

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

DANIEL F. HERBERT, :  
 :  
 Plaintiff-Appellee, : CASE NO. CA2011-07-132  
 :  
 - vs - : OPINION  
 : 5/14/2012  
 :  
 DEBBIE C. HERBERT, :  
 :  
 Defendant-Appellant. :

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
DOMESTIC RELATIONS COURT  
Case No. DR08091108

Fred S. Miller, 246 High Street, Hamilton, Ohio 45011, for plaintiff-appellee

Debbie C. Herbert, 541 Hale Road, Wilmington, Ohio 45177, defendant-appellant, pro se

**HENDRICKSON, P.J.**

{¶ 1} Defendant-appellant, Debbie C. Herbert (Mother), appeals from a decision of the Butler County Court of Common Pleas Division of Domestic Relations ordering her to reimburse plaintiff-appellee, Daniel F. Herbert (Father), for a portion of their son's college tuition, room, board, and books. For the reasons outlined below, we affirm the trial court's decision.

{¶ 2} The parties were married on September 8, 2004, and subsequently dissolved

their marriage on October 16, 2008. As a part of the separation agreement incorporated into their dissolution decree, the parties agreed to split the college expenses of their adult son (Son). Father was to pay 55 percent of Son's college tuition, room, board, and books, while Mother was to pay the remaining 45 percent of these expenses. The court retained jurisdiction over this issue "to guarantee payment and insure the equitable division of such debts."

{¶ 3} On December 3, 2010, Father filed a motion for contempt against Mother. While Mother had paid a portion of her 45 percent share for Son's college expenses, Father alleged he was entitled to be reimbursed \$6,219.00 from Mother. The magistrate took substantial testimony from both parties regarding Son's college expenses and the percentage each party had paid. At the end of the testimony, the magistrate found that Mother was not in contempt for failing to pay her full share of Son's college expenses, because Father had failed to provide her with receipts or invoices sufficient to inform her of the total cost. However, given the testimony and other evidence presented at the hearing, the magistrate found that Mother owed Father \$2,530.92 for Son's college expenses. The magistrate ordered Mother to reimburse Father this amount by August 15, 2011.

{¶ 4} On May 10, 2011, Mother filed an objection to the magistrate's decision. In her objection, Mother stated that a transcript of the hearing before the magistrate was not needed because findings of fact were not in dispute. On June 15, 2011, the trial court held a hearing on Mother's objection. At the hearing, Mother provided the trial court with a copy of the magistrate's decision and several exhibits that were before the magistrate. Mother also presented one exhibit that was not before the magistrate that provided information regarding her tax return. While the trial court admitted this exhibit, the court stated that the exhibit was not relevant to the issue before it. Due to the lack of a transcript, the trial court found that the magistrate's findings of fact were accurate and presumed the magistrate took into account

the proffered exhibits before it when making its decision.

{¶ 5} Mother now appeals, and raises three assignments of error for review.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE MAGISTRATE ERRED BY NOT DEDUCTING \$5000.00 BALANCE REMAINING IN THE BANK ACCOUNT SET ASIDE SOLEY [sic.] FOR [SON'S] COLLEGE EXPENSES.

{¶ 8} Assignment of Error No. 2:

{¶ 9} THE MAGISTRATE ERRED BY NOT EXAMINING EVIDENCE OF DEFENDANT'S TAX PAPERS SHOWING TWO SCHOOL DISTRICTS. [sic] INSTEAD OF DOING COMPUTATIONS OF SCHOOL TAXES BASED ON UNSUBSTANTIATED TESTIMONY BY [FATHER] MENTIONING ONLY ONE SCHOOL DISTRICT.

{¶ 10} Assignment of Error No. 3:

{¶ 11} THE MAGISTRATE ERRED BY NOT CREDITING RECEIPT #30 DEPOSITED BY [MOTHER] INTO [FATHER'S] BANK ACCOUNT FOR PAYMENT TOWARD [SON'S] COLLEGE EXPENSES.

{¶ 12} Mother specifically argues that the transcripts of the proceedings show that the magistrate did not consider \$5,000 in the bank account set aside for Son's college expenses in the calculation of the amount Mother owed to Father and demonstrate there was a lack of information regarding payment of school income tax except for "unsubstantiated testimony" from Father. Mother further argues that the transcripts of the proceedings show that the magistrate did not consider a deposit receipt of \$100 in its calculation of the amount owed to Father. However, Mother is precluded from asserting these arguments on appeal because a transcript of the hearing before the magistrate was not provided to the trial court.

{¶ 13} Civ.R. 53(D)(3)(b)(iii) provides that an objection to a factual finding, whether or not specifically designated as a finding of fact, must be supported by a transcript or affidavit

of the evidence submitted to the magistrate. The objecting party is required to file the transcript or affidavit with the court within 30 days after filing objections unless the time for preparing the transcript is extended by the court. See Civ.R. 53(D)(3)(b)(iii).

{¶ 14} It is well-established that when an objecting party fails to file a transcript with the objections, the court is "free to adopt the magistrate's findings without further consideration of the objections." *Stevens v. Stevens*, 12th Dist. Nos. CA2009-02-028, CA2009-06-073, 2010-Ohio-1104, ¶ 23, quoting *Shimman v. Germano*, 6th Dist. No. L-06-1358, 2008-Ohio-717, ¶ 14. In such circumstances, the trial court is limited to examining only the magistrate's conclusions of law and recommendations and has the discretion to adopt the factual findings of the magistrate. *Bartlett v. Sobetsky*, 12th Dist. No. CA2007-07-085, 2008-Ohio-4432, ¶ 9.

{¶ 15} Although transcripts of the proceedings are included in the record on appeal, when reviewing a magistrate's decision adopted by the trial court, an appellate court is precluded from considering evidence not before the court below. *Finkelman v. Davis*, 12th Dist. No. CA2003-07-173, 2004-Ohio-3909, ¶ 6. "[A] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *Stevens* at ¶ 24, quoting *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus.

{¶ 16} In this case, as the trial court indicated, it was entitled to accept the magistrate's factual findings. The magistrate found that 45 percent of Son's college expenses equaled \$20,884.14. The magistrate found that while Mother had paid \$18,353.22 of this amount, Father was entitled to reimbursement from Mother of \$2,530.92. Because it lacked a transcript of the hearing before the magistrate, the trial court properly presumed that the magistrate considered all relevant testimony and exhibits in making this factual determination. Consequently, Mother is precluded from challenging on appeal the trial

court's adoption of the magistrate's factual finding establishing the amount she must reimburse Father for payment of Son's college expenses.

{¶ 17} Accordingly, Mother's three assignments of error are all overruled.

{¶ 18} Judgment affirmed.

PIPER and HUTZEL, JJ., concur.