[Cite as *In re Palmer,* 2012-Ohio-2441.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN RE THE MARRIAGE OF THERESA M. PALMER,	:	**O P I N I O N**
Petitioner-Appellee,	:	**CASE NO. 2011-L-149**
and	:	
BRIAN D. PALMER,	:	
Petitioner-Appellant.		

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 07 DI 000088.

Judgment: Affirmed.

Sandra A. Dray, Sandra A. Dray Co., L.P.A., 1111 Mentor Avenue, Painesville, OH 44077 (For Petitioner-Appellee).

Kenneth J. Cahill, Dworken & Bernstein, 60 South Park Place, Painesville, OH 44077 (For Petitioner-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Brian D. Palmer ("father"), appeals from the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, ordering him to pay a 50% downwardly-deviated child support obligation to appellee, Theresa M. Palmer ("mother"). At issue is whether the trial court erred in failing to deviate his support obligation downward 100%. For the reasons discussed in this opinion, we answer this question in the negative.

{¶2} The parties' marriage was terminated by final order of dissolution entered on April 3, 2007. One child was born as issue of the marriage, a daughter born on July 4, 2001. A shared parenting plan was included in the order, which declared appellee the residential parent for school purposes. With respect to parenting time, the parties agreed to alternate weekends; weekends defined as Friday after school through Sunday at 7:00 p.m. The parties also agreed that father would have weekly parenting time from Tuesday after school until Thursday, at the time the child is transported to school. If the child had no school, father's Thursday parenting time would continue through 5:00 p.m. that day. The parties agreed that at all other times not mentioned, mother would have parenting time. The parties have maintained the foregoing schedule since the decree was filed.

{¶3} The shared parenting plan also included an agreement that father was not obligated to pay child support. According to the plan, the $0 figure was based upon father's extended shared parenting time and that mother earned approximately $12,000 more than father per year at the time of the decree. The agreed deviation was also a result of the parties' decision to evenly split their daughter's school tuition, child care costs, extracurricular and school activity costs, and the cost of clothing. The amount represented a downward deviation from $540.94 per month, the apparent figure to which father would be obligated pursuant to the child support worksheet computed at the time the final decree was filed.[1]

{¶4} Mother was ordered to provide health insurance for the parties' daughter and pay for 59% of unreimbursed medical expenses; father was therefore responsible

1. The child support computation worksheet computed in January of 2007 indicated father would be obligated to pay $540.62.

for the remaining 41% of any such unreimbursed expenses. Finally, the shared parenting plan provided that the parties would alternate claiming their daughter as a dependent for income tax purposes, with mother claiming the child on even-numbered years and father claiming on odd-numbered years. No appeal was taken from any aspect of the order.

{¶5} In late 2010, pursuant to a request by mother, the Lake County Department of Job and Family Services, Child Support Enforcement Division ("CSED") conducted an administrative review of the parties' child support arrangement. And, on August 31, 2010, CSED recommended father pay a revised amount of $444.33 per month in child support when private health insurance is provided in accordance with a support order; or $381.64 per month for child support when private health insurance is not so provided. Father subsequently filed a request for a hearing with the trial court pursuant to R.C. 3119.66. The matter was set for hearing and tried before the magistrate on December 6, 2010.

{¶6} At the hearing, Jennie Jewart, administrative hearing officer for CSED, testified to the manner in which the administrative recommendation was computed. According to Jewart, father's verified annual gross income at the time was $41,600. And, although mother had voluntarily left her prior employment in 2008 and was not earning an annual income at the time of the review, CSED imputed an income of $35,159 based upon the last wages mother reported before leaving her job. Jewart testified that, based upon the parties' relative incomes, as well as other factors that influence the computation, CSED arrived at its revised child support recommendation.

{¶7} Mother testified that she lives in a 4,900-square-foot home with her husband, the parties' daughter, and her two other children from a previous relationship. Mother testified her husband owned the residence, as well as a vacation home in West Virginia, prior to the couple's 2007 marriage.

{¶8} In 2007, mother testified she and her husband had a joint adjusted gross income of $212,470. According to mother, however, that income included money withdrawn from investments, including an approximate withdrawal of $20,000 from her 401(k). In 2007, mother testified her salary at her former employment was approximately $59,000. Mother stated that, during her employment, she worked approximately 70 hours per week but, as a salaried employee, received no additional compensation. In 2008, mother explained she fell ill and required surgery. She was off work for ten weeks and, due to her long hours and concerns for her health, she resigned from her job in July of 2008. Mother testified she had earned $35,158 in 2008 for the seven months she remained employed. After leaving her employment, mother began taking classes at Lakeland Community College and earned a paralegal certificate; she then enrolled at Ursuline college where she was due to graduate in May of 2011.

{¶9} In 2009, according to their joint tax return, mother and her husband earned $243,000. According to mother, the entire income was husband's and included $128,000 in wages and approximately $118,000 in pension withdrawal. At the time of the hearing, mother testified she had withdrawn all money from her 401(k) and husband had withdrawn all but the amount that had not vested. Mother stated the withdrawals were necessary because, when "the market crashed," they had difficulty paying their

bills. She explained that she and her husband owed more on their $800,000 home than it was worth and, although they placed it on the market, it did not sell. Aside from the retirement withdrawals, mother testified she and her husband had recently sold a jet ski as well as a motorcycle and placed their vacation home in West Virginia on the market, which was listed for sale at $150,000 to $160,000. At the time of the hearing, mother testified her family was in financial distress.

{¶10} Father testified he lives in a 1,500-square-foot home worth approximately $125,000 to $130,000. He stated he was employed at a civil engineering firm and had been so employed since approximately 2002. For the past four years, he earned $20 per hour and between 2007 and 2009, earned between $41,600 and $43,200. He, accordingly, earns a two-week gross pay of approximately $1,600, with a net pay of $1,220.

{¶11} With respect to his expenses, father testified he pays a home mortgage, which includes insurance and real estate expenses, of $845 per month; a car payment of $200 per month; insurance of about $70 per month; and spends approximately $200 to $250 for gasoline. The entirety of father's utility costs, e.g., electric, water, sewer, internet, cable, cell phone, etc., amount to between $390 and $440 per month; and, father testified, he spends approximately $200 to $250 per month for food and sundry items on himself and the parties' daughter. Finally, father testified he buys clothing, as needed, and spends approximately $50 to $100 per month on such items for himself and the parties' daughter. Given his expenses, father testified, at the end of each month, he has approximately $100 left and, thus, could not afford the child support recommendation of the CSEA.

{¶12} On May 5, 2011, after considering the testimony and exhibits, the magistrate rendered his decision, concluding CSED's recommendation for a revision of the previous child support order was not appropriate. In arriving at his conclusion, the magistrate used the same figures used by CSED, including the parties' annual income figures; to wit, $41,600 of actual annual income for father and $35,159 of annual income imputed to mother. Accordingly, the magistrate computed father's child support obligation at $444.33 per month when health insurance is provided and $381.64 when such insurance is not provided. The magistrate determined, however, that the evidence warranted a deviation of 50% from the amount yielded through the worksheet computation, i.e., $222.17 when private health insurance is provided and $190.82, when it is not. The magistrate premised the deviation on his determination that father exercises extended parenting time; he pays for half of the child's clothing as well as school costs; and father pays for the entirety of the child's horseback-riding lessons.

{¶13} Father subsequently filed objections to the magistrate's decision, arguing the magistrate erred in imputing only $35,159 annual income to mother to the extent that figure is a result of her voluntary underemployment for that year. He further argued that because the circumstances of the parties are roughly the same as when the original order was entered, the magistrate erred by not deviating from the computation by 100%.

{¶14} On October 12, 2011, the trial court entered final judgment sustaining father's objections in part and overruling them in part. The trial court first concluded the magistrate erred in imputing only $35,159 annual income to mother. The court observed mother last had full-time annual employment in 2007. In that year, she earned $56,644.93; the court found that mother was voluntarily underemployed in 2008,

and consequently imputing only $35,159 income to her was contrary to the evidence. As a result, the court imputed a potential annual income of $56,645 to mother for purposes of child support calculation.

{¶15} Next, the court considered father's position that the magistrate erred in failing to vouchsafe him a full 100% child support deviation. In overruling father's objection, the court stated:

> **{¶16}** [T]he transcript shows part of the basis for the deviation to zero in 2007 no longer exists: the minor child does not attend private school nor are there any daycare expenses. Father agreed to pay one-half of the preceding expenses as part of the parents' original deviation. In 2007[,] daycare expenses were $2,700 after the Federal tax credit. As a result, a deviation to zero is no longer warranted.

{¶17} Notwithstanding this conclusion, the court recomputed father's child support obligation in light of the revised imputed income ascribed to mother. After completing the worksheet, the court determined father was responsible for $411.00 per month when health insurance is provided and $348.18 per month when health insurance is not provided. The court further considered father's extended parenting time and his contribution to other expenses relating to the child's care and upbringing. Given these factors, the court determined a 50% deviation was appropriate. The court consequently entered a child support order of $205.50 per month when private health insurance is being provided; and $174.09 per month when such insurance is not provided.

{¶18} Father noticed appeal of the foregoing order and assigns the following error for our consideration:

{¶19} "Whether the trial court erred when it deviated downward defendant-obligor's child support guideline worksheet obligation by fifty percent (50%)."

{¶20} Under his assignment of error, father claims the trial court erred in declining to downwardly deviate his child support obligation by 100% because, in his view, the parties are in essentially the same position as they were when the original order was entered. Thus, he concludes, the trial court abused its discretion by only deviating from the support worksheet by 50%. Given the evidence submitted at the hearing, we hold the trial court committed no error when it entered its final judgment.

{¶21} In Ohio, once a child support enforcement agency has conducted an administrative review of a court-issued child support order and recommended a revised amount, either party may object to the recommendation and request a hearing on the issue. *See* R.C. 3119.66. If, after a hearing, the trial court concludes that the revised recommended amount is not an appropriate amount, it shall "determine the appropriate child support amount and, if necessary, issue a revised court child support order requiring the obligor to pay the child support amount determined by the court." R.C. 3119.70(B).

{¶22} Furthermore, R.C. 3119.02 provides that, in any action where a child support order is issued or modified, the agency or court shall calculate the amount of child support pursuant to "the basic child support schedule, the applicable worksheet, and the other provisions of sections 3119.02 to 3119.24 of the Revised Code." In a shared parenting case, such as the matter sub judice, a court may enter an order

deviating from the child support schedule and worksheet if "that 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 extraordinary circumstances of the parents or because of any other factors set forth in section 3119.23 of the Revised Code." R.C. 3119.24(A)(1). For purposes of R.C. 3119.24(A)(1), "extraordinary circumstances of the parents" include:

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

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

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

{¶26} (4) Any other circumstances the court considers relevant. R.C. 3119.24(B)(1)-(4).

{¶27} In reviewing matters concerning a child support deviation, the trial court's decision will not be overturned absent an abuse of discretion. *Booth v. Booth*, 44 Ohio St.3d 142, 144 (1989). The phrase "abuse of discretion" describes a judgment which comports neither with reason nor the record. *Gaul v. Gaul*, 11th Dist. No. 2009-A-0011, 2010-Ohio-2156, ¶24.

{¶28} As indicated above, father argues had the trial court given appropriate weight to all relevant deviation factors, his child support obligation would have remained $0. In particular, he asserts the court should have granted him a 100% deviation from the child support worksheet amount because mother's imputed income is significantly

higher than his annual income; mother's gross household income is approximately $250,000; and the parties share parenting time equally.

{¶29} Initially, we point out that father's assertion that he shares equal parenting time with mother is, as a matter of record, inaccurate. It is undisputed that the parties have consistently adhered to the shared parenting schedule since the order was entered in 2007. This schedule gives father parenting time every other weekend and every week from Tuesday, after school, until Thursday morning. Using this schedule, it is mathematically clear that parenting time is *not* equally divided. Rather, a rough calculation of the parenting time demonstrates that, on average, father is the residential parent for approximately 40% of the month, while mother is the residential parent for approximately 60% of the month. Although father has extended time, to which the court cited as a basis for downwardly deviating from the worksheet amount, he does not have equal time. Thus, the court did not err in failing to give him credit towards a greater downward deviation for having equally divided parenting time.

{¶30} With respect to the apparent disparity in personal income, on paper, it would appear that the parties are in approximately the same position as they were in 2007. The record demonstrates, however, that, while father's lifestyle and standard of living has remained consistent, since 2008, mother's has not. In its entry, the trial court specifically found that, although voluntarily underemployed in 2008, mother quit her job due to long hours and health concerns. Since that time, she and her husband have been experiencing progressive financial difficulties. They have placed their homes on the market, but, as of the hearing, had been unable to sell the properties. And, in an effort to pay bills, mother has liquidated the entirety of her 401(k) investments.

Moreover, the trial court pointed out that, even though mother is still unemployed, she testified that, as of the hearing, she was seeking employment. These findings are supported by the record.

{¶31} Further, although mother's household income is significantly higher than father's, uncontroverted testimony indicated that mother had either little or no available disposable income after monthly bills were paid. In 2009, mother and her husband's jointly filed Federal income tax form demonstrated a $243,000 annual income. Mother testified, however, this amount was generated solely by her husband; and, nearly half of those earnings came from her husband liquidating his available retirement to pay bills and expenses. Mother also testified that she had been attempting to obtain a job with, inter alia, her former employer to help with expenses; however, as of the hearing, she has not been hired. This testimony was not contested. Thus, even though the parties' relative household incomes are drastically different, the evidence demonstrated a significant difference in the financial burdens each household is required to shoulder.

{¶32} Finally, father takes issue with the court's determination that a deviation to $0 was inappropriate because, unlike in 2007, father no longer is required to pay one-half of private school or daycare. Father contends that the court's entry fails to recognize that, while he does not have these expenses, neither does mother. Father is correct on this point. However, the evidence also demonstrated that, unlike in 2007, mother and her husband are having some difficulty paying their monthly bills, while father's lifestyle has remained approximately the same. Even though the private school and daycare expenses have been erased, this does not necessarily imply both parties are in a better position financially than when the expenses existed. And, as indicated

above, the evidence introduced at the hearing demonstrates that mother's financial situation has become progressively more dire in recent years.

{¶33} In concluding that a 50% deviation was appropriate, the trial court considered the relative time the children spend with each parent; the parents' relative living expenses, as well as their individual and mutual expenses related to their daughter. While the court found that extraordinary circumstances existed that merited a deviation, it does not follow that father was entitled to a 100% deviation simply because certain extraordinary circumstances were present. Indeed, this court has concluded that even where one or more of the statutory factors are present, a court has the discretion, but is not required, to deviate from the standard child support worksheet. *Mitchell v. Mitchell*, 11th Dist. No. 2009-L-124, 2010-Ohio-2680, ¶28; *see also Smith v. Treadwell*, 11th Dist. No. 2009-L-150, 2010-Ohio-2682, ¶19. In other words, one is not *automatically* entitled to a downward deviation because a factor or factors are present. (Emphasis sic.) *Mitchell*, *supra.*, quoting *Lopez v. Coleson*, 3d Dist. No. 12-05-24, 2006-Ohio-5389, ¶9.

{¶34} Father received the benefit of a 50% discretionary deviation from the child support worksheet. In arriving at father's child support obligation, the trial court followed appropriate procedures and applied the relevant statutory factors to the facts of the case. We therefore hold the trial court did not abuse its discretion when it declined to grant father a 100% deviation.

{¶35} Father's assignment of error is without merit.

{¶36} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas, Domestic Relations Division is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.