[Cite as *Nolan v. Nolan*, 2010-Ohio-1447.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

CHRISTINA J. NOLAN,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-G-2885**
- vs -	:	
TIMOTHY B. NOLAN,	:	
Defendant-Appellant,	:	
(GEAUGA COUNTY CHILD SUPPORT ENFORCEMENT DIVISION,	:	
Appellee.)	:	

Civil Appeal from the Court of Common Pleas, Case No. 02 DC 000282.

Judgment: Affirmed.

John S. Salem, Denman & Lerner Co., L.P.A., 8039 Broadmoor Road, #21, Mentor, OH 44060 (For Plaintiff-Appellee).

Timothy B. Nolan, pro se, 7906 Plains Road, #11, Mentor, OH 44060 (Defendant-Appellant).

David P. Joyce, Geauga County Prosecutor, and *J.A. Miedema*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Timothy B. Nolan, appeals from the January 22, 2009 judgment entry of the Geauga County Court of Common Pleas, overruling his motion to modify child support and vacate previous child support orders and arrearages.

{¶2} On April 10, 2002, Christina J. Nolan ("Christina") filed a complaint for divorce against appellant on the grounds of gross neglect of duty, extreme cruelty, and incompatibility, along with motions for temporary residential parenting, child support, and spousal support.[1] Appellant filed an answer on June 14, 2002.

{¶3} On June 21, 2002, a hearing was held before the magistrate. An agreed judgment entry was filed on August 2, 2002, indicating that Christina was designated as the residential parent of the minor child, and appellant was to pay Christina child support in the amount of $507.73 per month, plus a two percent processing charge.

{¶4} On July 22, 2003, appellant filed a motion to modify child support, alleging that his annual salary had been reduced, which was dismissed by the trial court.

{¶5} The matter proceeded to a hearing before the magistrate on August 22, 2003. Evidence was presented that the parties were married on August 2, 1991, and that one child, the minor child, was born of the marriage. The parties reached an agreement as to the division of all marital property and the allocation of parental rights and responsibilities. The sole remaining issue was the grounds for divorce under R.C. 3105.01.

{¶6} At the hearing, Christina orally amended her complaint by testifying that she and appellant lived separate and apart, without cohabitation, for more than one year. Christina further stated that she moved out of the marital home on her own free will and volition. Counsel for appellant responded in the negative when asked whether he had any objections to the amendment. The magistrate proceeded to grant Christina's oral motion to amend her complaint to add the grounds of living separate

1. Colin Christopher Nolan ("minor child"), d.o.b. October 3, 1999, was born as issue of the marriage.

and apart without interruption for more than one year pursuant to R.C. 3105.01(J).

{¶7} Appellant also testified at the hearing that he had been living separate and apart from Christina for more than one year. He further indicated that during that year, Christina was invited to return to the marital residence but failed to accept the invitation.

{¶8} As memorialized in the magistrate's decision filed on October 9, 2003, the magistrate recommended that the parties be granted a divorce based on R.C. 3105.01(J), and that appellant pay $507.73 per month in child support plus a two percent processing charge. Appellant filed objections to the magistrate's decision on October 23, 2003. In its December 2, 2003 judgment entry, the trial court overruled appellant's objections and adopted the magistrate's decision.

{¶9} Also on December 2, 2003, a shared parenting decree was filed, indicating that appellant was to pay $507.73 per month in child support plus a two percent processing charge.

{¶10} On December 31, 2003, appellant appealed the judgment entry of divorce to this court, Case No. 2003-G-2553.

{¶11} While that appeal was pending, on March 9, 2004, appellee, Geauga County Child Support Enforcement Division ("GCCSED"), filed a motion to show cause. A hearing was held before the magistrate on May 4, 2004. Appellant did not appear. At the August 5, 2004 rescheduled hearing, appellant admitted his contempt of the trial court's order to timely pay child support. Pursuant to the August 9, 2004 agreed judgment entry, appellant was able to purge himself of contempt by making additional monthly payments toward the arrearage in the amount of $68.00. He was sentenced to thirty days, which was suspended so long as he completed his purge conditions.

{¶12} In a September 16, 2004 letter from UPMC physician, Dr. Iris A. Brossard, it was indicated that appellant has multiple sclerosis and is unable to work.

{¶13} On December 17, 2004, this court dismissed the appeal for lack of a final appealable order, pursuant to Civ.R. 75(F). *Nolan v. Nolan*, 11th Dist. No. 2003-G-2553, 2004-Ohio-6941.

{¶14} On January 27, 2005, the trial court issued a nunc pro tunc judgment entry of divorce correcting the clerical mistake raised by this court. Appellant filed a second notice of appeal, arguing that the trial court erred in granting Christina a divorce based upon the grounds set forth in R.C. 3105.01(J).

{¶15} While that appeal was pending, on May 3, 2005, GCCSED filed a motion to impose jail sentence. At that hearing, evidence was presented that appellant was diagnosed with multiple sclerosis and was unable to work. On July 15, 2005, the trial court overruled GCCSED's motion.

{¶16} On January 11, 2006, GCCSED filed its second motion to impose jail sentence.

{¶17} On March 31, 2006, appellant filed a motion for relief from judgment, from the trial court's January 27, 2005 entry, validating the child support obligation, which was overruled by the trial court on May 10, 2006.

{¶18} Also on March 31, 2006, appellant filed an affidavit of poverty, stating that he had been unemployed since January 2003.

{¶19} On June 30, 2006, this court affirmed the judgment of the trial court. *Nolan v. Nolan*, 11th Dist. No. 2005-G-2623, 2006-Ohio-3409.

{¶20} According to the August 22, 2006 letter from the Department of Veterans Affairs, Dr. Raghuram R. Sadda ("Dr. Sadda"), staff physician, indicated that appellant appeared to have weakness in his legs and arms and that he was unable to stand or walk. He gave a history that he was diagnosed to have multiple sclerosis in 2002, and that the department was investigating the problem. Dr. Sadda stated that appellant was currently disabled and unable to work.

{¶21} In a September 20, 2006 letter from the Department of Veterans Affairs, Christine Alford, Veterans Service Center Manager, stated that appellant was entitled to receive non service-connected pension benefits in the amount of $881 per month. She said that appellant was rated as permanently and totally disabled for VA purposes.

{¶22} According to the October 3, 2006 letter from Dr. Christopher A. Sheppard ("Dr. Sheppard"), neurologist at Oak Clinic for Multiple Sclerosis, appellant was a patient at the clinic. Dr. Sheppard stated that appellant had increasing difficulty with side effects from the medication for multiple sclerosis.

{¶23} On January 19, 2007, a hearing was held on GCCSED's second motion to impose jail sentence. At that hearing, the prosecutor indicated that appellant owed $22,085.01 in child support. She stated that no money had been received from the Department of Veterans Affairs, but that in fairness to appellant, he did not receive his benefits. Appellant's counsel stipulated that there had been no payments made through the bureau, but that there had been payments made outside the bureau.

{¶24} According to appellant, he is not employed because he is disabled with multiple sclerosis. His last day that he worked was January 24, 2003. The last time that he filed a tax return was in 2002. Appellant testified that he began receiving in

August 2006, a monthly disability pension in the amount of $881, to pay for his living expenses and utilities. He was informed that his disability pension is not income and is not subject to garnishment for child support purposes. Appellant also indicated that he received food assistance from Job and Family Services. Sometime in March of 2006, appellant applied to receive benefits for the minor child, but did not know his son's social security number, which he received a day or two later. However, the whole process was delayed.

{¶25} Pursuant to its January 24, 2007 judgment entry, the trial court found GCCSED's motion to impose jail sentence well-taken, and ordered that appellant serve three of the thirty days previously ordered and suspended. It is from that judgment that appellant filed another appeal, raising the following assignment of error:

{¶26} "The trial court abused its discretion when it granted appellee's motion to impose jail sentence."

{¶27} On March 28, 2008, this court affirmed the judgment of the trial court. *Nolan v. Nolan*, 11th Dist. No. 2007-G-2757, 2008-Ohio-1505.

{¶28} On October 3, 2008, GCCSED filed a third motion to impose jail sentence for failure to comply with the terms of the January 24, 2007 judgment entry.

{¶29} On January 9, 2009, appellant filed a motion to modify child support and vacate previous child support orders and arrearages.

{¶30} Pursuant to its January 22, 2009 judgment entry, the trial court referred this issue to the magistrate for further proceedings. The trial court determined that since the motion to modify child support has been referred to the magistrate, it cannot be heard at the same time as the previously scheduled motion to impose jail sentence.

Thus, the trial court overruled appellant's motion to modify child support and vacate previous child support orders and arrearages. The trial court made this decision for the following reasons: this court had already disposed of these issues; appellant had previously asked the trial court to vacate the 2003 and 2005 judgments; appellant may not attempt to utilize Civ.R. 60 as a substitute for unsuccessful appeals; and appellant's request that the trial court vacate arrearages is an indirect attempt to appeal the trial court's prior judgment that appellant should pay child support. It is from that judgment that appellant filed the present appeal, raising the following assignment of error for our review:[2]

{¶31} "The court erred in (sic) a matter of law when it overruled particular sections of Defendant's Motion to modify Child Support, specifically 'Defendant's motion to Vacate Previous Support Orders and [GCCSED] Arrearages.'"

{¶32} In his sole assignment of error, appellant argues that the trial court abused its discretion by overruling his January 9, 2009, motion to modify child support and vacate previous child support orders and arrearages.

{¶33} A trial court possesses broad discretion in its determination regarding a modification of child support obligations. *Pauly v. Pauly* (1997), 80 Ohio St.3d 386, 390, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. Accordingly, an appellate court will not disturb such determinations absent an abuse of discretion. Id. An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. Therefore, "abuse of

2. On February 4, 2009, the trial court overruled GCCSED's third motion to impose jail sentence.

discretion" describes a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶34} To prevail on a motion brought pursuant to Civ.R. 60(B), the movant must show: "(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 Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. If any of the elements are not met, the motion should be overruled. *Thrasher v. Thrasher* (June 15, 2001), 11th Dist. No. 99-P-0103, 2001 Ohio App. LEXIS 2720, at 6.

{¶35} In its January 22, 2009 judgment entry, the trial court stated in part:

{¶36} "[Appellant] has asked this Court to vacate previous judgments entered by this Court in 2003 and 2005. [Appellant] has already filed appeals from those judgments and the Court of Appeals has disposed of those appeals. [Appellant] cannot now attempt to utilize Civil Rule 60 as a substitute for his unsuccessful appeals.

{¶37} "[Appellant's] motion that this Court vacate [GCCSED] arrearages is an indirect attempt to again appeal this Court's prior judgments. Any arrearages determined by [GCCSED] were a result of judgment entered by this Court ordering [appellant] to pay child support. The judgment of this Court cannot be attacked by requesting that a determination of arrearages by [GCCSED] be vacated."

{¶38} We agree. The trial court properly set matters relating to appellant's request for modification of child support with the magistrate. The record establishes

that appellant has already attempted circumvention of his obligation to pay child support, and this court has disposed of his requests in his prior appeals. Although it is truly unfortunate that appellant has multiple sclerosis, he has ignored his ongoing child support order even though he has the financial ability to pay.

{¶39} The trial court also properly held that appellant cannot utilize Civ.R. 60 as a substitute for his failed appeals. In fact, appellant's motion to modify child support and vacate previous child support orders and arrearages does not rise to a proper Civ.R. 60(B) motion for relief from judgment. Appellant argues that in 2003, the trial court utilized fraudulent income for the purposes of the child computation worksheet. The record reveals that the trial court's judgment entry was filed on January 27, 2005, and this court's judgment entry was filed on June 30, 2006. Clearly, appellant's fraud allegation was not filed within the one-year time limit of Civ.R. 60(B)(3).

{¶40} Appellant also contends that vacating the December 2003 and January 2005 orders to pay child support is permitted under Civ.R. 60(B)(5). However, appellant's January 9, 2009 motion to modify child support and vacate previous child support orders and arrearages was not made within a reasonable time. See *Wisen v. Wisen*, 11th Dist. No. 2004-L-181, 2005-Ohio-6898, at ¶21. In addition, we note that a party is prohibited "from re-litigating issues in the trial court which have been duly considered and formerly adjudicated." *Kean v. Kean*, 11th Dist. No. 2005-T-0079, 2006-Ohio-3222, at ¶17, fn.3. In the instant matter, the trial court twice decided the issue of court-ordered child support obligations.

{¶41} Furthermore, although appellant claims to have raised new issues, a review of the record reveals the opposite. Thus, his January 9, 2009 motion to modify

child support and vacate previous child support orders and arrearages is barred by operation of res judicata. See *Kean*, supra, at ¶12, citing *Petralia v. Petralia*, 11th Dist. No. 2002-L-047, 2003-Ohio-3867, at ¶14-15 (holding "where a party has previously moved to modify a child support obligation on the same basis as a previous motion and presents no new evidence on how the circumstances were different, the motion is barred by operation of res judicata.")

{¶42} Even assuming arguendo that appellant set forth "new" issues in his January 9, 2009 motion to modify child support and vacate previous child support orders and arrearages, we note that "[t]heories of res judicata are used to prevent relitigation of issues already decided by a court *or matters that should have been brought as part of a previous action.*" (Emphasis added.) *Lasko v. Gen. Motors Corp.*, 11th Dist. No. 2002-T-0143, 2003-Ohio-4103, at ¶16.

{¶43} The trial court did not abuse its discretion by overruling appellant's motion to modify child support and vacate previous child support orders and arrearages.

{¶44} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Geauga County Court of Common Pleas is affirmed. It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J., concurs in judgment only,

TIMOTHY P. CANNON, J., concurs in judgment only with Concurring Opinion.

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TIMOTHY P. CANNON, J., concurring in judgment only.

{¶45} I respectfully concur in judgment only.

{¶46} The primary reason for concurring in judgment only is the analysis of what is pending before us on appeal.

{¶47} The trial court correctly observed that most of the issues raised by appellant had already been disposed of in the most recent of several appeals to this court and overruled appellant's Civ.R. 60(B) motion to vacate.

{¶48} The notice of appeal specifically states that notice is given that appellant appeals "from the trial court Judgment Entry time-stamped January 22, 2009 overruling Defendant's Motion to Vacate Previous Child Support Order and CSEA Arrearages arising from the absence of any income for child support calculation purposes; the existence of medically documented physical disability, need based public assistance and veteran's disability benefits; and the void order based on no electronically verified income on child support computation worksheet."

{¶49} Likewise, the assignment of error states the trial court erred "when it overruled particular sections of Defendant's Motion to modify Child Support, specifically, 'Defendant's motion to Vacate Previous Support Orders and CSEA Arrearages.'"

{¶50} There is no mention in the notice of appeal of appellant's motion to modify. The assignment of error clarifies that the portion of the ruling on the "motion" he claims as error is the request to vacate prior orders. This makes perfect sense, as the trial court specifically did not rule on the motion to modify support. In the January 22, 2009 entry, the trial court clearly stated: "Defendant's Motion to Modify Child Support is referred to this Court's Magistrate for further proceedings." It did not grant or deny the motion to modify.

{¶51} I believe the majority's discussion concerning the trial court "overruling" the motion to modify support is erroneous. However, I concur that it was totally appropriate to overrule appellant's Civ.R. 60(B) motion to vacate.