[Cite as *Heaton v. Heaton*, 2010-Ohio-6214.]

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

Lisa L. Heaton	Court of Appeals No. L-08-1434
Appellee	Trial Court No. DR2005-0793
v.	
Brian L. Heaton	**DECISION AND JUDGMENT**
Appellant	Decided: December 17, 2010

* * * * *

Lisa L. Heaton, pro se.

Brian M. Ramsey, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a final judgment entry of divorce entered by the Lucas County Court of Common Pleas, Domestic Relations Division. Prior to the entry of that judgment, the parties, plaintiff-appellee Lisa L. Heaton and defendant-appellant Brian L. Heaton, stipulated in open court to the great majority of the issues in this case,

including issues of property and debt allocation, child support and spousal support. They then submitted the remaining issues to the lower court for its determination. In its final judgment, the court incorporated the parties' stipulations and ruled on the remaining issues. From that judgment, appellant Brian Heaton, raises the following assignments of error:

{¶ 2} "I. The court erred as a matter of law by failing to use spousal support guidelines in fashioning its September 2, 2005 spousal support orders.

{¶ 3} "II. The trial court erred as a matter of law when it declared the issues of the flawed child support, spousal support and household expense payments res judicata and forbade testimony by defendant-appellant [sic] expert witness who would have testified as to defendant-appellant's income for calculating his support obligations."

{¶ 4} Lisa and Brian Heaton were married on October 14, 1998. Two children were born of the relationship. On July 11, 2005, Lisa filed a complaint for divorce in the court below. She also filed a request for temporary orders of support pursuant to Civ.R. 75(N).

{¶ 5} On September 2, 2005, the lower court issued the magistrate's order pursuant to Civ.R. 75(N), which is the subject of this appeal. The court ordered Brian to pay temporary child support of $542.83 per month, per child, plus a 2% processing charge, and spousal support of $1,000 per month, plus a 2% processing charge, effective August 11, 2005. The court based these support awards on Lisa's annual gross income of $2,000 and Brian's annual gross income of $101,083. It is not clear from the record from

where the court obtained these income figures. The court also ordered the parties to each pay various bills and ordered Brian to provide health insurance coverage for the minor children, and to maintain existing health and life insurance policies covering Lisa.

{¶ 6} On September 14, 2005, Brian filed a request for an evidentiary hearing on the court's Civ.R. 75(N) order. One reason for the request was Brian's assertion that his income was not $101,083. Lisa also filed a request for an evidentiary hearing on the Civ.R. 75(N) order. She asserted that the court's division of bills was inappropriate. The court evidently held a hearing on those motions on December 16, 2005, but no transcript of that hearing is in the record on appeal. On December 19, 2005, the lower court issued a magistrate's decision in which it expressly found: "Plaintiff's attorney and Defendant's attorney have requested that the pending motions be dismissed." The court, therefore, dismissed those motions without prejudice. No objections were filed from that magistrate's decision and the lower court issued a judgment entry approving it.

{¶ 7} On January 5, 2006, Brian filed a motion for an order reducing the temporary alimony awarded to Lisa. Brian asserted that the order had been based on Lisa's annual income of $2,000 and that Lisa had since obtained a job with an income of over $2,000 per month. Brian then filed, on June 9, 2006, a motion to terminate the temporary alimony award, reduce the temporary child support award, and for an order awarding him spousal support. In support of this motion, Brian asserted that from January 1, 2006, through March 31, 2006, he had earned no net income from his home construction business. He then attached to his motion a letter from his accountant

purporting to support his claim that he had no income during the first quarter of 2006. The letter, however, was not confirmed by an affidavit.

{¶ 8} The lower court called the matters of Brian's January 5 and June 9 motions for a hearing, scheduled for August 15, 2006. Both parties were properly notified. On August 21, 2006, the lower court filed a magistrate's order regarding Brian's motions, in which the court expressly found that Brian failed to appear in support of his motions and failed to comply with Dom.R.Loc.R. 7.03. That rule reads in relevant part that "[n]o motion to amend, modify, or terminate temporary orders shall be filed without leave of court." Brian had not sought leave of court before filing his motions to reduce, and then terminate, spousal support. The court therefore dismissed Brian's motions without prejudice.

{¶ 9} On August 29, 2006, Brian filed a motion, pursuant to Dom.R.Loc.R. 7.03, requesting a hearing on the requested modification of the temporary support orders of September 2, 2005. Brian asserted that since the court had entered that order, there had been a significant change in circumstances as to the income of both parties. Brian also filed objections to the magistrate's decision of August 21, 2006, in which he challenged the court's finding that he failed to appear and asserted that he had been in court that day waiting for the hearing. He also challenged the court's finding that he had failed to comply with Dom.R.Loc.R. 7.03 and asserted that at a hearing in March 2006, at which the magistrate entertained his January 2006 motion to modify the temporary orders, the magistrate never indicated that his motion did not comply with the local rule.

{¶ 10} In a judgment entry dated September 14, 2006, the lower court denied Brian's objections and motion for a hearing. Specifically, the court overruled the objections because Brian had not filed a transcript from the August 15, 2006 hearing or filed an affidavit in contravention of the magistrate's finding that he failed to appear for the hearing. The court further found that Brian failed to comply with Dom.R.Loc.R. 7.03 by failing to obtain leave of court before filing his motion to terminate the temporary order of spousal support. Therefore, the court found that the magistrate's decision was well-founded in fact and in law. Brian attempted to appeal that order, but in a decision of November 2, 2006, we dismissed the appeal for lack of a final appealable order. See. *Heaton v. Heaton*, 6th Dist. No. L-06-1334.

{¶ 11} On December 14, 2007, Brian filed a motion for leave to file a motion to modify the Civ.R. 75(N) order of September 2, 2005. The lower court granted the motion for leave, and on January 14, 2008, Brian filed a motion to modify. In that motion, Brian requested that the court grant him a hearing for the purpose of presenting evidence in support of his motion to modify. The case came before the court for a hearing on July 8, 2008. At that time, however, the parties notified the court that they had reached an agreement on a number of matters at issue and that the trial would only address seven specific issues. In particular, the parties agreed that Brian's child support obligation would be modified to $442.69 per month, plus $8.85 poundage, effective December 13, 2007, and that his spousal support obligation would terminate, also as of December 13, 2007. On the issue of support, the following discussion occurred:

{¶ 12} "MR. SPARROW [Brian's attorney]: I'd like to just amplify that pursuant to the order, which is prepared but unfiled, as we don't have a green sheet, the parties' further agreement was that my client's obligation – that temporary support was also terminated effective the 14th day of December, 2007 –

{¶ 13} "THE COURT: The temporary support? Child support?

{¶ 14} "MR. SPARROW: I'm sorry, temporary spousal support, Your Honor. There was, in the 75(N), originally, both a child and spousal component. Effective December of '07, we've modified the amount of the child support and terminated the spousal support."

{¶ 15} Then, the parties addressed the issue of the arrears existing pursuant to the Civ.R. 75(N) temporary order, and the following discussion took place:

{¶ 16} "MR. ZANER [Lisa's attorney]: Yes, the next issue, Your Honor, pursuant to the Temporary Order, the total amount under the Temporary Order for everything, child support, spousal support, additional bills that Mr. Heaton was supposed to pay is $82,524.73.

{¶ 17} "I will be handing the Court Plaintiff's Exhibit 9, I believe, without objection, which sets forth how that is broken down.

{¶ 18} "The parties have agreed that all of those arrears will go into child support, and the Child Support Agency shall correct the records that through June 30th of 2008, the total amount is as I've set forth in Exhibit 9.

{¶ 19} "MR. SPARROW: Your Honor, we – again, understanding that the Court previously, in chambers, indicated that its decision, with respect to our request that the 75(N) be modified, and the Court's position was, and I've conveyed that to my client, that that is a matter that will have to be resolved through appeal.

{¶ 20} "THE COURT: Okay. Well, I think for the record, at that juncture, Counsel, I believe the nature of your request and suggestions and the Court's inclination should be placed onto the record for the purpose of preserving the record, so go ahead at this juncture and state your – your position again.

{¶ 21} "MR. SPARROW: Certainly, may it please the Court, our position is that at the time the 75(N) Order was issued, the Court used numbers which were both inaccurate and incomplete in that the Court did not, at that time, have an accurate recitation of Mr. Heaton's income for the prior year nor did it use, as it should have, a three-year averaging of his income, which, had that been done, would have shown that there was some aberration and that he never made 101,000, in fact, had made significantly less than that. Now –

{¶ 22} "THE COURT: From that decision, were objections taken?

{¶ 23} "MR. SPARROW: Objections were filed. Well, no. May it please the Court, no, objections were not filed to that decision. A request for evidentiary hearing was timely filed but then dismissed because of an apparent – and this was before either my time or maybe Mr. Zaner's time, because there was an apparent agreement by and between the parties and then counsel. That agreement was never formalized. In fact, it

was never actually entered into, and then subsequent to that time, Mr. Heaton's then counsel filed several, I think, motions to modify the 75(N) Order. Those motions were dealt with, I think denied.

{¶ 24} "Objections were filed to those denials, and, in fact, I think at one point, the matter may have gone to the Court of Appeals, who found that these were not matters that were Final Appealable Orders, and ultimately, until the Court granted me permission to, under the rule, file the Motion to Modify, it had remained in place, but the issue of the 75(N) had been litigated, but we believe that given the nature of a trial where, you know, the Court's supposed to act both as a Court of law and a Court of equity, then it would be an inequitable position for the Court to – if there were errors made, to correct those errors, notwithstanding this would be like the third or fourth bite of the apple.

{¶ 25} "THE COURT: Okay, and then, from all that, you say at some point, a motion was filed to modify the Temporary Orders, and am I to understand that the result of that was the modification that became effective December 13th of '07?

{¶ 26} "MR. SPARROW: Yes, sir.

{¶ 27} "MR. ZANER: After the Court granted Mr. Sparrow leave of Court to –

{¶ 28} "THE COURT: Yes.

{¶ 29} "MR. ZANER: That's correct.

{¶ 30} "THE COURT: And up until that time, either by agreement of the parties or subsequent to – or pursuant to rulings on subsequent motions of Mr. Heaton, the matters had been litigated.

{¶ 31} "MR. SPARROW: Yes, Your Honor. I believe that's an accurate statement.

{¶ 32} "THE COURT: Okay. Then with that being the case, the Court will then order that all of those matters are, in fact, a matter of res judicata. They have been litigated, negotiated by the parties. Acts of forbearance have taken place by virtue of negotiations, and then subsequent motions were disposed of, and so therefore, the Court will not entertain any further matters in regards to those Temporary Orders. They shall remain in full force and effect, and then that brings – if I am to understand, Counsel, then that brings you to the stipulation that there is a grand total of arrearages due in the amount of $82,524.73."

{¶ 33} The parties' counsel then agreed that that was the arrearage. Subsequently, the court questioned both Brian and Lisa about the stipulations and whether each of the matters discussed was in fact their understanding. While both parties responded that it was, again the issue of the temporary order was raised:

{¶ 34} "THE COURT: Does your settlement fully and completely and to your mutual satisfaction divide and distribute those assets and liabilities that have been discussed and stipulated?

{¶ 35} "Mrs. Heaton?

{¶ 36} "THE PLAINTIFF: Yes, Your Honor.

{¶ 37} "MR. HEATON: Yes.

{¶ 38} "THE COURT: Have you entered into this agreement knowingly, voluntarily, and intelligently?

{¶ 39} "Mrs. Heaton?

{¶ 40} "THE PLAINTIFF: Yes.

{¶ 41} "THE COURT: Mr. Heaton?

{¶ 42} "THE DEFENDANT: Yes, with the rights to appeal.

{¶ 43} "THE COURT: I'm sorry?

{¶ 44} "THE DEFENDANT: With the rights to appeal.

{¶ 45} "THE COURT: I'm sorry?

{¶ 46} "THE DEFENDANT: The support.

{¶ 47} "THE COURT: Well, you'll have to discuss that with your attorney.

{¶ 48} "MR. SPARROW: Well, Your Honor, when we talked in Court – I'm sorry, in chambers, the fact that you are refusing to allow us to present evidence with respect to the circumstances under which the 75(N) Order was placed and continuing thereafter, we're reserving our right to appeal that. I don't think we even need to say –

{¶ 49} "THE COURT: Right, that issue –

{¶ 50} "MR. SPARROW: Yeah.

{¶ 51} "THE COURT: -- but as to the stipulated settlement here –

{¶ 52} "MR. SPARROW: As to the stipulated matters, that's – that's – we're done.

{¶ 53} "THE COURT: You understand that that's not –

{¶ 54} "THE DEFENDANT: Yes.

{¶ 55} "THE COURT: -- going to be appealable.

{¶ 56} "THE DEFENDANT: Yes. I just –

{¶ 57} "THE COURT: The rulings that the Court made relative to the Temporary Orders, because it has been raised, that is subject to appeal, and any decisions that I make pursuant to trial are subject to appeal as well, but the stipulations that you're entering into now and the agreement that you are making now is not subject to appeal. Do each of you understand that?"

{¶ 58} Both parties indicated that they understood and that they wanted the court to approve the settlement. The court approved the settlement and adopted it as part of the order of the court. The court then tried the remaining issues in the case, none of which are at issue in this appeal.

{¶ 59} On July 14, 2008, the lower court filed its decision and judgment entry. The court disposed of the issues that had been tried and then ordered counsel for the parties, within 30 days of the date of the entry, to "prepare and submit for filing an appropriate judgment entry providing for the parties' settlement, the ruling of the court and the decisions and orders herein." When Brian refused to sign the entry proposed by Lisa, Lisa filed a motion to enter the judgment entry of divorce. The court called a status conference on October 9, 2008, a transcript from which is included in the record. Again, Brian contested the income used to calculate the temporary support orders. On October 14, 2008, the court filed a judgment entry in which it ordered the parties to provide the court with a transcript of their settlement that had been read into the record,

along with their proposed judgment entries. The court would then compare the proposed entries with the transcript and enter judgment accordingly.

{¶ 60} Lisa filed a transcript of the settlement with the court below, and on November 19, 2008, the court filed a judgment entry in which it found that Lisa's proposed judgment entry accurately reflected the parties' settlement in all substantive terms. The court, therefore approved and signed that judgment entry of divorce, which was filed that same day.

{¶ 61} On appeal, Brian continues to challenge the lower court's treatment of the temporary support orders. Lisa has not filed a brief in this matter. Because the assignments of error are related, we will discuss them together. Brian asserts that the lower court erred in its calculation of spousal support in the Civ.R. 75(N) temporary order and further erred in ruling at the July 8, 2008 hearing that the matters of the allegedly flawed temporary orders were res judicata.

{¶ 62} Initially, we are compelled to address the appealability of temporary support orders. "Temporary support orders, like other interlocutory orders, are reviewable after entry of a final decree disposing of the action in which they were entered." *DiLacqua v. DiLacqua* (1993), 88 Ohio App.3d 48, 57. Like other support orders, they are reviewed under an abuse of discretion standard. Id.

{¶ 63} R.C. 3105.18(B) provides that "[d]uring the pendency of any divorce, or legal separation proceeding, the court may award reasonable temporary spousal support to either party." "A purpose of such an award is to preserve the status quo during the

proceeding." *DiLacqua*, supra at 54. Civ.R. 75(N)(1) states that such temporary orders for support can be granted upon satisfactory proof by affidavit, without an oral hearing and for good cause shown. It is well-established that trial courts enjoy wide latitude in determining the appropriateness as well as the amount of spousal support. *Bolinger v. Bolinger* (1990), 49 Ohio St.3d 120. This rule applies equally to awards of temporary spousal support. *Office v. Office* (Jan. 17, 1997), 2d Dist. No. 15298.

{¶ 64} After an order of temporary spousal support is journalized, however, Civ.R. 75(N)(2) provides that "[u]pon request, in writing * * * the court shall grant the party so requesting an oral hearing within twenty-eight days to modify the temporary order." In the proceedings below, the lower court magistrate issued a temporary order of both child and spousal support on September 2, 2005. Brian then filed a request for a hearing, as allowed by Civ.R. 75(N)(2). Lisa also requested a Civ.R. 75(N)(2) hearing. At this time, Brian could have, but chose not to, present evidence challenging his income which was the basis for the temporary orders. Instead, at the hearing on the parties' motions, they both requested that the motions be dismissed.

{¶ 65} Thereafter, on January 5, 2006, Brian filed a motion to reduce his temporary alimony payments on the ground of a change in circumstances. The change cited by Brian was that Lisa now had a job earning over $2,000 per month. He did not argue that there had been any change in his income. Then, in his motion of June 9, 2006, to terminate the temporary alimony award, reduce the temporary child support award, and for an order awarding him spousal support, Brian asserted that he had earned no income

between January 1 and March 31, 2006. Brian did not seek leave of court to file these motions and the court dismissed them on that basis.

{¶ 66} Ultimately, Brian did not properly seek leave of court to modify the temporary orders until December 14, 2007. The matter was set for a hearing, but when the case came before the court, the parties entered their stipulations into the record and, thereby, settled most of the issues that were before the court, including that the temporary child support order was modified and the temporary spousal order was terminated, that both modifications were effective December 13, 2007, and that Brian was $82,524.73 in arrears pursuant to the temporary order. The parties further agreed that the arrearage was to be paid through the Child Support Enforcement Agency and that the agency was to correct its records to reflect the arrearage of $82,524.73.

{¶ 67} It is well-settled that "[s]tipulations of fact bind the parties and, ordinarily, the court to the facts to which stipulations have been entered. The court is thus relieved of inquiry as to evidence which may exist to prove these facts." *Toth v. Toth*, 6th Dist. No. OT-05-006, 2005-Ohio-7001, ¶ 17, citing *Cunningham v. J.D. Myers Co.* (1964), 176 Ohio St. 410, 414.

{¶ 68} In our view, because appellant stipulated to a modification of the temporary support orders, effective December 13, 2007, any defect in the original temporary orders was settled and rendered moot. See *Gabriel v. Gabriel*, 6th Dist. No. L-08-1303, 2009-Ohio-1814, ¶ 24; *Roth v. Roth*, 8th Dist. No. 89141, 2008-Ohio-927, ¶ 55-62 (where issue of temporary support was settled by the parties through a separation agreement,

appellant's request for a Civ.R. 75(N) hearing was rendered moot); see, also, *In re. K.P.*, 8th Dist. No. 82709, 2004-Ohio-1448, ¶ 67 (stipulated order on pre-dispositional temporary custody rendered defect in original order moot). Despite the discussions the parties and court had regarding the Civ.R. 75(N) order and the basis for that order, the parties stipulated to a modification of that order and stipulated to the effective date of the modification. In addition, Brian stipulated to the amount of the arrearage, which was based on the temporary order, and stipulated that the arrearage was to be paid through the Child Support Enforcement Agency. If appellant did not agree with that modification, effective date, or arrearage amount, he should not have stipulated to it. As stated above, temporary support orders are subject to appeal and review once a final order has been entered by the court. But in this instance, appellant has waived his right to challenge that order on appeal by agreeing to its modification. Moreover, by agreeing to the effective date of the modification of December 13, 2007, appellant has agreed that the original orders were valid until that date.

{¶ 69} Accordingly, the assignments of error are not well-taken.

{¶ 70} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J.
CONCUR. _____
JUDGE

Keila D. Cosme, J.,
DISSENTS.

COSME, J.

{¶ 71} I respectfully dissent from the majority's determination that, by stipulating to the amount of the arrearage, appellant waived his right to challenge the basis for that order. Throughout the proceedings and even during the hearing regarding the stipulations, appellant repeatedly and unmistakably expressed his disagreement with the basis for the temporary child support order and his desire to appeal that issue. Even the trial court's statements recognized appellant's intent to appeal the basis for the temporary orders. Therefore, I would rule that appellant's stipulation to the arrearage did not destroy his ability to challenge the basis and resulting amount of that arrearage.