# STATE OF MICHIGAN

# COURT OF APPEALS

DOUGLAS W. MACVOY,

Plaintiff-Appellee,

v

LISA MARIE MACVOY, a/k/a LISA MARIE FENDELET,

Defendant-Appellant.

UNPUBLISHED
November 25, 2003

No. 242590
Oakland Circuit Court
LC No. 1988-344350-DM

Before: Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from the trial court's order awarding plaintiff credit against an accumulated child support arrearage that arose from the trial court's order retroactively increasing plaintiff's child support obligation from $275 to $1,000 a week. We reverse and remand for further proceedings.

## I. Underlying Facts and Proceedings

Plaintiff and defendant are divorced parents of a son, born in 1987. In September 1998, defendant learned that plaintiff's income was substantially higher than she had previously believed, and she sought modification of his child support obligation in accordance with the child support formula guidelines, MCL 552.605(2). After nearly three years of intermediary proceedings, including a hearing before a Friend of the Court referee, the trial court held an evidentiary hearing in July and August 2001. Defendant testified that the existing support obligation of $275 a week was inadequate because the child now attended private school and played hockey on a traveling team. Defendant did not specify when the child began to play hockey or when he joined the more expensive traveling team, but it is undisputed that he did not enroll in private school until the 2000-2001 school year. Defendant acknowledged that plaintiff voluntarily agreed to pay hockey and tuition expenses in addition to his court-ordered support obligation. She also acknowledged that, with a few exceptions, he honored his agreement to pay these expenses, though he sometimes paid late, or did so only after she reminded him.

The trial court agreed that an increase in support was warranted by these expenses, though it also determined that ordering support at the level recommended by the guidelines would far exceed the child's needs and result in a tax-free alimony award for defendant.[1] The trial court found:

> The minor child could be enjoying a better standard of living with his mother if the current child support amount was increased. Here, the evidence indicates that Defendant mother and her son live in a condominium, which she purchased for $120,000.00. Mother and son live a simple lifestyle, which in no way could be considered lavish or excessive.
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> Furthermore, the evidence indicates that the needs of the minor child include expenses of approximately $6,000.00 per year for private school tuition and $16,500.00 in hockey expenses. Although Plaintiff has been paying some of these expenses voluntarily, he often pays late. Defendant then has to make several requests for his cooperation.
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> The Court finds it would be best for the welfare of the minor child if the money for these expenses were to be paid directly to Defendant, who could then pay these expenses on a timely basis. Clearly, Plaintiff father has the ability to pay an increased amount. In addition, Plaintiff's testimony indicates he has no objection to paying his son's cost to attend Catholic Central High School or to paying his hockey expenses.

The trial court ordered plaintiff to pay $1,000 in weekly child support, retroactive to September 18, 1998, the date defendant filed her petition. Although both parties were presumably dissatisfied with this order, neither appealed.

After the order modifying child support was entered, plaintiff moved for a credit against the arrearage that had accrued as a result of the retroactive modification order. Plaintiff characterized the retroactive order as a reimbursement to defendant for hockey and tuition expenses, and reasoned that he should be credited for past payments of $22,500 a year ($6,000 for tuition and $16,500 for hockey). Plaintiff did not actually assert that he made these payments throughout this period. Rather, he argued that defendant had *not* paid them, or "nobody" paid, and in either case, defendant should not receive money for a payment she did not make.

In response, defendant alleged that plaintiff should be credited only for payments he actually made. She emphasized that plaintiff could not be credited for any tuition payments before 2000, because the child attended public school then, and that he could not be credited for hockey payments because he did not offer proof as to how much he actually paid. Plaintiff responded that the retroactive award was actually intended as a reimbursement to defendant, and

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[1] Between 1997 and 1999, plaintiff's annual income was close to or more than $2 million. The trial court determined that, if the guidelines formula was followed, plaintiff would have to pay weekly support of $2,627 for 1998, $2,539 for 1999, and $2,126 for 2000.

that she should only be reimbursed for amounts she actually paid. The trial court awarded plaintiff $22,500 credit for each year of the retroactivity period.

## II. Analysis

Both parties accepted, without challenge, the trial court's decision to increase plaintiff's child support obligation to $1,000 a week, retroactive to September 18, 1998, the date defendant filed the first petition seeking an increase. Defendant did not appeal on the grounds that the trial court erred in awarding an amount below the guidelines recommendation. MCL 552.605(2); *Ghidotti v Barber*, 459 Mich 189, 196; 586 NW2d 883 (1998). Plaintiff did not appeal on the grounds that the trial court abused its discretion by modifying the award or erred in determining the retroactive amount. MCL 552.603(2); *Harvey v Harvey*, 237 Mich App 432, 437-438; 603 NW2d 302 (1999). We therefore regard the modification order of $1,000 a week, retroactive to September 18, 1998, as a settled matter not subject to review.

The sole question before us, then, is whether the trial court erred in determining that plaintiff was entitled to a credit of $22,500 a year (or $432.69 a week) based on the annual cost of tuition and hockey. This involves a question of fact, which we review under the clearly erroneous standard. *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990); *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999). Additionally, as discussed below, the trial court's order resulted in a further departure from the guidelines. The trial court is required to explain any departure from the guidelines, and whether its explanation is adequate presents a question of law subject to de novo review. MCL 552.605(2); *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002). Also as discussed below, this case raises a question as to whether the trial court properly understood the nature of plaintiff's motion. This, too, is a question of law reviewed de novo. *Id.*

Defendant vehemently argues that the trial court's decision was not supported by fact, because it is based on unsubstantiated assumptions that plaintiff had paid $16,500 for hockey and $6,000 for tuition *each* year from September 1998 to January 2002. In defendant's view, this was error because the child did not attend private school before September 2000, and plaintiff did not provide evidence of what he had actually paid for hockey. In plaintiff's view, the trial court's retroactive award was intended to reimburse defendant for $22,500 in hockey and tuition expenses. Plaintiff argues, however, that defendant did not actually pay these amounts each year; either plaintiff paid them, or they were not actually incurred, and either way, defendant is not entitled to reimbursement.

We find two material flaws in plaintiff's reasoning. First, it is based on the assumption that the trial court intended the retroactive award as a reimbursement. Though this assumption is not unreasonable, neither is it certain. The trial court's written opinion indicates that plaintiff had already been voluntarily paying these expenses; nowhere does it indicate any belief that defendant had paid them. Moreover, the trial court's full award of $1,000 a week (an increase of $725 a week, or $37,700 a year) was greater than the $22,500 yearly cost of hockey and tuition. It can therefore be inferred that the trial court intended the increased child support to cover more than just hockey and tuition expenses. These factors militate against plaintiff's underlying assumption that the retroactive modification was intended as reimbursement for defendant.

The second flaw in plaintiff's argument is his claim that he was entitled to a credit not only for what he paid, but also for expenses that were never incurred. This argument distorts the commonly understood meaning of the term "credit" in this context, and clouds the actual substance of plaintiff's argument, namely that the trial court's retroactive award was higher than the evidence warranted. If plaintiff believed that the trial court erred in determining the amount of the retroactive award, he could have moved for reconsideration pursuant to MCR 2.119(F), which would have required him to "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). He also might have moved for relief from judgment under MCR 2.612(C)(1). Alternatively, if he believed the trial court abused its discretion in awarding a retroactive increase to $1,000 a week, or that it relied on clearly erroneous findings of fact, he could have appealed the order to this Court. Had he done so, he would have had the burden of showing that the trial court's order was an abuse of discretion. *Thompson v Merritt*, 192 Mich App 412, 416; 481 NW2d 735 (1991). Plaintiff did not challenge the court's modification order, however, and instead moved for a credit, and attempted to stretch the concept of a "credit" to cover not only amounts that he had already paid, but also amounts that he believed should not have been awarded.

The trial court thus erred in treating what was, in substance, a motion for reconsideration as a motion for a credit, and in reducing its retroactive support order on the misplaced theory that it was "crediting" plaintiff for payments defendant never made. Consequently, the trial court's order of a "credit" was in substance a modification of the court's earlier January 3, 2002 order, made without explanation and without plaintiff having made a proper motion for modification. To compound this error, the modified order, in substance, further departs from the guidelines formula without the requisite explanation in writing as to why the formula would be unjust or inappropriate. MCL 552.605(2), *Paulson*, *supra*.

We therefore remand this matter to the trial court for reevaluation of plaintiff's motion for credit against the accumulated arrearage based on the common and reasonable understanding of a credit, i.e., the deduction of payments already made toward satisfaction of the amount due. The evidence is already clear with respect to tuition; indeed, defendant concedes in her appellate brief that plaintiff is entitled to a credit for the tuition paid to St. Michael's for the 2000-2001 school year, and to Catholic Central for the 2001-2002 school year. However, if plaintiff is to be credited with hockey payments, he must offer proof of the amounts paid in the retroactive period.

We recognize that plaintiff might well be correct in his implied argument that the trial court unintentionally issued a retroactive award that included coverage for payments he made for the child's hockey participation and for private school tuition for years he attended public school. However, it was plaintiff's decision to move for credit toward the arrearage, instead of moving for reconsideration or appealing the January 3, 2002, order. Plaintiff thus tacitly accepted the terms of that order, and opted for credit as his only source of relief from the order. Accordingly, it is not unjust to limit his available relief to that option.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ William B. Murphy
/s/ Janet T. Neff