[Cite as *Ludwig v. Ludwig*, 2014-Ohio-2217.]

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

Lenore D. Ludwig	Court of Appeals No. L-13-1116
Appellee	Trial Court No. DR 2008-1018
v.	
Daniel A. Ludwig	**DECISION AND JUDGMENT**
Appellant	Decided: May 23, 2014

* * * * *

Thomas P. Goodwin and Dan Nathan, for appellee.

Matthew O. Hutchinson, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Daniel Ludwig, appeals the May 14, 2013 judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, denying the objections to the magistrate's January 22, 2013 decision, which denied appellant's motion for modification of child support and awarded appellee, Lenore Ludwig, $4,000

in attorney fees. Because we find that the trial court did not abuse its discretion, we affirm.

{¶ 2} This action commenced on September 23, 2008, with the filing of the divorce complaint. The parties were married in 2002 and had two children; one born in 2001 and one in 2003. In its December 10, 2009 judgment entry of divorce, the trial court adopted the parties' shared parenting plan which provided that appellant would have the children from after school or 4:00 p.m. Friday until Monday morning when the children got on the bus for school. Appellee would have the children at all other times. Regarding the children's activities, the parenting plan also provided that the parents would not, without the other's prior consent, schedule activities for the children that would interfere with the parenting time of the other parent. The plan further provided that if a conflict arose, the parties would first seek counseling or mediation through Northwest Ohio Family Mediation.

{¶ 3} Regarding child and spousal support, the judgment entry of divorce provided that appellant pay appellee $814.04 per month for the children and that he pay $1,200 per month in spousal support for 24 months, beginning September 2009, which would cease upon appellee's marriage or cohabitation with an unrelated male.

{¶ 4} On August 5, 2011, appellant filed a motion to modify the shared parenting plan. Appellant's request was based on his assertion that since the judgment of divorce, the children had chiefly resided with him. Appellant also claimed that he had been making most of the decisions regarding the children's health and educational needs and

providing for most of their expenses. Appellant then requested that the court modify the plan naming him the residential parent and that appellee be ordered to pay child support.

{¶ 5} On December 1, 2011, appellee filed a motion for payment of attorney fees. Appellee argued that because her spousal support had terminated and she was a full-time student working part-time, she could not afford to pay her attorney.

{¶ 6} On June 13, 2012, the parties entered into a partial consent judgment entry. The parties agreed to modify the shared parenting plan as follows: appellant was to have the children every Friday at 5:00 p.m. until 9:00 a.m. Monday. Appellant was also to have the children alternating Wednesdays from 5:00 p.m. until 8:00 p.m. and Thursdays from 5:00 p.m. until 9:00 p.m. During summer break, appellant was to have the children every Thursday, 5:00 p.m., until Monday, 9:00 a.m. Appellee was to have the children all other times.

{¶ 7} The agreement further clarified that the parties would discuss enrollment of the children in extracurricular activities prior to enrollment and that any activity taking place during the other parent's parenting time would need prior, written approval. The judgment entry reserved the issues regarding spousal support, child support, and attorney fees. Just prior to the hearing, the parties stipulated that appellant overpaid spousal support to appellee for one month, a sum of $1,200 and that appellant would pay the outstanding guardian ad item fee of $968.

{¶ 8} A hearing on the remaining issues was held on September 27, 2012, and the following evidence was presented. Appellant testified that the children participate in

soccer and gymnastics and that he has paid all of the related expenses. The receipts were admitted into evidence and totaled $3,447.10 since September 2010.

{¶ 9} During cross-examination, appellant was questioned regarding the activity fees. He acknowledged that the fees involved activities that he signed the children up for. Appellant admitted that part of the dispute between the parties was appellee's assertion that appellant had signed the children up for activities before discussing it with appellee. Appellant stated that "98 percent" of the activities were discussed and agreed upon. Appellant denied that appellee ever objected to the activities he scheduled during her parenting time. Appellant also admitted that his sister paid for their YMCA membership.

{¶ 10} Appellant testified that he requested that the court award him a child support deviation based on the additional expenses he has paid and the fact that the children resided with him for more hours than set forth in the parenting agreement. Appellant admitted that since the May 2012 shared parenting agreement, he had not had the children any Fridays but stated that it was due to his work schedule. Appellant also admitted that he had worked some Saturdays as well.

{¶ 11} Appellant testified that he agreed to pay the initial amount for the guardian ad litem but that he felt that it was "inequitable" for him to pay the entire amount.

{¶ 12} Appellee testified that she did not agree to 98 percent of the children's extracurricular activities and that appellant refused to reduce the number. Appellee stated that appellant would discuss the activity with the children prior to asking her and then, if she refused they would be upset. Regarding parenting time, appellee stated that since

their divorce, the parenting schedule has not been closely adhered to and that she has allowed appellant to have the children during her parenting time for special events.

{¶ 13} Regarding child support, appellee stated that if she did not receive the amount from appellant she would not be able to maintain her household. She agreed that her income was imputed at full-time minimum wage, but that she was not earning the amount. Appellee testified that she has only been able to make one payment to her attorney since appellant filed his motion but that she could not have handled the case pro se.

{¶ 14} During cross-examination, appellee admitted that the soccer and gymnastics were good for the children's self-esteem, socialization, physical fitness, and sportsmanship. Appellee further agreed that the children love their activities.

{¶ 15} Appellee also testified that she has been enrolled in school since 2008 and was taking approximately 12 credit hours per semester. Appellee stated that she last worked as seasonal part-time help in December 2009. Appellee stated that in order to maintain her household she relies on child support and takes out the maximum amount of student loans. Appellee agreed that her boyfriend, with whom she resides, shares the rent and household expenses.

{¶ 16} Appellee acknowledged that in August 2011, when the motion to modify shared parenting was filed, appellant had the children more nights than the order in the divorce judgment entry. Appellee explained that appellant would frequently offer the

children a "big outing" after gymnastics and she, rather than being the "bad guy," would allow them to go and then they would spend the night at appellant's home.

{¶ 17} During the hearing there was testimony elicited regarding appellant's attempt to mediate the issue prior to filing his motions. Appellee denied that she was aware of a mediation date prior to the motion being filed. Appellee stated that she never received the notice that appellant sent and that, once a family member informed her that appellant was trying to "take the girls" she immediately called the mediation office to see if she missed an appointment. They responded negatively. Appellee stated that there was a mediation scheduled after the motion was filed, but that she missed the appointment due to a stomach virus. Appellee stated that there was no follow-up because the motions were pending and attempts to mediate were "moot."

{¶ 18} Appellee was cross-examined regarding her knowledge of the timing of appellant's attempts to mediate. Appellee stated that she believes that she contacted the court in June 2011, and that appellant had been to the office in January. Appellee scheduled an individual appointment but missed it due to the flu. The mediation was scheduled for September 2011; the motion had been filed in August 2011.

{¶ 19} Appellant testified that he contacted Northwest Ohio Mediation in January 2011, and had an individual appointment in February. Appellant stated that appellee contacted him in May 2011, and claimed that she never got the letter. Appellee indicated that she had made her individual appointment. After appellee failed to attend her appointment or reschedule, appellant filed his motion to modify shared parenting.

According to appellant, he was told that the mediation could not go forward until appellee had her appointment.

{¶ 20} In the January 22, 2013 decision, the magistrate made the following relevant findings. Regarding the request to modify child support, the magistrate found that appellant's assertion that his time share of the children is 15 percent greater than the parenting schedule was not proven since the evidence demonstrated that he often worked on Fridays and Saturdays which required appellee to care for the children. The magistrate noted that any increase was "slight" and did not support a deviation based upon extraordinary circumstances under R.C. 3119.24. The court further noted that the expenses of extracurricular activities were to be borne by the party enrolling the children.

{¶ 21} The magistrate found that appellant failed to mediate the issues prior to filing any motions in contravention of the shared parenting plan. The magistrate found that this behavior, combined with the disparity in the parties' income supported an award to appellee of partial attorney fees in the sum of $4,000.

{¶ 22} Appellant filed multiple objections to the magistrate's decision. Notably, appellant argued that the magistrate erred by failing to apply the offset formula utilized in this court's decision in *Ontko v. Ontko*, 6th Dist. Erie No. E-03-050, 2004-Ohio-3805. Appellant also argued that the magistrate wrongly determined that appellant, in contravention of the shared parenting plan, filed his motion to modify without first attempting mediation.

{¶ 23} Regarding offset, the trial court concluded that appellant's request for a deviation based upon increased parenting time and the payment of various activity and school fees was not supported by the evidence necessary to demonstrate that the amount he was ordered to pay was unjust, inappropriate, or not in the best interests of the children. The court also agreed that the partial attorney fee award of $4,000 was not in error. This appeal followed.

{¶ 24} Appellant raises three assignments of error for our consideration:

> Assignment of Error No. 1: The trial court erred when it concluded that Ohio law prohibited child support offsets in all cases.
>
> Assignment of Error No. 2: The trial court erred when it failed to deviate Mr. Ludwig's child support obligation.
>
> Assignment of Error No. 3: The trial court erred in awarding $4,000.00 to Ms. Ludwig for her attorney's fees.

{¶ 25} Appellant's first assignment of error asserts that the trial court, citing *Hubin v. Hubin*, 90 Ohio St.3d 1482, 438 N.E.2d 1255 (2000), erroneously determined that Ohio law prohibits child support offsets in all cases. In citing *Hubin*, the court noted that the certified question posed to the Supreme Court of Ohio was: "When determining the proper amount of child support in a shared parenting case, must a court presume that each parent must pay his or her child support obligation on line twenty-four of the child support worksheet and then order the difference through an offset while reserving the ability to deviate." *Id.* The court summarily affirmed the Tenth District's decision

denying the offset on the authority of *Pauly v. Pauly*, 80 Ohio St.3d 386, 686 N.E.2d 1108 (1997), where the court determined that a party is not entitled to an "automatic credit in child support obligations under a shared parenting order. However, a trial court may deviate from the amount of child support * * * if the court finds that the amount of child support would be unjust or inappropriate to the children or either parent and would not be in the best interest of the child." *Id.* at syllabus.

{¶ 26} Reviewing the trial court's judgment on the objections, we disagree with appellant's interpretation that the court rejected any use of an offset in shared parenting situations. The court merely stated that an offset is not required but that courts may deviate from the guidelines upon determining that the circumstances and interests of the child warrant a different amount. Appellant's first assignment of error is not well-taken.

{¶ 27} In appellant's second assignment of error he contends that the court erred when it denied his request to deviate from his child support obligation. R.C. 3119.24(A) gives the trial court, in its discretion, the ability to deviate from the child support schedule where the calculation would be unjust or inappropriate or not in the best interests of the child. The non-exhaustive list of factors to be considered is listed in R.C. 3119.23, and provide for deviations in cases of extended parenting time or extraordinary costs associated with parenting time and significant in-kind contributions for expenses such as schooling, extracurricular activities, or clothing.

{¶ 28} Reviewing the evidence presented at trial, we cannot say that the trial court abused its discretion when it determined that appellant failed to establish that his

increased parenting time or increased expenses warranted a downward deviation in child support. The evidence presented at the hearing showed that neither appellant's nor appellee's income had changed since the initial child support order. Appellee was co-habitating and sharing living expenses with a partner and her $1,200 monthly spousal support had terminated. Appellant complained that he was paying increased amounts of the children's activity expenses; the activities that he introduced and enrolled them in. Appellant testified that he had the children for a significant increased period of time but also admitted that despite the revised parenting plan, he had not been with them on Fridays or some Saturdays. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 29} Appellant's third assignment of error challenges the trial court's partial award of attorney fees. R.C. 3105.73(B) provides:

> In any post-decree motion or proceeding that arises out of an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that motion or proceeding, the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets.

{¶ 30} A court's decision to award a party attorney fees in a post-divorce proceeding is reviewed under an abuse of discretion standard. *Kendall v. Kendall*, 6th Dist. Ottawa No. OT-08-054, 2009-Ohio-4067, ¶ 73.

{¶ 31} Appellant argues that it was appellee's failure to mediate that precipitated his filing of the motions. He further argues that spousal support terminated one month prior to its expiration date due to appellee's cohabitation with an unrelated male; appellee stipulated to this fact prior to trial. Further, appellant contends that the court failed to define which fees were incurred defending the various issues.

{¶ 32} In awarding attorney fees, the court noted that appellant failed to mediate the issues as required in the shared parenting agreement. The court further relied on the disparity in the parties' incomes. As set forth above, conflicting evidence was presented on the issue of mediation; we cannot say that the court abused its discretion in finding that appellant failed to properly pursue mediation. In addition, the court did not award appellee her entire sum of her attorney fees which totaled over $6,000. The parties proceeded to trial on the issue of the modification of child support; undoubtedly, this was the issue that incurred the largest sum of attorney fees. Thus, we cannot say that the trial court abused its discretion when it granted appellee a partial attorney fee award. Appellant's third assignment of error is not well-taken.

{¶ 33} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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
Stephen A. Yarbrough, P.J.	
James D. Jensen, J. CONCUR.	_______________________________ JUDGE
	_______________________________ JUDGE

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