[Cite as *Walker v. Walker*, 2010-Ohio-5798.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

BRIAN WALKER,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2010-L-025**
- vs -	:	
MICHELE WALKER,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 05 DR 000722.

Judgment: Affirmed.

R. Russell Kubyn, The Kubyn Law Firm, 8373 Mentor Avenue, Mentor, OH 44060 (For Plaintiff-Appellant).

Linda D. Cooper, Cooper & Forbes, 166 Main Street, Painesville, OH 44077-3403 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Brian Walker, appeals from the February 26, 2010 judgment entries of the Lake County Court of Common Pleas, Domestic Relations Division, overruling the objections and adopting the magistrate's decision.

{¶2} Appellant and appellee, Michele Walker, were married in Ashtabula County, Ohio on September 2, 2000, and one child was born as issue of the marriage: B.W., d.o.b. June 19, 2001 ("minor child"). The parties separated on January 1, 2004.

Appellee filed an action for child support in 2005 in the Ashtabula County Court of Common Pleas, Juvenile Division, case No. 05 JH 13. Appellant was ultimately ordered to pay child support in the amount of $479.76 per month and was granted the right to claim the minor child as a dependent for tax purposes every third year. Also in 2005, appellee moved to Arizona with the minor child and was later designated as the primary residential parent.

{¶3} On October 31, 2005, appellant, a Lake County, Ohio resident, filed a complaint for divorce against appellee and a motion for visitation in the Lake County Court of Common Pleas, Domestic Relations Division, case No. 05 DR 000722. Appellee did not file an answer or counterclaim to the complaint. Rather, appellee, a Maricopa County, Arizona resident, filed for a dissolution of marriage in April 2006 in the Superior Court of Arizona, Maricopa County, case No. FC 2006-002650. On May 8, 2006, appellee filed a motion in the Lake County case to quash service and dismiss the action for lack of jurisdiction. On May 12, 2006, the magistrate from Lake County ordered that unless appellant filed a response to appellee's motion, he would recommend that appellant's complaint be dismissed for lack of jurisdiction and/or failure to prosecute. Appellant complied with the magistrate's order and filed a response on May 30, 2006.

{¶4} On August 10, 2006, appellant filed an amended complaint for divorce. Appellee did not file an answer or counterclaim to the amended complaint. On January 9, 2007, appellee filed a motion in Lake County for sanctions, reimbursement, and spousal support. It was ultimately determined that matters of custody and parenting

time would be heard in Arizona, and the balance of divorce issues would be heard in Ohio.

{¶5} Trial commenced in Lake County before the magistrate on February 26, 2007. The parties agreed that neither would receive spousal support. On March 2, 2007, the magistrate submitted his decision, recommending, inter alia, the following: appellant is entitled to be granted a divorce on the grounds of incompatibility; appellant's PERS pension acquired during the marriage shall be divided equally; appellee removed $10,370 from her IRA without sufficient explanation as to what she did with the proceeds, which after taxes amounted to $8,296, and appellant is therefore entitled to an offset credit of $4,148; appellant did not seek permission of the court before canceling appellee's health insurance, therefore appellant shall pay appellee $633 which represents the mammogram bill incurred by appellee after the insurance was canceled; and each party shall pay his and her own attorney fees and one half of the court costs. No objections were filed. The trial court adopted the magistrate's decision and entered a final divorce decree on June 15, 2007.

{¶6} On May 8, 2008, appellant filed a motion in the Ashtabula County court to transfer the child support matter to Lake County, stressing that the case was spread throughout three different courts (Ashtabula and Lake Counties in Ohio, and Maricopa County in Arizona). Also on that date, appellant filed a motion in Ashtabula County to modify child support. On May 19, 2008, the Ashtabula County court granted appellant's motion to transfer the case to Lake County.

{¶7} On June 20, 2008, appellant filed an ex parte motion to accept jurisdiction over child support in Lake County. On June 23, 2008, the Lake County court accepted jurisdiction over the child support issues.

{¶8} On March 24, 2009, appellee filed a motion to modify child support and tax exemption.

{¶9} A hearing was held before the magistrate on May 8, 2009.

{¶10} At that hearing, appellant, through counsel, voluntarily withdrew his pending motion to modify child support. The case proceeded on appellee's motion to modify child support and tax exemption. The parties stipulated that appellee's hourly rate of pay was $17.67 and appellant's hourly rate of pay was $19.45.

{¶11} According to appellant, he has lived at the same address in Lake County, Ohio for over 14 years with his 13-year-old son and is a city of Painesville employee. Appellant testified that he receives a Social Security death benefit of $400 per month for his son and claimed him as a dependent on his 2008 federal tax return. Appellant claimed the minor child, B.W., as a dependent in 2006. He indicated that he has health insurance for her through his employer. Appellant stated that his parenting time with the minor child is pursuant to the parties' November 2007 agreement in the Arizona court, permitting him to have four visitations per year. He stated that he was not able to see the minor child two of those times due to a lack of money.

{¶12} Appellee testified that she lives with her mother and the minor child in Arizona. Appellee has been employed full-time by Solutions Staffing for the past four years, but her hours were cut to 37.5 hours per week due to economic conditions. She indicated that she has taken the tax exemption for the minor child for the past two years.

She preferred that appellant not have the tax dependency exemption every third year as allocated. Appellee stated that her work-related child care expenses for the minor child are approximately $3,480 per year.

{¶13} Pursuant to his November 20, 2009 decision, the magistrate determined the following: appellant's present child support obligation for the minor child is $479.76 per month, and his recalculated amount is $534.35, more than ten percent greater; the effective date of the modified child support order was March 24, 2009, the date appellee filed her motion to modify child support; there was insufficient evidence presented regarding the enumerated factors set forth in R.C. 3119.82 to be considered in allocating the tax dependency exemption, thus, the tax dependency exemption for the minor child shall remain as set forth in the Ashtabula County court's June 8, 2007 order, giving appellant the right to claim the minor child as a dependent for tax purposes every third year; appellant shall provide health insurance for the minor child; and the parties were ordered to share the costs of the proceedings equally.

{¶14} On December 3, 2009, appellant filed objections to the magistrate's decision. Appellee filed objections on December 11, 2009. A hearing on the objections was held on February 2, 2010.

{¶15} Pursuant to its February 26, 2010 judgment entries, the trial court overruled the parties' objections and adopted the magistrate's decision. The trial court ordered the following: appellant shall pay child support in the amount of $534.35 per month; health insurance for the minor child shall be provided by appellant; the tax dependency exemption for the minor child shall remain as set forth in the Ashtabula County court's June 8, 2007 order, giving appellant the right to claim the minor child as

a dependent for tax purposes every third year; and the parties were ordered to share the costs of the proceedings equally. It is from the foregoing judgments that appellant filed a timely appeal, asserting the following assignments of error for our review:[1]

{¶16} "[1.] The trial court erred to the prejudice of Appellant by affirming the Magistrate's Decision that Appellant's child support obligation be increased.

{¶17} "[2.] The trial court erred to the prejudice of the Appellant by affirming the Magistrate's failure to deviate child support downward based upon the circumstances of the parties and the minor child.

{¶18} "[3.] The trial court erred to the prejudice of the Appellant by affirming the Magistrate's failure to modify the tax dependency exemption so that Appellant be entitled to claim the minor child."

{¶19} In his first assignment of error, appellant argues that the trial court erred by adopting the magistrate's decision, thereby increasing his child support obligation. Appellant stresses that appellee failed to provide competent, credible evidence regarding day care expenses and that the increase in child support is not warranted.

{¶20} A trial court's decision regarding child support will not be reversed by a reviewing court unless it is shown that the trial court abused its discretion. *Pauly v. Pauly* (1997), 80 Ohio St.3d 386, 390, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

1. Appellant indicates in his appellate brief that appellee has filed a cross-appeal. We note, however, that the record and docket do not establish that appellee has filed a cross-appeal in the instant matter.

{¶21} This court, in *Mitchell v. Mitchell*, 11th Dist. No. 2009-L-124, 2010-Ohio-2680, at ¶20-21, recently stated:

{¶22} "The purpose of child support is to meet the needs of the minor children. *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, at ¶10. (Citations omitted.) 'Generally, courts must use the Ohio Child Support Guidelines in ascertaining the appropriate level of child support. (***) However, a court may deviate from these guidelines at its discretion after considering the statutory factors delineated in R.C. 3119.23, and after determining that the calculated amount would be unjust or inappropriate and not in the children's best interest. (***).' *Albright v. Albright*, 4th Dist. No. 06CA35, 2007-Ohio-3709, at ¶6. (Internal citations omitted.)

{¶23} "'R.C. 3119.022 governs the procedures for awarding and calculating child support. Its provisions are mandatory in nature and must be followed literally and technically in all material aspects because the overriding concern is the best interest of the children for whom the support is being awarded. (***) If the trial court makes the proper calculations on the applicable worksheet, the amount shown is "rebuttably presumed" to be the correct amount of child support due. (***) A party who attempts to rebut the basic child support guideline amount has the burden of presenting evidence that proves the calculated amount is unjust, inappropriate, or not in the best interest of the children. (***).' Id. at ¶7."

{¶24} R.C. 3119.79(A) provides:

{¶25} "If an obligor or obligee under a child support order requests that the court modify the amount of support required to be paid pursuant to the child support order, the court shall recalculate the amount of support that would be required to be paid

under the child support order in accordance with the schedule and the applicable worksheet through the line establishing the actual annual obligation. If that amount as recalculated is more than ten per cent greater than or more than ten per cent less than the amount of child support required to be paid pursuant to the existing child support order, the deviation from the recalculated amount that would be required to be paid under the schedule and the applicable worksheet shall be considered by the court as a change of circumstance substantial enough to require a modification of the child support amount."

{¶26} In the case at bar, at the May 8, 2009 hearing, appellee indicated that the minor child is in day care after school and during summer due to her work schedule. She testified with regard to her work-related child care expenses for the minor child. Appellee also testified with respect to Exhibit D, which recited the day care rates for 2008. She stated that the rates had not increased for 2009. Appellee also produced her day care credit schedule for her tax return from 2007. The only testimony appellant had to rebut the foregoing was that he did not know if the minor child was in day care.

{¶27} We determine that appellee satisfied her burden that she incurred permitted day care expenses. As such, the trial court did not abuse its discretion in granting appellee's motion to modify child support.

{¶28} Appellant's first assignment of error is without merit.

{¶29} In his second assignment of error, appellant contends that the trial court erred by adopting the magistrate's decision not to deviate child support downward based upon the circumstances of the parties and the minor child. Appellant alleges that

he provided competent, credible evidence that his child support obligation should be deviated to account for his extraordinary transportation costs.

{¶30} "[U]nder R.C. 3119.23, the time the child is with one parent as opposed to the other is just one of several factors to consider in determining whether a deviation is appropriate." *Kilgore v. Kilgore*, 11th Dist. Nos. 2008-A-0006 and 2008-A-0008, 2008-Ohio-5858, at ¶25, citing *Anthony v. Anthony* (Dec. 3, 1999), 11th Dist. No. 98-L-222, 1999 Ohio App. LEXIS 5759, at *12. Although the trial court is permitted to deviate from the standard child support guidelines, it is not mandated to do so. See *Mitchell*, supra, at ¶28.

{¶31} In the instant case, appellant requested a deviation based on his travel expenses in his motion to modify child support; however, at the May 8, 2009 hearing before the magistrate, appellant, through counsel, voluntarily withdrew his pending motion to modify child support, and the matter proceeded on appellee's motion to modify child support and tax exemption. Further, we note that in the November 15, 2007 judgment entry of the Arizona court, the parties were ordered to equally divide the cost of the minor child's air travel. The Lake County magistrate, in his November 20, 2009 decision, and the Lake County court, in its February 26, 2010 judgment entry, made reference to the parties' equal split of the minor child's transportation costs in determining not to deviate from the statutory child support calculation. Thus, because the parties were equally sharing the transportation costs, the failure to deviate does not constitute an abuse of discretion.

{¶32} Appellant's second assignment of error is without merit.

{¶33} In his third assignment of error, appellant maintains that the trial court erred by adopting the magistrate's decision not to modify the tax dependency exemption so that he would be entitled to claim the exemption for the minor child more often than once every third year.

{¶34} R.C. 3119.82 provides in part:

{¶35} "Whenever a court issues, or whenever it modifies, reviews, or otherwise reconsiders a court child support order, it shall designate which parent may claim the children who are the subject of the court child support order as dependents for federal income tax purposes as set forth in section 151 of the 'Internal Revenue Code of 1986,' 100 Stat. 2085, 26 U.S.C. 1, as amended. *** If the parties do not agree, the court, in its order, may permit the parent who is not the residential parent and legal custodian to claim the children as dependents for federal income tax purposes only if the court determines that this furthers the best interest of the children ***. In cases in which the parties do not agree which parent may claim the children as dependents, the court shall consider, in making its determination, any net tax savings, the 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 factor concerning the best interest of the children."

{¶36} Although appellant maintains the trial court erred in its decision, we again note that he withdrew his motion. Appellant fails to show any evidence in the transcripts or magistrate's decision that would support a modification of the tax exemption. We do not find appellant affirmatively demonstrated that the trial court abused its discretion by

upholding the tax dependency exemption in the June 8, 2007 judgment entry of the Ashtabula County court, granting appellant the right to claim the minor child as a dependent every third year.

{¶37} Appellant's third assignment of error is without merit.

{¶38} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas, Domestic Relations Division, is affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.