[Cite as *Hirzel v. Ooten* , 2010-Ohio-2206.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

JEFFREY L. HIRZEL,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA3
	:	
vs.	:	**Released: May 12, 2010**
	:	
CHRISTINA M. OOTEN,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Steven L. Story, Story Law Office, Pomeroy, Ohio, for Appellant.

Michael L. Barr, Little, Sheets & Warner, Pomeroy, Ohio, for Appellee.

Per Curiam:

{¶1} Appellant, Christina Ooten, appeals from an amended entry of divorce issued by the Meigs County Court of Common Pleas. On appeal, Appellant contends that 1) the trial court erred when it failed to impose child support pursuant to the statutory guidelines as required by law and instead ordered that in lieu of child support the obligor could pay mortgage payments and lawn care expenses; 2) the trial court erred when it sua sponte modified the property settlement or equitable distribution payment without any jurisdiction to do so, and claims that the modification order is, therefore, void; 3) the trial judge erred by abandoning his role as a neutral, detached

factfinder, and without any authority to do so, acted as an advocate to improperly order collection of court costs.

{¶2} In our view, because the trial court abused its discretion in deviating from guideline child support, we sustain Appellant's first assignment of error and reverse the decision of the trial court with respect to the deviation from guideline child support. Further, here the trial court also exceeded its authority in its attempted collection of court costs. As such, we sustain Appellant's second assignment of error and vacate the decision of the trial court with regard its modification of Appellant's equitable distribution. In light of our disposition of Appellant's second assignment of error, Appellant's third assignment of error has been rendered moot. Accordingly, we reverse in part and vacate in part the decision of the trial court.

FACTS

{¶3} This matter is now before us for a second time on appeal, after having been remanded to the trial court. The following facts are pertinent to this appeal. As set forth in our prior opinion related to this matter, the parties were married on July 22, 1988 and have one child together. Upon separation, Appellant and the parties' child remained in the marital residence. Appellee moved out but continued to pay the mortgage on the marital residence, as well as most of the utilities, with the exception of heat,

totaling approximately two thousand dollars per month, until the parties were eventually divorced in August of 2006.

{¶4} In the original divorce decree, the trial court determined that Appellee should pay child support in the amount of $905.33 per month; however, the trial court did not complete its own child support worksheet. Although the court apparently referenced and relied on the worksheet submitted by Appellee, it did not expressly state such, nor did it attach that form to its judgment entry or otherwise make it part of the record. Further, after the court determined the amount of child support, it ordered Appellant to continue to pay the mortgage on the marital residence and the lawn care expenses, in lieu of child support, through August of 2009. In making this upward deviation in child support, the trial court did not find that the guideline support was unjust, inappropriate or not in the best interest of the child. In addition to ordering Appellee to pay the mortgage on the marital residence through August of 2009, the trial court also ordered exclusive occupancy of the residence to Appellant and the minor child until that time. Because the trial court did not make the required findings to support a deviation from guideline child support, or attach the child support worksheet, we remanded the case with respect to the issue of child support.

{¶5} On remand, the trial court issued an "Amended Entry of Divorce Specifically Regarding Child Support As By The Fourth District Court Of

Appeals." In this amended entry, the trial court stated that it specifically found "the attached worksheet to be appropriate and adopts it as the worksheet of the Court." However, once again, there is no worksheet attached to the entry. Further, although the trial court states that the child support calculation is $905.33, this amount apparently relates back to the worksheet we reviewed as part of the first appeal of this matter, which we noted was not signed or dated by either party or the court. In fact, our review of the record currently before us indicates that the trial court's amended entry of divorce very closely mirrors a proposed entry submitted by Appellee's counsel on remand. Attached to that proposed entry is another unsigned child support worksheet, which calculates child support to be $937.76, as opposed to $905.33. However, neither worksheet is actually attached to the trial court's entry.

{¶6} On remand, the trial court did, however, find that ordering Appellee to pay guideline child support would be inappropriate and unjust under the circumstances, and not in the best interest of the minor child. Thus, the trial court again ordered Appellee to pay the mortgage on the marital residence, as well as lawn care maintenance, in lieu of child support. Further, the trial court specified that "based upon her lack of financial responsibility and lack of credibility," Appellant "cannot be relied on to actually pay the housing and lawn services costs out of any child support

paid directly to her." As such, the trial court ordered Appellee to directly pay for those services, completely bypassing Appellant altogether. As before, the trial court ordered that Appellant and the minor child have the right to live in the marital residence until August of 2009, with the title and ownership of the property remaining with Appellee.

{¶7} In the prior appeal, Appellant also raised several assignments of error regarding the methods utilized by the trial court in its attempt to collect court and transcript costs. As we noted in the first appeal of this matter, the trial court attempted to use its contempt powers to collect the payment of court costs, and even issued a warrant for Appellant's arrest. In the first appeal, Appellant complained that the trial court acted as judge and advocate by virtue of the conduct exhibited during the contempt hearing. We found the issues raised by Appellant concerning the trial court's tactics related to the collection of court costs to be meritorious and vacated the court's orders which were issued as a result of the improper contempt hearing.

{¶8} On remand, the trial court sua sponte raised the issue of collection of costs. In spite of our finding in the first appeal of this matter that the trial court had used improper methods in the collection of court costs from Appellant, in its "Amended Entry of Divorce Specifically Regarding Child Support As By The Fourth District Court Of Appeals," the trial court found that Appellant "cannot be relied upon to pay court costs and transcript

costs." And, even though the issue was not properly before the court on remand, the trial court went on to vacate its prior division of marital assets and liabilities, ordering as follows:

" * * * the fourth full paragraph on page five (5) of the August 31, 2006 entry, which reads 'Plaintiff shall pay to Defendant the sum of $10,000.00 on or before June 30, 2009,' shall be held for naught and is hereby amended, as follows:

{¶9} The Plaintiff is hereby ordered to pay the sum of $1,394.67, as and for costs, on or before June 30, 2009 to the Meigs County Clerk of Courts. This amount consists of Plaintiff's share of the court costs accrued since August 31, 2006, in the amount of $90.35; defendant's original remaining share of court costs, pursuant to the August 31, 2006 entry, in the amount of $114.47; defendant's share of the court costs accrued since August 31, 2006, in the amount of $90.35; and $1,099.50 for transcript costs.

{¶10} Furthermore, the Plaintiff shall deposit the sum of $8,605.33, as and for complete satisfaction of the $10,000.00, heretofore ordered to be paid to the defendant, with the Meigs County Clerk of Court on or before June 30, 2009.

{¶11} The Meigs County Clerk of Courts shall disburse all monies on deposit once all costs have been paid in full."

{¶12} Thus, the trial court ordered collection of Appellant's share of costs by sua sponte reducing her prior equitable distribution award, and by ordering Appellee to pay the amount owed by Appellant, essentially treating that amount as a setoff against the amount Appellee was ordered to pay to Appellant as part of the divorce. It is from this amended entry of divorce that Appellant now brings her appeal, assigning the following errors for our review.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED WHEN IT FAILED TO IMPOSE CHILD SUPPORT PURSUANT TO THE STATUTORY GUIDELINES AS REQUIRED BY LAW AND INSTEAD ORDERED THAT IN LIEU OF CHILD SUPPORT THE OBLIGOR COULD PAY MORTGAGE PAYMENTS AND LAWN CARE EXPENSES.

II. THE TRIAL COURT ERRED WHEN IT SUA SPONTE MODIFIED THE PROPERTY SETTLEMENT OR EQUITABLE DISTRIBUTION PAYMENT WITHOUT ANY JURISDICTION TO DO SO AND THE MODIFICATION ORDER IS THEREFORE VOID.

III. THE TRIAL JUDGE ERRED BY ABANDONING HIS ROLE AS A NEUTRAL DETACHED FACTFINDER, AND WITHOUT ANY AUTHORITY TO DO SO, ACTED AS AN ADVOCATE TO IMPROPERLY ORDER COLLECTION OF COURT COSTS."

ASSIGNMENT OF ERROR I

{¶13} In her first appeal of this matter, Appellant raised several issues with respect to the child support award issued by the trial court. After reviewing the errors assigned by Appellant regarding child support, we affirmed in part and reversed in part. Specifically, we affirmed the trial court's inclusion of Appellant's social security disability benefits in the child support calculation. Nevertheless, we reversed and remanded the matter in light of the trial court's failure to make the required findings to support its deviation from guideline support, and to complete and attach a copy of the child support worksheet to its entry.

{¶14} Although not currently raised by Appellant in this second appeal of the child support award, we sua sponte note deficiencies in the record related to the required child support worksheet. In its amended entry of divorce issued after remand, the trial court references an "attached" worksheet and specifically "adopts it as the worksheet of the court." However, once again, there is no worksheet attached to the entry. As set forth in our prior decision related to this matter, "the Ohio Supreme Court has held that: (1) The child support guidelines require a trial court to complete a child support computation worksheet and include it in the record. (2) This requirement is mandatory and must be literally and technically followed. (3) The court must enter any deviation from the applicable worksheet and the basic child support schedule in its journal and must include findings of fact to support such determination. *DePalmo v. DePalmo,* 78 Ohio St.3d 535, 538, 1997-Ohio-184, 679 N.E.2d 266; citing *Marker v. Grimm*, supra, paragraphs one through three of the syllabus. See, also, *Long v. Long*, 162 Ohio App.3d 422, 2005-Ohio-4052, 833 N.E.2d 809, at ¶ 9; *Murral v. Thomson,* Hocking App. 03CA8, 2004-Ohio-432, at ¶ 17." *Hirzel v. Ooten*, Meigs App. No. 06CA10 and 07CA13, 2008-Ohio-7006.

{¶15} Further, in the amended entry, the trial court refers to guideline support in the amount of $905.33, however, this amount clearly refers to the

worksheet submitted prior to the first appeal, which we noted was not signed by the court or the parties. Additionally, prior to the trial court's issuance of its amended entry of divorce, Appellee's counsel submitted a second, proposed child support worksheet, which is also unsigned. That worksheet calculates the amount of child support owed by Appellee to be $937.76. Thus, the deficiencies in the record related to the child support calculation and worksheet that existed after the first appeal of this matter have not been remedied by the court. Accordingly, before reaching the merits of Appellant's second appeal of this matter, we conclude that we must, once again, remand this matter in order that the trial court may remedy these deficiencies.

{¶16} However, in the interests of justice and to potentially avoid the need for further appeal of the issue of child support, we will address the merits of Appellant's assignment of error contained in the present appeal, in which Appellant contends that the trial court erred when it failed to impose child support pursuant to the statutory guidelines and instead ordered that Appellee pay the mortgage and lawn care expenses in lieu of child support. In response to this alleged assignment, Appellee contends that the trial court did not abuse its discretion in finding that guideline support was unjust and not in the best interest of the minor child, and instead ordered that Appellee pay the mortgage and lawn care expenses in lieu of guideline support,

especially considering the order resulted in a upward deviation from the calculated guideline support. For the following reasons, we agree with Appellant's argument and therefore sustain her first assignment of error.

{¶17} We initially note that we review child-support matters under an abuse-of-discretion standard. See, e.g., *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. An abuse of discretion "connotes more than an error of law or judgment; rather, it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When applying the abuse-of-discretion standard of review, appellate courts must not substitute their judgment for that of the trial courts. See, e.g., *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181. Furthermore, an appellate court must presume that the findings of the trial court are correct because the finder of fact is best able to observe the witnesses and to use those observations to weigh witness credibility. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 461 N.E.2d 1273; see, also, *Mahlerwein v. Mahlerwein* 160 Ohio App.3d 564, 2005-Ohio-1835, 828 N.E.2d 153, at ¶ 19.

{¶18} R.C. 3119.022 governs the procedure for awarding and calculating child support. The statute's overriding concern is to ensure the best interest of the child for whom support is being awarded. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 110, 616 N.E.2d 218. Thus, the statute's

provisions are mandatory in nature and courts must follow the statute literally and technically in all material aspects. *Marker v. Grimm* (1992), 65 Ohio St.3d 139, 601 N.E.2d 496, paragraph two of the syllabus; see, also, *Albright v. Albright*, Lawrence App. No. 06CA35, 2007-Ohio-3709, at ¶ 7. If a 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. See *Rock*, supra, at 110; *Albright*; see, also, R.C. 3119.03.

{¶19} Appellant contends that in ordering Appellee to pay the mortgage and lawn care expenses on the marital residence in lieu of child support, the trial court erred and, in fact, failed to award child support. R.C. 3119.22 authorizes the court to order child support in an amount that deviates from the guideline worksheet "if, after considering the factors and criteria set forth in section 3119.23 of the Revised Code, the court determines that the amount calculated * * * would be unjust or inappropriate and would not be in the best interest of the child." The statute further provides that if the court deviates from the child support guideline, it "must enter in the journal the amount of child support calculated pursuant to the basic child support schedule and the applicable worksheet, * * * its determination that that amount would be unjust or inappropriate and would not be in the best interest of the child, and findings of fact supporting that determination." Id. See, also, *Marker v. Grimm*, supra, paragraph three of

the syllabus; *Bishop v. Bishop*, Scioto App. No. 03CA2908, 2004-Ohio-4643.

{¶20} On remand, the trial court again found that the child support guideline worksheet established Appellee's child support obligation to be $905.33 per month plus administrative fees, and additionally found that the guideline support, under the circumstances, was unjust, inappropriate and not in the best interest of the minor child, as required by the statute. However, the trial court went on to find as follows:

"Defendant, based on her lack of financial responsibility and lack of credibility, cannot be relied upon to actually pay the housing and lawn service costs out of any child support paid directly to her. That is, such deviation would be in the best interest of that minor child and for the Court to order a deviation from guideline support of $905.33 per month to the Plaintiff making direct payment of the mortgage payment and lawn service costs as and for his child support obligation or in lieu of his child support obligation until the child graduates from high school or turns 18 years of age, whichever last occurs."

Thus, the trial court essentially ordered that, in lieu of child support, Appellee was to directly pay his mortgage payment and lawn care services, without providing any cash directly to Appellant whatsoever, while also awarding Appellee sole ownership of the marital residence, and possession of that residence once the child turned 18 or graduated from high school.

{¶21} "All parents have a duty to support their children.[footnote omitted] Both common and statutory law mandate that a biological parent, absent a court order to the contrary, provide sufficient support for his or her

child." 47 Ohio Jur. 3d Family Law § 1007. "The parental obligation of providing the support of minors extends only to necessaries, which includes providing suitable shelter, food, and clothing. Medical services are also a necessary.[footnotes omitted]" 47 Ohio Jur. 3d Family Law § 1010. Here, while the trial court's deviation from guideline child support provides for suitable shelter for the minor child, it does not provide for other necessaries, specifically food or clothing. As argued by Appellant on appeal, the current structure of the child support order allows the child's residential parent no discretion whatsoever in how to allocate the child support for the minor child. Further, the way the award is structured arguably benefits Appellee more than the minor child, in that it allows Appellee to pay the mortgage payments on a residence that was awarded to him in the divorce. We are mindful of the fact that Appellant did request that she and the minor child be permitted to reside in the marital residence until the child reached the age of majority, however, there is no evidence to suggest that she made such request at the exclusion of any other form of child support for the minor child.

{¶22} Additionally, the child's need for clothing and food clearly outweighs the need for lawn care expenses to be paid out of the child support order. Further, we find the trial court's commentary in its original order, that the minor child could perform the lawn care services in exchange

for that portion of the child support award, to be unreasonable and inappropriate. In light of the foregoing, we conclude that the trial court abused its discretion in granting a deviation from guideline child support in the manner that it did. Thus, we sustain Appellant's first assignment of error. Accordingly, we reverse and remand the trial court's amended entry of divorce with respect to the issue of child support.

SECOND ASSIGNMENT OF ERROR

{¶23} In her first appeal of this matter, Appellant assigned errors related to the way in which the trial court had attempted to collect costs, which had included holding a contempt hearing and issuing an arrest warrant for Appellant's failure to pay. We held that such action by the court was impermissible and vacated all orders flowing from the contempt hearing.

{¶24} In her second assignment of error of her present appeal, Appellant contends that the trial court erred when it sua sponte modified the property settlement or equitable distribution payment without any jurisdiction to do so, arguing that the modification order is void, as a result. We agree.

{¶25} On remand, the trial court again dealt with the issue of court and transcript costs. As set forth above, the trial court ordered collection of Appellant's share of costs by sua sponte reducing her prior equitable distribution award, and by ordering Appellee to pay the amount owed by

Appellant, essentially treating that amount as a setoff against the amount Appellee was ordered to pay to Appellant as part of the divorce. For the same reasons that we vacated the trial court's original order related to the payment of costs, we again vacate the trial court's amended entry of divorce insofar as it relates to the attempted collection of Appellant's share of costs.

{¶26} As set forth in our prior decision related to this matter, "In *Strattman v. Studt* (1969), 20 Ohio St.2d 95, 253 N.E.2d 749, the court held in syllabus language as follows:

6. 'The duty to pay court costs is a civil obligation arising from an implied contract.'

7. 'Obligations arising upon implied contracts and judgments thereon are debts, within the purview of Section 15, Article I of the Ohio Constitution, which forbids imprisonment for debt in civil actions. (Paragraph one of the syllabus of *Second National Bank of Sandusky v. Becker*, 62 Ohio St. 289, approved and followed.)' " *Hirzel v. Ooten*, supra.

{¶27} We further noted in our prior decision that "[i]n *State v. Glasscock* (1993), 91 Ohio App.3d 520, 632 N.E.2d 1328, this Court followed *Strattman*, supra, by holding that since court costs are civil obligations for which imprisonment is not justifiable and collectable only by process for collection of civil judgments, a court could not order the costs paid by performance of community service." Instead of applying the

principles set forth in our prior decision, on remand the trial court again attempted to collect its costs via impermissible means. Specifically, the trial court exceeded its authority by sua sponte vacating Appellant's prior equitable distribution, which was not at issue on remand, and attempting to collect its costs by reducing Appellant's previously ordered equitable distribution. As we explained in our prior decision of this matter, court costs are collectible only by process for collection of civil judgments. *Glasscock*, supra. Further, R.C. 3105.171 governs the division of marital and separate property and provides in section (I) that "[a] division or disbursement of property or a *distributive award* made under this section is not subject to future modification by the court." (Emphasis added).

{¶28} In light of the foregoing statutory and case law, we agree with Appellant and hold that the trial court erred when it sua sponte vacated its prior equitable distribution to Appellant in order to modify the distribution payment as a means to collect costs. Accordingly, we sustain Appellant's second assignment of error and vacate the trial court's amended entry of divorce with respect to the collection of costs.

ASSIGNMENT OF ERROR III

{¶29} In her third assignment of error, Appellant contends that the trial judge erred by abandoning his role as a neutral and detached factfinder, and without any authority to do so, acted as an advocate to improperly order

collection of court costs. In light of our determination that the trial court exceeded its authority in vacating its prior divorce entry in order to modify Appellant's equitable distribution in an attempt to collect court costs, as well as our decision to vacate that order, Appellant's third assignment of error has been rendered moot. Thus, we need not address it.

{¶30} However, as in the prior appeal of this matter, and because of the seriousness and repetitiveness of the trial judge's actions regarding the issue of collection of costs, we again remind counsel and the court of the duty of the tribunal to remain impartial and unbiased in the proceedings, as well as the proper avenue for addressing inappropriate judicial action. This Court recently explained, in *In the Matter of the Adoption of C.M.H.*, that "[j]udicial bias is 'a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by law and the facts.' *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, 132 N.E.2d 191, paragraph four of the syllabus. See, also, *Cleveland Bar Association v. Cleary* (2001), 93 Ohio St.3d 191, 201, 754 N.E.2d 235." Hocking App. No. 07CA23, 2008-Ohio-1694.

{¶31} As noted in *In the Matter of the Adoption of C.M.H.*, supra, we have previously held that such challenges of judicial prejudice and bias are

not properly brought before this Court. "Rather, [A]ppellant must make such a challenge under the provisions of R.C. 2701.03, which requires an affidavit of prejudice to be filed with the Supreme Court of Ohio." *Baker v. Ohio Department of Rehabilitation and Correction*, 144 Ohio App.3d 740, 754, 2001-Ohio-2553, 761 N.E.2d 667. Courts of appeal lack authority to void the judgment of a trial court on such basis. Id. As such, although we have already vacated the judgment issued by the court on other grounds, we cannot void it based on a claim of prejudice or bias.

{¶32} Accordingly, we reverse in part and vacate in part the decision of the trial court.

JUDGMENT REVERSED IN PART AND VACATED IN PART.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED IN PART AND VACATED IN PART and that the Appellant recover of Appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

McFarland, P.J., Abele, J., and Kline, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland
Presiding Judge

BY: _____
Judge Peter B. Abele

BY: _____
Judge Roger L. Kline

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.