

[Cite as *Snyder v. Snyder*, 2011-Ohio-1372.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95421

BRAD SNYDER

PLAINTIFF-APPELLANT

vs.

SUSAN L. SNYDER

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-266384

BEFORE: Rocco, J., Sweeney, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: March 24, 2011

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KENNETH A. ROCCO, J.:

{¶ 1} In this action to reduce his child support obligation, plaintiff-appellant Brad Snyder appeals from the decision of the Cuyahoga County Common Pleas Court, Domestic Relations Division. The trial court, although it sustained appellant's objections to the magistrate's report, adopted that report with modifications and increased appellant's child support obligation over the amount the magistrate recommended.

{¶ 2} Appellant presents three assignments of error. He asserts the trial court improperly "substituted" its judgment for that of the magistrate, in contravention of the manifest weight of the evidence presented at the hearing

on his motion and without first conducting a hearing de novo. He further argues the trial court improperly imputed income to him from property that actually was not income-producing.

{¶ 3} Upon a review of the record on appeal, however, this court cannot find the trial court abused its discretion in this matter. Its decision, therefore, is affirmed.

{¶ 4} According to the record, appellant and defendant-appellee Susan L. Snyder originally married in 1992. They had two children, born in 1995 and 1997. Appellant filed a complaint for divorce in 1999.

{¶ 5} In October 2000, the parties entered into a settlement agreement. The trial court adopted the terms the parties agreed upon, and ordered appellant to pay child support in a monthly amount of \$1,357.67.

{¶ 6} In November 2004, the parties agreed to a modification of appellant's child support obligation. As adopted by the trial court's judgment entry, appellant's obligation increased to \$1,437.09 per month.

{¶ 7} In May 2009, appellant filed a motion to modify his child support obligation. According to his affidavit attached to the motion, appellant's employer, Forest City Enterprises, terminated him from his position as a vice-president, effective November 7, 2008. Appellant averred that, although his severance package from his former employer provided him a "salary

continuation,” that continuation was scheduled to end on June 15, 2009; therefore, at that time, he would be receiving unemployment compensation of \$503.00 per week.

{¶ 8} On February 22, 2010, the matter proceeded to a hearing before a magistrate. The record reflects appellant testified about his income and current expenses, and introduced seven exhibits into evidence that purported to support his testimony. None of the exhibits appears in the appellate record.

{¶ 9} Appellee testified in her own behalf and presented the testimony of the custodian of records for one of the banking institutions appellant utilized. Appellee, too, introduced many exhibits; similarly, none of these appears in the record on appeal. The magistrate accepted all the exhibits the parties offered.

{¶ 10} Two weeks after the hearing, the magistrate issued his decision. In pertinent part, the magistrate made the following findings:

{¶ 11} “In 2008, the Plaintiff/Husband had a * * * total income of \$376,190.00. * * * [H]e was given * * * his base salary for thirty-two weeks ending on June 15th, 2009. At that date he began receiving * * * (\$26,156.00 per year) in unemployment benefits.

{¶ 12} “ * * * .

{¶ 13} “The Plaintiff/Husband * * * owns four storage units * * * valued at \$350,000.00 (Defendant’s Exhibit F). * * * [O]ne was rented * * * one [would be] vacant in a month and * * * two were rented at thirty-five percent of market value. The Plaintiff/Husband also has an account with Fidelity investing basically in growth stocks. The value as of July 31st, 2009 was \$236,494.43. The Plaintiff/Husband also has \$217,500.00 invested in two Cold Stone Creamery stores. Pursuant to ORC 3119.01(B)(11)(b) income can be imputed to non-income producing assets. The Certificate of Deposit rate is 3% and can be imputed to value of the storage units and the portfolio balance. It can reasonably be presumed that the ice cream stores can produce a 5% gain on their combined value taking into account appreciation.

{¶ 14} “INCOME CALCULATION:

{¶ 15} “Unemployment \$26,156.00

{¶ 16} “Storage Units and portfolio X 3% 17,594.00

{¶ 17} “Cold Stone Creamery X 5% 10,875.00

{¶ 18} 54,625.00

{¶ 19} “ * * *.

{¶ 20} “The Defendant/Wife attempted to introduce the loan applications [for the Cold Stone stores] as evidence to his interest and dividend income, but his tax returns indicate that the amounts are negligible.

{¶ 21} “The Plaintiff/Husband has one other natural minor child residing with him that he should be given credit for.”

{¶ 22} Based upon these figures, the magistrate decided appellant’s total monthly child support obligation should be reduced to \$706.08.¹ The attached child support computation worksheet, however, neglected to give appellant credit for his third child.

{¶ 23} Appellant filed objections to the magistrate’s decision. He essentially presented challenges to the following portions of the report: 1) the imputation of income from assets that he claimed were both “underperforming” and encumbered by loans; 2) the interest rate of three percent applied to his investments; 3) the assumption his Cold Stone stores would produce a five percent gain; 4) the calculation of his income; and 5) the failure to include his third child in the worksheet calculation. Appellant further argued R.C. 3119.01(C)(11)(b)² was “unconstitutionally vague.”

¹The figure was slightly higher should the children no longer be covered by appellant’s current wife’s health insurance plan.

²In pertinent part, R.C. 3119.01 provides:
“(C) As used in this chapter:
“(11) Potential income means * * * the following for a parent who the court pursuant to a court support order * * * determines is voluntarily unemployed or voluntarily underemployed: * * *
“(b) Imputed income from any nonincome-producing assets of a parent, as determined from the local passbook savings rate or another appropriate rate as determined by the court or agency, not to exceed the rate of interest specified in division (A) of section 1343.03 of the Revised Code [the federal short-term rate], if

{¶ 24} Appellee responded to appellant's motion with a brief in opposition; appellee presented no objections to the magistrate's decision. On June 18, 2010, the trial court issued a judgment entry in which it sustained appellant's objections and modified the magistrate's decision.

{¶ 25} In pertinent part, the trial court noted in its judgment entry that a deduction should be applied for appellant's third child. The trial court further noted that the "*issue in this matter is the income for [appellant] after his termination from his previous employer * * * and the end of his severance package. * * ** [H]e earned \$119,088.36 from Forest City Enterprises according to his 2009 W-2. After that he received \$503 per week in unemployment benefits, which annualizes to \$25,156.

{¶ 26} "At the time of his termination * * *, [he] owned four storage units in Avon Lake, Ohio on which he owed approximately \$100,000, and a rental home in Cleveland, Ohio, for which there was no mortgage. He also held funds in a Fidelity investment account. * * *. As of July 31, 2009, the date closest to the change in support, the funds had a value of \$236,494.43.

{¶ 27} "After the termination of his employment, but before the severance package terminated, obligor/father purchased a[n] * * * ice cream

the income is significant."

franchise for \$208,000, and applied for a small business loan for \$142,000. [He] lent himself the difference in the purchase price and the loan. In the fall of 2009, he purchased a second franchise for \$75,000 using some of his investment funds. On both the franchise application (signed February 16, 2009, Defendant's Ex. F) and the financial disclosures form for the business loan (signed June 3, 2009, Defendant's Ex. D), [he] listed his employer as Forest City Enterprises. * * * .

{¶ 28} “On his financial statement in Defendant's Ex. D, he listed his income from * * * rental property as totaling \$49,200 per year. On his franchise application in Defendant's Ex. F, he listed the [same rental income].

He has a [monthly] mortgage on the storage units * * * of approximately \$1100 * * * . Therefore, by his own statements he earns approximately \$36,000 in rental income. [His] testimony contradicted these figures. * * * Where there is a conflict in evidence that is self-serving, the Court must resolve it against the favor of the person who has created the conflict. Therefore, in this matter the Court finds that business income of \$36,000 should be included in the calculation of [appellant's] income.

{¶ 29} “The Court further notes that on Defendant's Ex. F, the storage units are valued at \$350,000 and the rental home at \$75,000, but that on

Defendant's Ex. D the storage units are valued at \$341,000 and the rental home at \$100,000.

{¶ 30} “The Court further finds that [appellant] testified he was working (Tr. 127) at the [franchise], but was not taking an income. He did testify that he had paid back some of the monies he had ‘lent’ to the business to purchase it (Tr. 36). He further was still receiving unemployment compensation which would have terminated had he paid himself a salary at the business.

{¶ 31} “The Court therefore finds that for purposes of this child support calculation, [appellant's] income is: Unemployment Compensation of \$26,156.00 and Ordinary and Necessary Business Income of \$36,000, less [5% of AGI], or \$33,984.00, for a total adjusted gross income of \$60,140.00 (Emphasis added).”

{¶ 32} Based upon these calculations, the trial court put appellant's monthly child support obligation at \$732.51, rather than the amount the magistrate recommended.³

³As an aside, the trial court stated: “The Court further notes that pursuant to ORC 3119.01(B)(1)(b), the Court may use a rate equivalent to the passbook savings rate or another appropriate rate, but not to exceed the statutory rate of interest, which in 2009, was 5%. Therefore, the Court *could assess an additional \$7095 in income* for a 3% return on the funds in Fidelity as of July 21, 2009. The Court declines to do so *at this time*. (Emphasis added.)” Based upon the foregoing, this writer wonders, if not then, when? The question is especially pertinent in light of

{¶ 33} Appellant filed his appeal from the trial court's order, and presents the following assignments of error:

{¶ 34} "I. The trial court erred and abused its discretion when it sustained all of the appellant's objections to the magistrate's decision and thereafter substituted its own determination of the appellant's earnings solely upon the transcript of the proceedings and without a hearing de novo.

{¶ 35} "II. The trial court erred and abused its discretion in finding that the appellant's income included 'ordinary and necessary business income of \$36,000.00' per year without any factual basis for the same and despite the evidence establishing that appellant's storage condos were unoccupied or leased for less than market rate and that the rental property was and had been vacant.

{¶ 36} "III. The trial court erred and abused its discretion when it sustained all of appellant's objections to the magistrate's decision and modified that decision contrary to the manifest weight of the evidence presented at the hearing before the magistrate."

{¶ 37} Appellant's assignments of error present similar issues and will be addressed together. In them, appellant argues that the trial court's order

appellant's patent underemployment.

amounted to an abuse of discretion, because the trial court altered the magistrate's findings, increasing the amount of income imputed to him, without taking additional evidence at a hearing de novo to support those findings. This court disagrees.

{¶ 38} Civ.R. 53 places upon the court the ultimate authority and responsibility over the magistrate's findings and rulings. *Hartt v. Munobe*, 67 Ohio St.3d 3, 1993-Ohio-177, 615 N.E.2d 617. In ruling on objections to a magistrate's decision, the trial court is required to make a full and independent judgment of the referred matter, and should not adopt the findings of the magistrate unless the trial court fully agrees with them. *DeSantis v. Soller* (1990), 70 Ohio App.3d 226, 232, 590 N.E.2d 886. A trial court retains its authority to decide an issue independent of the magistrate, since the grant of authority to a magistrate does not affect a trial court's inherent jurisdiction. *Davis v. Reed* (Aug. 31, 2000), Cuyahoga App. No. 76712, citing *Proctor v. Proctor* (1988), 48 Ohio App.3d 55, 59, 548 N.E.2d 287.

{¶ 39} Furthermore, Civ.R. 53(D)(4)(b) grants the trial court discretion to "adopt * * * a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, [or] take additional evidence, or return a matter to a magistrate." Civ.R. 53(D)(4)(d),

too, grants the trial court authority to “hear additional evidence.” This same subsection, however, permits the trial court to “refuse to do so unless the objecting party demonstrates that [he] could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.”

{¶ 40} Appellant did not assert in his objections to the magistrate’s decision that he had additional evidence to present. Rather, he complained that the magistrate did not give proper consideration to the evidence presented to it.

{¶ 41} In reviewing the trial court’s order, this court presumes that the trial court conducted the proper independent analysis of the magistrate’s decision. *Bradach v. Bradach*, Cuyahoga App. No. 88622, 2007-Ohio-3417, ¶19. It is appellant’s duty to ensure the completeness of the record on appeal. *Shannon v. Shannon* (1997), 122 Ohio App.3d 346, 350, 701 N.E.2d 771. In the absence of the exhibits the trial court found to be relevant to its modification of the magistrate’s decision, this court presumes the regularity of the proceedings below. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384.

{¶ 42} A trial court’s decision regarding a child support obligation will not be reversed on appeal absent an abuse of discretion. *Pauly v. Pauly*, 80 Ohio St.3d 386, 390, 1997-Ohio-105, 686 N.E.2d 1108, citing *Booth v. Booth*

(1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. An abuse of discretion is more than an error of law, it connotes that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. Moreover, as long as the decision of the trial court is supported by some competent, credible evidence, the reviewing court will not disturb it. *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 488 N.E.2d 857.

{¶ 43} Pursuant to R.C. 3119.79, when a party requests a child support modification, the court must recalculate the child support amount using the applicable statutory guidelines, schedules, and worksheets. A recalculated amount that varies more than ten percent from the existing amount “shall be considered by the court as a change of circumstance substantial enough to require a modification of the child support amount.” R.C. 3119.79(A). The trial court in this case determined that appellant demonstrated a change in circumstances. *Julian v. Julian*, Summit App. No. 21616, 2004-Ohio-1430, ¶8.

{¶ 44} R.C. 3119.02 requires the trial court to calculate the amount of a child support obligation “in accordance with the basic child support schedule, the applicable worksheet, and the other provisions of sections 3119.02 to

3119.24”; the trial court must determine the obligation that is “in the best interest of the children.”

{¶ 45} R.C. 3119.021 and 3119.022 set forth the basic child support schedules in cases in which the parents’ combined gross income is between \$6,600 and \$150,000 annually and they share parenting. R.C. 3119.04(B) applies to child support obligation cases in which the “combined gross income of both parents is greater than one hundred fifty thousand dollars per year.”

{¶ 46} R.C. 3119.01(C)(5)(b) defines “income” for a parent who is unemployed or underemployed as “the sum of the gross income of the parent and any potential income of the parent.” Section (C)(7) defines “gross income” as “the total of all earned and unearned income from all sources * * *.” The amount of child support calculated pursuant to the basic child support schedule and applicable worksheet is “rebuttably presumed” to be the correct amount of child support due. R.C. 3119.03; *Marker v. Grimm* (1992), 65 Ohio St.3d 139, 601 N.E.2d 496.

{¶ 47} Despite this presumption, the trial court may order child support in an amount that deviates from the calculation obtained from the schedule and worksheet. R.C. 3119.22. The deviation is permitted only if the trial court determines that the “amount * * * would be unjust or inappropriate to the children or either parent and would not be in the best interest of the

child” because of “the factors and criteria set forth in [R.C. 3119.23]” or because of “the extraordinary circumstances of the parents” as set forth in R.C. 3119.24.

{¶ 48} R.C. 3119.23 provides a list of the statutory criteria a trial court may consider when determining whether to deviate from the child support schedule. These include:

{¶ 49} “(A) Special and unusual needs of the children;

{¶ 50} “(B) Extraordinary obligations for minor children or obligations for handicapped children who are not stepchildren and who are not offspring from the marriage or relationship that is the basis of the immediate child support determination;

{¶ 51} “(C) Other court-ordered payments;

{¶ 52} “(D) Extended parenting time or extraordinary costs associated with parenting time, provided that [R.C. 3119.23] does not authorize and shall not be construed as authorizing any deviation from the schedule and the applicable worksheet, through the line establishing the actual annual obligation, or any escrowing, impoundment, or withholding of child support because of a denial of or interference with a right of parenting time granted by court order;

{¶ 53} “(E) The obligor obtaining additional employment after a child support order is issued in order to support a second family;

{¶ 54} “(F) The financial resources and the earning ability of the child;

{¶ 55} “(G) Disparity in income between parties or households;

{¶ 56} “(H) Benefits that either parent receives from remarriage or sharing living expenses with another person;

{¶ 57} “(I) The amount of federal, state, and local taxes actually paid or estimated to be paid by a parent or both of the parents;

{¶ 58} “(J) Significant in-kind contributions from a parent, including, but not limited to, direct payment for lessons, sports equipment, schooling, or clothing;

{¶ 59} “(K) The relative financial resources, other assets and resources, and needs of each parent;

{¶ 60} “(L) The standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued or had the parents been married;

{¶ 61} “(M) The physical and emotional condition and needs of the child;

{¶ 62} “(N) The need and capacity of the child for an education and the educational opportunities that would have been available to the child had the circumstances requiring a court order for support not arisen;

{¶ 63} “(O) The responsibility of each parent for the support of others;

{¶ 64} “(P) Any other relevant factor.”

{¶ 65} R.C. 3119.24(B) provides:

{¶ 66} “[E]xtraordinary circumstances of the parents include * * *:

{¶ 67} “(1) The amount of time the children spend with each parent;

{¶ 68} “(2) The ability of each parent to maintain adequate housing for the children;

{¶ 69} “(3) Each parent’s expenses, including child care expenses, school tuition, medical expenses, dental expenses, and any other expenses the court considers relevant;

{¶ 70} “(4) Any other circumstances the court considers relevant.”

{¶ 71} The evidence in the record is incomplete, but, such as it is, it supports the trial court’s modification of the magistrate’s decision. *Dinu v. Dinu*, Cuyahoga App. No. 89216, 2008-Ohio-223, ¶12; cf., *Julian* (Carr, P.J., dissenting). As the transcript of the hearing demonstrates, appellant downplayed his income when it suited him to do so. For example, he continued to take unemployment benefits although he was self-employed.

{¶ 72} On the other hand, appellant displayed canny investment strategies, since the funds in his Fidelity account generally increased.

Moreover, he still retained the trappings of a high-income life style.⁴ The trial court was permitted, upon the evidence presented, to draw the conclusion that appellant would be more forthcoming about his income on his loan applications for investment purposes than he was either at the support modification hearing, or on his federal tax returns. No error appears in the trial court's calculations; since they are "rebuttably presumed" to be the correct amount of child support due, and since the evidence in the record is incomplete, this court cannot find any abuse of discretion on the trial court's part.

{¶ 73} Appellant's assignments of error, accordingly, are overruled.

{¶ 74} The trial court's order is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

⁴The record reflects appellant is a former Certified Public Accountant with a high level of business experience and significant assets, including a pleasure boat and membership in an exclusive condominium/yachting community. Although he professed to be searching for suitable employment while he collected unemployment compensation, he admitted he worked approximately 15 to 20 hours a week at his ice cream stores, primarily as a "soda jerk." Appellant is thus patently underemployed. Even in light of this evidence, the trial court generously assumed R.C. 3119.021 applied, rather than R.C. 3119.04(B), and did not consider that appellant's choice of jobs forced his children to alter their standard of living. Under these circumstances, this writer finds appellant's challenge to the trial court's decision offensive.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

KENNETH A. ROCCO, JUDGE

JAMES J. SWEENEY, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR