for clinical depression which impedes his ability to work; and when he has received social security benefits in the past.

Assignment of Error No. 3: The trial court abused its discretion by disparaging Appellant's testimony concerning his mental health, and finding that Appellant is underemployed, and capable of earning more

money than he has in the past ten years when he introduced evidence from his doctor of his inability to work based on clinical depression.

## I.

{¶ 11} We will address appellant's first and third assignments of error together. Appellant argues, in his first assignment of error, that the trial court erred in denying admission of a doctor's note into evidence to show appellant's alleged inability to work due to clinical depression. In his third assignment of error, appellant also essentially argues that the trial court abused its discretion in finding that he is underemployed, and that the court ignored the testimony regarding his mental health issues and the doctor's note offered into evidence.

{¶ 12} Generally, a trial court's decision regarding the admission of evidence is a matter of discretion. *Ament v. Reassure Am. Life Ins. Co.*, 180 Ohio App.3d 440, 2009-Ohio-36, 905 N.E.2d 1246, ¶ 26 (8th Dist.). The court's decision will not be reversed on appeal absent a showing of an abuse of that discretion. *Id.* An abuse of discretion connotes more than an error of law or judgment; rather, it 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).

{¶ 13} Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is generally not admissible unless the statement falls within one of the hearsay exceptions. *See* Evid.R. 802, 803, 804, 805, 807.

Unauthenticated notes, reports, or letters are not admissible within any of the hearsay rule exceptions to prove the truth of the information contained in such documents. *See Wallace v. Hipp*, 6th Dist. No. L-11-1052, 2010-Ohio-623 (police report contains inadmissible hearsay); *Hissa v. Hissa*, 8th Dist. No. 93575, 93606, 2010-Ohio-3087 (unauthenticated expert's report is inadmissible); *Havelly v. Franklin Cty.*, 10th Dist. No. 07AP-1077, 2008-Ohio-4889 (investigator's report inadmissible because it was unauthenticated by affidavit or deposition testimony).

{¶ 14} In this case, appellant attempted to introduce a doctor's note which allegedly stated that he was unable to work due to depression. The doctor did not testify at trial nor was the note authenticated by affidavit or deposition testimony. Since appellant wished to introduce the note to prove that his depression has caused his inability to work, it was offered for the truth of the matter asserted and was, thus, inadmissible hearsay. Therefore, the trial court properly denied admission of the note to show that appellant was unable to work.

{¶ 15} Nevertheless, the court did modify appellant's child support obligation, reducing it from \$550 per month to \$157.95 per month. Contrary to appellant's claim, even though it excluded the doctor's note, the trial court considered and found credible the testimony regarding appellant's inability to continue employment as a paralegal or to obtain higher paying employment. Although the court imputed additional income to appellant, it was only for part-time work at a minimum wage rate. In other words, the court recognized appellant's reduced capability to work due to mental health issues and

reduced his child support obligation accordingly. We decline to disturb the trial court's finding that appellant is capable of working a part-time minimum wage job or the order to seek such employment. Therefore, appellant's argument that the court ignored or failed to consider his testimony that his mental health issues affected his ability to work is without merit.

{¶ 16} Accordingly, appellant's first and third assignments of error are not well-taken.

## II.

{¶ 17} In his second assignment of error, appellant claims that the trial court erred in finding him in contempt for failure to pay the full amount of child support. We agree.

{¶ 18} An appellate court's standard of review of a trial court's contempt finding is abuse of discretion. *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 75, 573 N.E.2d 62 (1991). In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 19} In determining an action for contempt of court, a trial court need not find that a defendant's violation of a court order is purposeful, willful or intentional. *See Pugh v. Pugh*, 15 Ohio St.3d 136, 472 N.E.2d 1085 (1984), paragraph one of the syllabus. The inability to pay child support, however, is a valid defense in a contempt proceeding. *DeMarco v. DeMarco*, 10th Dist. No. 09AP-405, 2010-Ohio-445, ¶ 25;

*Courtney v. Courtney*, 16 Ohio App.3d 329, 334, 475 N.E.2d 1284 (3d Dist.1984). The burden to show an inability to pay is on the party being held in contempt. *Raleigh v. Hardy*, 5th Dist. No. 08 CA 0140, 2009-Ohio-4829, ¶ 47, citing *Farrell v. Farrell*, 5th Dist. No. 2008-CA-0080, 2009-Ohio-1341, ¶ 15. If a party makes a good faith effort to pay support, contempt is not justified. *Raleigh, supra*, 2009-Ohio-4829, ¶ 47, citing *Courtney, supra*.

{¶ 20} In this case, the trial court granted appellant's motion to modify his child support, based upon his reduced income and ability to work. Thus, the court recognized that appellant did not have the ability to pay the previously ordered child support, since he earned only \$3,000 per year. Nevertheless, the court contemporaneously found appellant in contempt for failure to pay the \$550 per month order, imposed 30 days incarceration, and a purge order that appellant pay "the child support reaffirmed the date of this decision and remitting a lump sum payment of \$500 to later than 1/4/12."

{¶ 21} We conclude that these two orders are inconsistent. Implicit in the trial court's significant reduction of father's child support obligation is the conclusion that father's ability to earn income had been drastically affected by his mental health issues. Moreover, appellant had attempted to pay some child support over the years, albeit in greatly reduced payments. These factors support father's defense of an inability to pay the previously ordered child support amount. We conclude, therefore, that the trial court abused its discretion in finding appellant in contempt.

{¶ 22} Accordingly, appellant's second assignment of error is well-taken.

{¶ 23} The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed in part and reversed in part. We remand this case to the trial court for determination of and a reasonable payment schedule for arrearages consistent with the income imputed to appellant. Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

Judgment affirmed in part  
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

\_\_\_\_\_  
JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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