[Cite as *McNeeley v. Ortiz,* 2010-Ohio-4650.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
AMANDA MCNEELEY	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-00012
JASON N. ORTIZ	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Domestic Relations Division, Case No. 2006-DR-00473

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 27, 2010

APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.

{¶1} Defendant-appellant Jason N. Ortiz appeals a judgment of the Court of Common Pleas, Domestic Relations Division, of Stark County, Ohio, which modified appellant's child support obligation. Plaintiff-appellee is Amanda McNeely, mother of the parties' minor child. Appellant assigns two errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ORDERING A MODIFICATION OF AN EXISTING CHILD SUPPORT OBLIGATION IN THE ABSENCE OF ANY MOTION TO MODIFY CHILD SUPPORT.

{¶3} "II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN MODIFYING AN EXISTING CHILD SUPPORT OBLIGATION RETROACTIVE TO AN ARBITRARY DATE."

{¶4} The record indicates the parties were divorced in 2007. On July 21, 2008, appellee filed a motion for modification of the parties' shared-parenting plan, alleging a substantial change in circumstances because appellant had moved from Kansas City, Kansas to Long Beach, California. Appellant responded on October 15, 2008, with his own motion to terminate the shared-parenting plan and designate him to be the child's residential parent and legal custodian or in the alternative, to modify the shared parenting plan to accommodate the change in circumstances. Neither party's motion made any reference to child support.

{¶5} On April 29, 2009, the parties settled the disputed parenting issues. On April 30, 2009, the magistrate ordered that the existing shared-parenting plan remain in effect until an agreed judgment entry could be prepared. Also in the April 30th decision, the magistrate set a second hearing for June 2, 2009, on the separate subject of

financial matters, including the amount and commencement date of child support and responsibility for transportation costs to and from California for appellant's parenting time. Appellant asserts it was not until the April 29 hearing and the magistrate's decision of April 30th that he was first put on notice the court would be reviewing the issue of child support.

{¶6} On June 2, 2009, the magistrate issued her decision. Her findings of fact indicate appellant had argued there was no pending motion for modification of child support, but appellee requested modification because appellant had less time now with the child, and the allocation of travel expenses had been modified. The magistrate stated counsel had made oral arguments on the issue of child support. The magistrate gave appellee ten days to file a responsive brief with regard to the commencement date of the new child support order. The magistrate increased appellant's child support payment by nearly $300 per month, and made a provision for health insurance and medical expenses. The order directed appellant to reimburse appellee's gas expenses from her home to Hopkins Airport and back for the child's travel for visitation if appellee provided a receipt. On June 3, 2009, the magistrate memorialized the agreed parenting issues, designating appellee's residence as the primary resident for the minor child, and setting out regular parenting time, to commence on August 8, 2009.

{¶7} On June 18, 2009, the magistrate issued a decision establishing the commencement date of the new child-support obligation to be January 1, 2009. Appellant filed objections to the magistrate's modification of child support in the absence of any motion to that effect, and arguing the commencement date for the child support modification was arbitrary and contrary to law, and created a retroactive child support

arrearage. The trial court overruled the objections and adopted the magistrate's decision, from which appellant brings his appeal.

{¶8} Appellant urges the trial court erred as a matter of law and also abused its discretion. We review appeals based upon alleged errors of law de novo, without deference to the trial court. *Goodyear Tire & Rubber Company v. Aetna Casualty and Surety Company,* 95 Ohio St. 3d 512, 2002-Ohio- 2842, 769 N.E. 2d 835, at paragraph 4, citation deleted.

{¶9} The Supreme Court specifically made the abuse of discretion standard applicable to decisions calculating child support in *Dunbar v. Dunbar,* 68 Ohio St. 3d 369, 1994-Ohio-509, 627 N.E. 2d 532. The Supreme Court has repeatedly held the term "abuse of discretion" implies the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E. 2d 1140. In applying the abuse of discretion standard, this court may not substitute our judgment for that of the trial court. *Pons v. Ohio State Medical Board,* 66 Ohio St. 3d 619, 1993-Ohio-122, 614 N.E. 2d 748.

I.

{¶10} In his first assignment of error, appellant asserts the proper practice to modify a support order is to file a motion with the trial court and give the opposing party notice in the matter provided for in Civ. R. 4 through 4.6. Appellant acknowledges the trial court retains jurisdiction over the child support obligation, but cites us to *Cooper v. Cooper* (1983), 10 Ohio App. 3d 143, 460 N.E.2d 1137 as authority for the proposition a court may not initiate a modification of a support order sua sponte.

{¶11} *Cooper* held:" Pursuant to Civ.R. 75(I), a divorce court retains continuing jurisdiction over both the subject matter and the parties to modify its previous child support order, and that jurisdiction can be properly invoked only by motion filed in the original action, notice of which shall be served in the manner provided for the service of process under Civ.R. 4 through 4.6." Syllabus by the court, paragraph 1. In *Cooper*, the court revisited the child support order after the Support Bureau reported a change in circumstances and suggested the court modify its order accordingly. The appellant failed to object to the court's assertion of personal jurisdiction over her and conceded she had notice of the hearing, and the appeals court concluded the trial court had not erred. It did reverse on the issue of change of circumstances.

{¶12} If neither party has filed a motion for modification of a final judgment entry, a court may not in essence vacate its prior order by entering a new one sua sponte. *Ohio Receivables, LLC v. Landaw,* Wayne App. No. 09CA0053, 2010-Ohio-1804, at paragraph 6.

{¶13} A different situation presents where a court, during a hearing on another issue, sua sponte reviews the child support order. There, the question is not one of jurisdiction, but rather, of notice. As the Ninth District explained in *Gary v. Gary* (October 19, 1988), Summit App. No. 13593, "regardless of the means by which the issue of modification is brought before the court, due process mandates that a party receive adequate notice that the court is considering modification as well as an adequate opportunity to gather evidence and to refute the other parties' claims. *Goss v. Lopez* (1975), 419 U.S. 565; *Fuentez v. Shevin* (1972), 407 U.S. 67."

{¶14} In *Gary*, the parties were before the court on a show cause hearing because the obligor had failed to make the child support payments. The obligor's defense was a change in his employment status, and the court reduced his support obligation to zero until he had obtained some form of employment. The court of appeals found the trial court had erred by ordering a reduction in child support without giving the opposing party a meaningful opportunity to contest the modification.

{¶15} Here, appellant concedes on April 29th or 30th he received notice the court was raising the issue of child support in light of the modification of the custodial arrangements. We find the parties' motions to modify the shared-parenting order properly invoked the jurisdiction of the court. Thereafter, the court gave sufficient notice that it would also review the child support order. We conclude the court did not err as a matter of law.

{¶16} Civ. R. R. 53 (D) (3) (b)(iii) provides:

{¶17} "(iii) Objection to magistrate's factual finding; transcript or affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections."

{¶18} We have before us a transcript of the trial court's hearing on the objections, at which the parties apparently conceded there was no transcript of the proceedings before the magistrate. The Rule provides if a transcript is unavailable, the objecting party can provide an affidavit, but the record does not show either party ever submitted one to the court.

{¶19} In the absence of a transcript or affidavit, the trial court may only review claims of plain error or errors of law, or other defects that are evident from the face of the magistrate's decision. See Civ. R. 53 (D)(3)(b)(IV). *Livingston v. Graham,* Jefferson App. No. 09JE16, 2010-Ohio-1091, at paragraph 19.

{¶20} We find the record does not demonstrate any plain error or error of law. The first assignment of error is overruled.

II.

{¶21} In his second assignment of error, appellant argues the trial court abused its discretion by making the new child support order retroactive to January 1, 2009. Appellant argues at the earliest, the issue of child support was raised in April 2009, and the change to the shared-parenting plan became effective on August 8, 2009. By contrast, appellee argues the court could have made the child support modification effective on the date appellee first filed her motion for modification of the shared-parenting plan in July 2008.

{¶22} Generally, trial courts may make orders altering child support effective as of the date the opposing party had notice of the request ordered child support. *Waco v. Waco* (March 8, 1999), Stark App. No. 1998-CA-00279. This court has also held a trial may order a child support modification retroactive to the date the shared parenting

agreement terminated. *Kemp v. Kemp,* Stark App. No. 2009-CA-00035, 2009-Ohio-6089.

{¶23} Appellant asserts the January 1 date has no relation to any significant fact in the case. Appellee suggests the trial court "split the difference" between the date of appellee's motion for modification of the shared-parenting agreement and the date, nearly a year later, when the court issued its order modifying the financial aspects of the case. We decline to speculate on the court's reasoning, but in the absence of the transcript of proceedings, or affidavit of the hearing before the magistrate, we cannot find the January 1, 2009 date is purely arbitrary.

{¶24} We conclude the trial court did not err as a matter of law or abuse its discretion. The second assignment of error is overruled.

{¶25} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, of Stark County, Ohio, is affirmed.

By Gwin, P.J., and

Wise, J., concur;

Farmer, J., dissents

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE

WSG:clw 0907

Farmer, J., dissenting

{¶26} I respectfully dissent from the majority's decision in Assignment of Error II. I would find that despite the lack of a transcript, a review of the docket clearly establishes that the January 1, 2009 date has no relationship to the motion to modify custody. The motion was originally filed on October 15, 2009. The Uniform Child Custody Affidavit filed October 15, 2008, establishes that appellee had custody of the child from September 2008 to the present. A pretrial on the issue was scheduled for January 15, 2009. The final hearing was set for April 29, 2009. On June 3, 2009, the magistrate recommended the modification of custody. On June 22, 2009, the magistrate determined the commencement date for child support to be January 1, 2009. The trial court filed its final entry on December 29, 2009, approving the January 1, 2009 date.

{¶27} Although the judgment entry of June 22, 2009 backdates the award of child support to January 1, 2009, there is no explanation for that date.

{¶28} I would reverse and remand for a determination or explanation on the child support modification date.

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HON. SHEILA G. FARMER

[Cite as *McNeeley v. Ortiz,* 2010-Ohio-4650.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

AMANDA MCNEELEY	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JASON N. ORTIZ	:	
Defendant-Appellant	:	CASE NO. 2010-CA-00012

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, of Stark County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE