

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

KENNETH BATCHER

Appellant

v.

SERENA PIERCE

Appellee

C.A. Nos. 27415
 27497

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2007 04 1123

DECISION AND JOURNAL ENTRY

Dated: June 3, 2015

SCHAFFER, Judge.

{¶1} Plaintiff-Appellant, Kenneth Batcher (“Father”), appeals the judgments of the Summit County Court of Common Pleas, Domestic Relations Division, allocating tax dependency exemptions to Defendant-Appellee, Serena Pierce (“Mother”), modifying Father’s child support obligation upward, and denying Father’s motion for relief from judgment. For the reasons that follow, we affirm.

I

{¶2} The parties were married in July 1995 and they have four minor children together. The marriage ended by divorce decree issued on April 18, 2008. The divorce decree incorporated the parties’ agreements for a shared parenting plan as well as the payment of spousal support and child support.

{¶3} The shared parenting plan designated both parties as legal custodians and residential parents of the four minor children. It also ordered Father to pay spousal support in the

monthly amount of \$4,000.00 plus processing fees. Father was also ordered to pay child support in the monthly amount of \$842.00 plus processing fees and it allowed each party to claim two dependency tax exemptions. The statutory guideline worksheet that was used to reach this child support figure is not included in the record. But, both parties concede that the \$842.00 figure included a deviation from the amount reflected in the statutory guideline. The shared parenting plan relevantly provides that the original child support order was “subject to further court order, and particularly shall be terminated upon Mother’s household earnings exceeding \$100,000 per year after support obligation.”

{¶4} In 2010, the parties filed a variety of post-decree motions. For the purposes of this appeal, Mother relevantly moved to modify child support and Father moved to terminate his child support obligation on the basis that Mother’s household income was over \$100,000.00. After a two-day hearing before a magistrate, the trial court issued a judgment entry modifying child support to \$1,080.50 per month plus processing fees, but it failed to state that it found a change in circumstances supporting a modification. The court arrived at this figure after granting Father a 50 percent downward deviation from the amount reflected in the statutory guideline worksheet. The court also terminated Father’s spousal support obligation since Mother was now remarried, but denied his motion to terminate his child support obligation based on its finding that Mother’s household income was \$98,454.00.

{¶5} Mother appealed to this Court, challenging the trial court’s granting of a downward deviation. We found that the trial court “abused its discretion by failing to undertake an appropriate analysis in this case.” *Batcher v. Pierce*, 9th Dist. Summit No. 26785, 2013-

Ohio-4677, ¶ 20 (“*Batcher II*”).¹ Specifically, we noted that (1) “the court did not first determine that a change of circumstances had occurred before modifying the parties’ existing child support order”; and (2) the court did not properly consider “the children’s standard of living in selecting the amount of Father’s support obligation” before deviating from the statutory guidelines. *Id.* The matter was then remanded so that the trial court could engage in the required analysis.

{¶6} After remand, Father filed a new post-decree motion seeking the reallocation of all of the tax dependency exemptions for the minor children to him. Without a hearing, the trial court subsequently issued a judgment entry modifying child support, effective November 19, 2010, to \$2,160.75 plus processing fees, based on its finding that “[t]he recalculated amount is more than ten percent greater than the amount previously required as and for child support, the [c]ourt finds that a change of circumstances has occurred justifying a modification of child support.” This figure reflects the amount calculated in the statutory guideline worksheet and it includes no deviation. As to the exemption allocation, the trial court simply stated that “[d]esignation of the income tax dependency exemption shall not be modified.”

{¶7} Father filed a notice of appeal relating to this judgment. He also filed a motion for relief from judgment with the trial court. The asserted basis for the motion was the failure of the trial court to conduct a change of circumstances analysis and consider the children’s standard of living. Since the notice of appeal divested the trial court of jurisdiction, we stayed appellate proceedings and remanded the matter for the limited purpose of ruling on the motion for relief from judgment. Subsequently, the trial court denied the motion and the appellate proceedings

¹ This is the third time that this matter has come before us on appeal. The first appeal, *Batcher v. Batcher*, 9th Dist. Summit No. 25314, 2011-Ohio-1509, related to the termination of spousal support.

were reinstated. Father then appealed from the denial of his motion for relief from judgment. These matters were consolidated and Father has raised three assignments of error for our review.

II

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO A GRANT ALL FOUR OF THE TAX DEPENDENCY EXEMPTIONS FOR THE PARTIES' MINOR CHILDREN TO FATHER, WHERE, AS HERE, THE MOTHER HAS NO TAXABLE INCOME.

{¶8} In his first assignment of error, Father contends that the trial court erred in not granting all four of the tax dependency exemptions for the parties' minor children to him. We disagree.

{¶9} We review a trial court's allocation of tax dependency exemptions for an abuse of discretion. *Lawrence v. McGraw*, 9th Dist. Medina No. 10CA0079-M, 2011-Ohio-6334, ¶ 14. An abuse of discretion implies the court's decision is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying this standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶10} R.C. 3119.82 controls the awarding of tax dependency exemptions in child support proceedings. When the parents are unable to agree as to the allocation of the exemptions, which is the case here,² the court is required to consider "any net tax savings, the

² Although the divorce decree includes a provision that the parties will each take two dependency exemptions, the provision specifically contemplates that this allocation was subject to further court order and that the trial court has continuing jurisdiction to modify it. *See Singer v. Dickinson*, 63 Ohio St.3d 408, 413 (1992) (finding that juvenile court retained jurisdiction over dependency allocation since "[i]t has long been recognized in Ohio that a court retains continuing jurisdiction over its orders concerning the custody, care, and support of children, even when the court's initial order was based on an agreement by the parents of the child").

relative financial circumstances and needs of the parents and children, the amount of time the children spend with each parent, the eligibility of either or both parents for the federal earned income tax credit or other state or federal tax credit, and any other relevant fact concerning the best interest of the children.” R.C. 3119.82. When there is a sole parenting situation, there is a presumption that the trial court should allocate the dependency exemption to the residential parent. *Greschke v. Greschke*, 9th Dist. Medina Nos. 3266-M, 3268-M, 2002-Ohio-5426, ¶ 32. But, if there is a shared parenting plan, as there is here, then no such presumption arises. *In re B.S.*, 9th Dist. Summit No. 26368, 2013-Ohio-1976, ¶ 22, citing *Hall v. Hall*, 3d Dist. Hardin No. 6-10-01, 2010-Ohio-4818, ¶ 49. “While the trial court does not need to state a basis for allocating the exemption, the record does need to include financial data in relation to the [R.C. 3119.82] factors to support the trial court’s decision.” *Ankney v. Bonos*, 9th Dist. Summit No. 23178, 2006-Ohio-6009, ¶ 40, *overruled in part on other grounds*, *Gunderman v. Gunderman*, 9th Dist. Medina No. 08CA00670-M, 2009-Ohio-3787.

{¶11} There are two prongs to Father’s argument. First, he claims that the tax dependency exemptions should go to him because he has a higher income than Mother. Second, Father asserts that the trial court was precluded from considering Mother’s household income, which includes the income of her new spouse. We disagree with these assertions.

{¶12} Trial courts are granted latitude in their consideration of the R.C. 3119.82 factors. *See Nist v. Nist*, 5th Dist. Delaware No. 02 CAF 11060, 2003-Ohio-3292, ¶ 56 (“R.C. 3119.82 * * * increases the court’s discretion in determining best interests ‘to a level beyond that of merely net tax savings.’”), quoting *Reichman v. Reichman*, 5th Dist. Tuscarawas No. 2001 AP 12 0112, 2002-Ohio-4712. Accordingly, there is no requirement under the statute that the tax dependency exemptions automatically flow to the parent with higher income or to the parent who would

experience the greatest tax savings. *See, e.g., Ornelas v. Ornelas*, 12th Dist. Warren No. CA2011-08-094, 2012-Ohio-4106, ¶ 54 (affirming allocation of tax dependency exemptions to the mother even though she made \$66,200 less than the father since “[a] trial court does not abuse its discretion in granting tax exemptions to the residential parent even though the non-residential parent would have received a greater tax benefit than the residential parent”); *Foster v. Foster*, 6th Dist. Sandusky No. S-03-037, 2004-Ohio-3905, ¶ 23 (affirming allocation of tax dependency exemption to the nonresidential parent even though his income was less than the income of the residential parent and her new husband); *Nist* at ¶ 56 (affirming allocation of tax dependency exemptions to the mother even though the father was “in a higher tax bracket and would realize greater tax savings if the exemption were awarded to him”). While there is no such requirement, reviewing courts have previously found that certain factual scenarios with disparate incomes between the parents should produce an allocation of the tax dependency exemptions to the parent with a higher income. But, those scenarios only exist where there is a significant gap between the income of the parents and the household of one of the parents has little to no income. *See, e.g., Dunlap v. Dunlap*, 9th Dist. Summit No. 23860, 2008-Ohio-3201, ¶ 13-15 (affirming allocation of exemption to nonresidential parent who had income over \$86,000 while the residential parent only had income of \$300); *Yasinow v. Yasinow*, 8th Dist. Cuyahoga No. 86467, 2006-Ohio-1355, ¶ 35 (affirming allocation of exemption to nonresidential parent who had income over \$99,000.00 while the residential parent only had income of \$5,300.00).

{¶13} This matter does not fall under the *Dunlap* ambit since, although there is a disparity between the parties’ incomes, Mother still has a significant household income and realizes serious tax savings from having two of the four exemptions allocated to her. Contrary to

Father's contention, trial courts may consider the total household income of a parent, including the income of a parent's new spouse, when deciding how to allocate tax dependency exemptions. *See, e.g., In re J.H.*, 7th Dist. Jefferson No. 10 JE 15, 2011-Ohio-6536, ¶ 20 ("The trial court has discretion to include or exclude the income of a new spouse when recalculating child support or when calculating the net benefit of a tax exemption."); *Foster* at ¶ 23-24 ("The focus of the trial court's analysis was the disparity between the larger family income of appellant [including her new husband] and the small income of appellee. * * * Under these facts, we find that the trial court did not abuse its discretion in awarding appellee the dependency tax exemption."); *Hutchinson v. Hutchinson*, 85 Ohio App.3d 173, 177-178 (4th Dist.1993) ("[I]t is * * * within the trial court's discretion whether to consider a new spouse's income when determining the question of who should be awarded the income tax dependency exemption."). When the income of Mother's new spouse is taken into consideration, her adjusted household income was \$98,454.00 in 2010, as reflected in the tax information provided by Mother. In light of this income, the trial court could clearly determine that a net tax savings resulted to Mother by allocating two of the four tax exemptions to her, which ultimately benefitted her household and all four minor children. Moreover, since Mother no longer receives spousal support, which reduces her household income to approximately \$68,000.00, the record reflects that the tax savings to her household would be even more critical for the care of the children. *See Foster* at ¶ 23 ("The trial court found that it would be in the best interest of the child for [the parent with lower income] to have more available monetary resources[.]"). Finally, this is not the type of case where the parties failed to provide financial information to the court, so there is no need for a remand to properly consider the R.C. 3119.82 factors. *Compare In re B.S.*, 2013-Ohio-1976, at ¶ 26 ("The matter is remanded so that the trial court can receive evidence which would allow it

to fully evaluate [the exemption allocation] issue[.]”); *Ankney*, 2006-Ohio-6009, at ¶ 42 (reversing tax exemption allocation where “the record [was] clearly void of any specific tangible financial information or tax records”).

{¶14} Accordingly, we overrule Father’s first assignment of error.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY MODIFYING THE FATHER’S CHILD SUPPORT OBLIGATION FROM \$842 PER MONTH TO \$2134.92 PER MONTH EFFECTIVE NOVEMBER 19, 2012.

{¶15} In his second assignment, Father argues that the trial court erred in modifying his support obligation upward. We disagree.

{¶16} We review a trial court’s modification of a child support order for an abuse of discretion. *Booth v. Booth*, 44 Ohio St.3d 142, 144 (1989). Since this matter is before us after remand, we are mindful of the applicability of the law of the case doctrine, which “provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.” *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984). The doctrine has a significant effect on later appellate proceedings in the same matter for it “precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred.” *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405 (1996).

{¶17} In *Batcher II*, we instructed the trial court that “ ‘[w]hen modifying an existing child support order, [it] must find that a change of circumstances has occurred.’ ” *Batcher II*, 2013-Ohio-4677, ¶ 10, quoting *Farmer v. Farmer*, 9th Dist. Medina No. 03CA0115-M, 2004-Ohio-4449, ¶ 10. We further noted that “ ‘a change of circumstances is found if the recalculated

amount is more than ten percent less or greater than the amount previously required as child support.’ ” *Id.*, quoting *Maguire v. Maguire*, 9th Dist. Summit No. 23581, 2007-Ohio-4531, ¶ 7. This recalculation is performed by the trial court “complet[ing] a new child support worksheet [and] recalculating the amount of support required based on the new figures.” *Maguire* at ¶ 7, citing R.C. 3119.79(A).

{¶18} After remand, the trial court ran the appropriate guideline worksheet for a shared parenting situation and found that it produced a monthly child support order of \$2,160.75, which represented the statutorily-defined level of support since the parties earn a combined gross income exceeding \$150,000.00. R.C. 3119.021; *Batcher II* at ¶ 9. This is an approximately 150 percent change from the original monthly order of \$842.00. Moreover, the trial court had a record before it disclosing that, effective November 19, 2010, Mother was going to no longer receive significant monthly spousal support payments. In light of this record, we cannot find that the trial court abused its discretion in finding that there was a change in circumstances that supported the modification of Father’s support obligation.

{¶19} Father asserts that the trial court failed to properly consider the children’s standard of living and other possible bases for a deviation from the amount reflected in the guideline worksheet. His argument in this regard, though, fails to account for the burden he carried in these proceedings. R.C. 3119.03 relevantly states as follows:

In any action or proceeding in which the court determines the amount of child support that will be ordered to be paid pursuant to a child support order * * *, the amount of child support that would be payable under a child support order, as calculated pursuant to the basic child support schedule and applicable worksheet through the line establishing the actual annual obligation, is rebuttably presumed to be the correct amount of child support due.

While a deviation from the guideline worksheet amount is allowed under certain circumstances, R.C. 3119.04(B), R.C. 3119.22, “[t]he party who seeks to rebut the presumption [of R.C.

3119.03] and asks the court to deviate has the burden of proof,” *Irish v. Irish*, 9th Dist. Lorain No. 10CA009810, 2011-Ohio-3111, ¶ 16. We have stated that to satisfy this burden, the party requesting a deviation “must provide facts from which the court can determine that the actual annual obligation is unjust or inappropriate and would not be in the children’s best interest.” *Id.*

{¶20} The trial court conducted a two-day hearing where Father had the opportunity to present extensive evidence on the variety of factors that could give rise to a downward deviation. However, as noted in *Batcher II*, only “limited testimony” was offered at the hearing “about the children’s standard of living.” *Batcher II*, 2013-Ohio-4677, at ¶ 14. Despite learning of this, Father failed to ask for further hearing after remand.³ As a result, the trial court was able to consider the record before it and engage in the analysis we required it to undergo in *Batcher II*. After considering the record and our decision in *Batcher II*, the trial court decided that Father failed to carry his burden and that a deviation downward from the statutorily set floor of \$2,160.75 was inappropriate in light of the “limited testimony.” *Id.* at ¶ 14. Our review of the record reveals no abuse of discretion in that determination. *See id.* at ¶ 18 (“The magistrate’s logic in granting Father a deviation is curious, as virtually all of the statements he made could apply equally to Father and Mother.”); *Zeitler v. Zeitler*, 9th Dist. Lorain No. 04CA008444, 2004-Ohio-5551, ¶ 9 (affirming child support modification where the parties earned over \$150,000.00 combined and the judgment entry did not state findings for ordering amount based

³ Indeed, our opinion in *Batcher II* did not instruct the trial court to conduct an additional evidentiary hearing. We merely remanded the matter for the proper change in circumstances and deviation analysis to occur. *Batcher II* at ¶ 20; *see also In re Salsgiver*, 11th Dist. Geauga No. 2002-G-2477, 2003-Ohio-1206, ¶ 20 (“[I]f the only error in the original proceedings occurred after the close of evidence, the parties should not be given a new opportunity to present evidence. To this extent, appellant is generally correct in stating that if a party failed to submit sufficient evidence to carry its burden of proof originally, a remand for an additional finding of fact does not open the door for the admission of new evidence.”).

on the \$150,000 maximum since “the \$150,000-equivalent served its intended purpose as to the minimum child support award, below which the court cannot go without explanation”).

{¶21} Accordingly, we overrule Father’s second assignment of error.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY NOT GRANTING THE FATHER’S MOTION FOR RELIEF FROM JUDGMENT.

{¶22} In his third assignment of error, Father contends that the trial court erred in denying his motion for relief from judgment pursuant to Civ.R. 60(B). We disagree.

{¶23} We will not disturb a trial court’s ruling on a motion for relief from judgment under Civ.R. 60(B) absent an abuse of discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987). The Supreme Court of Ohio has instructed the following requirements for the granting of a Civ.R. 60(B) motion:

To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and where the grounds of relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment, order or proceeding was entered or taken.

GTE Automatic Elec., Inc. v. ARC Industries, Inc., 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. “It is also well established in Ohio that a Civ.R. 60(B) motion for relief from judgment must not be used as a substitute for a timely appeal.” *Watkins v. Williams*, 9th Dist. Summit No. 23186, 2007-Ohio-513, ¶ 12.

{¶24} If a motion for relief from judgment raises the same issues as those raised in a previous appeal, it is not cognizable under Civ.R. 60(B). *See Sellers v. Kiger*, 5th Dist. Fairfield No. 2004CA00005, 2004-Ohio-7270, ¶ 18 (affirming denial of Civ.R. 60(B) motion where “[t]he issue raised in appellants’ Motion for Relief From Judgment were cognizable on direct appeal”).

Father's Civ.R. 60(B) motion implicates the exact same issues as those raised in this appeal. Therefore, Civ.R. 60(B) relief was not warranted and the trial court properly denied Father's motion.

{¶25} Accordingly, we overrule Father's third assignment of error.

III

{¶26} Having overruled all of Father's assignments of error, the judgment of the Summit County Court of Common Pleas, 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(C). 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.

JULIE A. SCHAFER
FOR THE COURT

HENSAL, P.J.
WHITMORE, J.
CONCUR.

APPEARANCES:

SUSAN K. PRITCHARD, Attorney at Law, for Appellant.

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