

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

RACHEL L. UNGERLEIDER,	:	
Appellant/Cross-appellee,	:	CASE NOS. CA2010-09-069
	:	CA2010-09-074
- vs -	:	<u>OPINION</u>
	:	5/31/2011
JASON S. UNGERLEIDER,	:	
Appellee/Cross-appellant.	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 2008DRA01389

Donald W. White, 237 Main Street, Batavia, Ohio 45103, for appellant/cross-appellee

Michael A. Kennedy, 70 North Riverside Drive, Batavia, Ohio 45103, for appellee/cross-appellant

HENDRICKSON, P.J.

{¶1} Plaintiff-appellant and cross-appellee, Rachel L. Ungerleider, appeals from a final decree of divorce entered by the Clermont County Court of Common Pleas, Domestic Relations Division, regarding spousal and child support matters. Defendant-appellee and cross-appellant, Jason S. Ungerleider, also appeals from the final decree.

{¶2} Jason and Rachel were married in 2005. The marriage produced one child,

daughter Madeline, born in January 2008. Following the marriage, Jason adopted Rachel's then 11-year-old daughter, Adriana.

{¶13} Rachel testified that she met Jason in 2003 while living in California. At that time, she and Adriana resided with her parents. Rachel, a college graduate, worked part-time as a preschool teacher and was enrolled in a teacher credentialing program for grades K through eight. Adriana attended a private elementary school and had received financial aid and a scholarship package, the balance of which was paid by Rachel.

{¶14} In January of 2005 Jason moved to Ohio for employment reasons. Rachel and Adriana followed soon thereafter and the parties were married in October of that year. Adriana's private school education was continued, and she was enrolled at Cincinnati Country Day School. The record indicates that Adriana received financial assistance in the form of a yearly grant, and the remaining tuition balance was paid by Rachel's father. According to Rachel, there was an expectation that she and Jason would take over the payment of Adriana's schooling once they were settled in Ohio.

{¶15} Rachel worked approximately 18 hours each week as an assistant teacher at Summit Country Day School earning \$19 per hour. She testified that she left her employment in November of 2007 for maternity reasons. She was not employed outside the home following Madeline's birth.

{¶16} The parties separated in August 2008 and Rachel filed a complaint for divorce in September of that year. At the final hearing in June 2010, evidence was presented with regard to several issues in contention, including matters relating to spousal and child support. Rachel requested an order of spousal support and further requested that the court order Jason to assist in the payment of Adriana's private school tuition.

{¶17} At the hearing, the court also heard testimony regarding two contempt motions

filed by Jason. He claimed that Rachel violated the terms and conditions of a January 2009 court order regarding parenting time, which resulted in his loss of approximately two hours of time with his daughters during the year.

{¶8} In its decision on the matter, the court designated Rachel as residential parent and legal custodian of the children, with Jason receiving parenting time in accordance with the court's parenting schedule. For child support calculation purposes, Jason's gross income was determined to be \$94,558.33. The court found that Rachel was voluntarily unemployed and imputed an annual minimum wage income to her of \$15,184.

{¶9} With regard to Rachel's requests, the court determined that an order of spousal support was not appropriate or reasonable and further found that Jason was not required to assist in the payment of Adriana's tuition at Cincinnati Country Day. The court denied Jason's contempt motions.

{¶10} The court issued a final decree of divorce on September 3, 2010. The parties appeal from that decree, with Rachel raising two assignments of error and Jason raising one cross-assignment of error.

{¶11} Rachel's Assignment of Error No. 1:

{¶12} "THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO AWARD SPOUSAL SUPPORT TO THE APPELLANT."

{¶13} In her first assignment of error, Rachel contends that the trial court abused its discretion in failing to award her spousal support. Specifically, Rachel argues that the court improperly concluded that she was voluntarily underemployed¹ and failed to take into account the disparity in income between the parties.

1. Although Rachel argues that the trial court found her to be voluntarily "underemployed," the record indicates that the court determined she was voluntarily "unemployed."

{¶14} A trial court has broad discretion in determining whether an award of spousal support is proper based on the facts and circumstances of each case. *Beamer v. Beamer*, Warren App. No. CA2009-08-107, 2010-Ohio-3143, ¶23, citing *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67. An appellate court cannot substitute its judgment for that of the trial court unless, considering the totality of the circumstances, the trial court abused its discretion in making the support award. *Id.* A trial court abuses its discretion only if its decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶15} After the division of marital property, a trial court may order an award of reasonable spousal support to either party in a divorce proceeding. R.C. 3105.18(B). R.C. 3105.18(C)(1) provides that "[i]n determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support * * * " the court shall consider several factors. These include each party's "income, earning capacities, age, retirement benefits, education, assets and liabilities, and physical, mental and emotional condition; the duration of the marriage; their standard of living; inability to seek employment outside the home; contributions during the marriage; tax consequences; and lost income capacity due to a party's fulfillment of marital responsibilities." *Brickner v. Brickner*, Butler App. No. CA2008-03-081, 2009-Ohio-1164, ¶21, citing R.C. 3105.18(C)(1)(a)-(m). A trial court is also free to consider any other factor it deems relevant and equitable. *Id.*, citing R.C. 3105.18(C)(1)(n).

{¶16} Whether a parent is voluntarily unemployed or underemployed is also a matter to be determined by the trial court based upon the facts and circumstances of each particular case. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, paragraph one of the syllabus. Absent an

abuse of discretion, an appellate court will not disturb the trial court's finding in this regard.
Id.

{¶17} Rachel claims that the court's conclusion with regard to her employment status was not supported by the evidence presented. She testified that she left her part-time employment with Summit due to maternity reasons and did not return to work following Madeline's birth because she had assumed full-time child care responsibilities. In addition, she stated that Summit did not have a position available for a teacher lacking the appropriate state credentials. Rachel claimed that she needed approximately 30 hours of additional education in order to receive her Ohio state teaching certificate. According to Rachel, the only teaching jobs for which she was qualified would not pay enough to cover the cost of day care.

{¶18} Rachel also relies on the First Appellate District's decision in *Doan v. Doan* (Oct. 2, 1997), Hamilton App. No. C-960932, 1997 WL 602881, in support of her argument. In *Doan*, the husband worked part-time as a sole practitioner attorney while the wife was employed as a homemaker and reared the parties' children. Id. at 1. The trial court determined that the husband was voluntarily underemployed, in part, because there was expert testimony offered regarding the salary levels of other attorneys in the community who had comparable years of legal experience to that of the husband. Id. at 5. In reversing the trial court's finding, the court of appeals noted that the practice of law, and in particular solo practice, "does not yield consistent annual profits such that an attorney's annual income can be calculated based upon a generalized survey of the salary levels of attorneys in the same community with the same number of years of experience." Id. Although Rachel correctly notes that *Doan* involved a determination that a voluntary underemployment finding was in

error, the facts and rationale are inopposite to the case at bar. As a result, we find *Doan* unpersuasive.

{¶19} Upon review, we find no error on the part of the trial court in concluding that Rachel was voluntarily unemployed. There was evidence that at age 31, Rachel was in good physical health and had earned a four-year college degree. The evidence also indicated that although Rachel worked part time both before and during the parties' marriage, she elected to stay home after the birth of Madeline. In addition, there was evidence that Rachel did not actively seek employment during the 18 months the parties' divorce was pending. Rachel testified that she did not apply for non-teaching positions, and also stated that she did not intend to work during the approximate three-year period in which she would be enrolled in an on-line educational program in pursuit of her state teaching certificate. According to Rachel, she intended to take courses at home in the evenings on a part-time basis.

{¶20} With regard to her claim that the disparity in the parties' income necessitated a spousal support award, Rachel argues that based on her lack of employment, teaching certification expenses, and her anticipated \$7,624 monthly living expenses, a support award was necessary. In addition, she argues that the trial court "ignored" the fact that she left her family support system in California when she relocated to Ohio so that Jason could pursue higher-paying employment.

{¶21} In its decision, the trial court stated that it considered the large disparity in the parties' income, but concluded that spousal support was inappropriate given the short-term nature of the parties' marriage and that they had separated after less than three years of marriage. The court indicated that it had also considered the allocation of debts and liabilities, in which Jason was held solely responsible for the payment of all of the marital debt of approximately \$4,950. There was also evidence before the court that during the pendency

of the proceedings, Jason had paid Rachel temporary spousal support of \$500 each month, as well as the mortgage, taxes and insurance at the marital home. Jason also testified that Rachel received a \$20,000 inheritance during the marriage and that her parents were holding the money for her. This testimony was not rebutted by Rachel.

{¶22} As a result of the foregoing, we conclude that Rachel failed to establish that the trial court's determination that an award of spousal support was not appropriate or reasonable constituted an abuse of its discretion.

{¶23} Rachel's first assignment of error is overruled.

{¶24} Rachel's Assignment of Error No. 2:

{¶25} "THE TRIAL COURT ERRED BY FINDING THAT THE APPELLEE WAS NOT REQUIRED TO PARTICIPATE IN FUNDING THE TUITION SHORT FALL FOR ADRIANA."

{¶26} In her second assignment of error, Rachel claims that the trial court abused its discretion in failing to order Jason to pay 50 percent of Adriana's private school tuition expenses. Rachel takes issue with the court's conclusions that the parties could not afford the yearly tuition without the financial assistance of Rachel's father, and that Jason had never been involved in decisions concerning Adriana's education.

{¶27} Private school tuition is a form of child support. *Roberts v. Roberts*, Butler App. Nos. CA2004-04-081, CA2004-04-087, 2005-Ohio-2792, ¶21. In contemplating a child support deviation, a trial court may consider educational opportunities that would have been available to the child had the circumstances requiring a support order not arisen. *Id.*; R.C. 3119.23(N). A court may order a parent to pay for private school tuition if the court determines that "1) it is in the best interest of the child to have private schooling; 2) the payor(s) can afford to pay the tuition; 3) the children have been in private schooling; and 4) private schooling would have continued if not for the ending of the marriage." *Kaminski v.*

Kaminski (Mar. 3, 1997), Clermont App. No. CA96-09-073 at 3, citing *Brock v. Brock* (Nov. 17, 1995), Montgomery App. No. 15075, 1995 WL 680059. A trial court's decision regarding child support matters will not be reversed on appeal absent a showing of an abuse of discretion. *Id.*; *Dario v. Colliver*, Butler App. No. CA2010-03-047, 2010-Ohio-5310, ¶18.

{¶28} In this case, Adriana was enrolled in private schooling in California before Rachel and Jason met. Rachel testified that at that time, Adriana received a financial aid and scholarship package covering approximately 80 percent of her tuition. According to Rachel, she paid the remaining tuition expenses with the part-time job she held while living with her parents. Rachel also testified that before moving, Adriana had been offered a full scholarship to another private school in California for grades six through twelve.

{¶29} Rachel stated that the parties discussed Adriana's schooling options prior to moving to Ohio, and had agreed that they would choose a private school that most closely resembled the California school. According to Rachel, both she and Jason chose Cincinnati Country Day School for Adriana. Jason disputed this testimony, claiming that he was not involved in the selection process and although he visited the school and agreed to allow Adriana to attend, the parties would not be able to afford the \$19,750 yearly tuition expense without the assistance of Rachel's parents.

{¶30} Upon a close review of the record, we find that the trial court's decision was supported by credible evidence and therefore, the court did not abuse its discretion in failing to order Jason to pay 50 percent of Adriana's tuition. During the marriage, neither party contributed financially toward Adriana's tuition expenses. After the application of a \$12,000 yearly grant, Rachel's father consistently paid the remaining balance through a checking account established for that purpose. Although Rachel claimed that there was an expectation that she and Jason would eventually take over the payments, she also testified

that there was no reason to believe that her parents would not continue paying the expenses post-divorce. It was also Jason's understanding that Rachel's parents would continue to pay the tuition. Jason testified that the only financial contribution the parties made toward Adriana's schooling during their marriage was the purchase of a computer. In addition, although Rachel testified that Jason was an active participant in the schooling decisions, the court was within its discretion to find Jason's testimony with regard to his involvement to be more credible.

{¶31} In light of the foregoing, Rachel's second assignment of error is overruled.

{¶32} Jason's Cross-Assignment of Error:

{¶33} "THE TRIAL COURT ERRED BY DENYING THE DEFENDANT/HUSBAND'S MOTIONS FOR CONTEMPT FOR A DENIAL OF PARENTING TIME."

{¶34} In his sole cross-assignment of error, Jason argues that the trial court erred in denying his motions to hold Rachel in contempt for violating a January 2009 court order regarding parenting time.

{¶35} The record indicates that on two occasions in 2009, Rachel took the children to the west coast to visit her parents. Jason claimed that although he had advance knowledge of the first trip, he was unaware of the second trip until after Rachel and the children had already left Ohio. According to Jason, he lost a total of two hours of parenting time with his daughters as a result of the trips.

{¶36} Contempt of court is defined as "disobedience of an order of a court * * * which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." *Hueber v. Hueber*, Clermont App. Nos. CA2006-01-004, CA2006-02-019, CA2006-02-020, 2007-Ohio-913, ¶16, quoting *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, paragraph one of the syllabus. To support a

contempt finding, the moving party must establish, by clear and convincing evidence, the existence of a valid court order, that the offending party had knowledge of the order, and that the offending party violated such order. *Id.*, citing *Arthur Young & Co. v. Kelly* (1990), 68 Ohio App.3d 287, 295. Technical violations of a court order do not necessarily mandate a finding of contempt. *Quint v. Lomakoski*, 173 Ohio App.3d 146, 2007-Ohio-4722, ¶24. This court has held that a trial court's decision denying a motion for contempt will not be reversed on appeal absent a finding of an abuse of discretion. See *Miller v. Miller*, Butler App. No. CA2001-06-138, 2002-Ohio-3870, ¶15.

{¶37} In overruling Jason's motions, the trial court determined that he had failed to meet his initial burden of establishing, by clear and convincing evidence, that Rachel had violated the court's order. Upon review, we find no abuse of discretion on the part of the trial court. Jason's loss of parenting time was only two hours and there was evidence before the court that Rachel had offered to facilitate additional parenting time to make up for the approximate two hours Jason lost. Jason's cross-assignment of error is therefore overruled.

{¶38} Judgment affirmed.

PIPER and HUTZEL, JJ., concur.

[Cite as *Ungerleider v. Ungerleider*, 2011-Ohio-2600.]