[Cite as *Banfield v. Banfield*, 2011-Ohio-3638.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

CYNTHIA BANFIELD,	:	
Appellee/Cross-appellant,	:	CASE NOS. CA2010-09-066 CA2010-09-068
	:	
- vs -	:	O P I N I O N 7/25/2011
RON BANFIELD, JR.,	:	
Appellant/Cross-appellee.	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 04DRA01029

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HENDRICKSON, P.J.

{¶1} Defendant-appellant and cross-appellee, Ron Banfield, Jr., appeals a decision of the Clermont County Common Pleas Court, Domestic Relations Division, modifying his child support obligations. Plaintiff-appellee and cross-appellant, Cynthia Banfield, also appeals the court's decision with regard to parenting time matters. For the reasons discussed below we affirm in part, reverse in part, and remand.

{¶2} Ron and Cynthia were married in 2002. The marriage produced one child, daughter Cameron, born in June of 2003.

{¶3} In July 2004 Cynthia filed a complaint for divorce. The trial court entered a final decree of divorce on July 12, 2006, which incorporated a parenting order. Pursuant to the order, Cynthia was designated residential parent and legal custodian of Cameron, with Ron receiving weekly overnight parenting time on Mondays and Wednesdays from 2:30 p.m. until 6:00 a.m. the following morning, and on alternating weekends each month.

{¶4} For child support calculation purposes, Cynthia's annual income as a school guidance counselor was established at $70,796.85 and Ron's annual income as a sales serviceman was determined to be $63,669.21. The court calculated child support pursuant to the basic worksheet, under which Ron was required to pay $6,240.75 in annual support. The court determined that a deviation from the calculated amount of support was appropriate based on the amount of parenting time awarded to Ron and that the parties would be sharing expenses related to Cameron's care. The court ordered the payment of Cameron's extracurricular activities, child care and preschool tuition expenses, and outstanding health care costs to be evenly shared between the parties. As a result, the court deviated Ron's annual child support obligation to zero.

{¶5} On August 27, 2009, Cynthia moved to modify Ron's parenting time and monthly child support obligation. Cynthia claimed that a change of circumstances occurred necessitating a modification of the existing child support order, and that Ron's overnight visitation on weekdays was no longer in Cameron's best interest during the school year. According to Cynthia, in order to accommodate Ron's work schedule, Cameron had to wake up at approximately 5:40 a.m. on Tuesday and Thursday mornings. Cynthia requested that Cameron be returned to her on Monday and Wednesday evenings so that she could sleep

longer in the morning before leaving for school.

{¶6} The matter was heard before a magistrate in January and March of 2010. In its May 26, 2010 decision, the magistrate modified the parties' 2006 order eliminating Ron's overnight weekday parenting time during the school year. Ron was awarded parenting time on Mondays and Wednesdays from 3:30 p.m. to 8:00 p.m.

{¶7} The parties' shared expense arrangement was also subject to dispute at the hearing. Both Cynthia and Ron submitted evidence relating to the expenses they paid for Cameron's medical bills, school-related items and extra-curricular activities. Cynthia claimed that she submitted copies of bills and receipts to Ron for partial reimbursement, but did not receive a response from him. Ron testified that Cynthia never provided him with copies of her receipts. According to Ron, he paid for the expenses incurred during his parenting time and did not seek reimbursement from Cynthia.

{¶8} Based on the evidence presented at the hearing, the magistrate concluded that the parties' expense-sharing arrangement was no longer working. The magistrate determined that effective September 1, 2009, Ron would not be obligated to continue to pay expenses for Cameron, with the exception of his share of uncovered health care expenses and any routine expenses incurred during his parenting time.

{¶9} With respect to Cynthia's request to modify Ron's child support obligation, the magistrate completed a revised worksheet using Ron's 2009 income of $76,237.50. The worksheet indicated a monthly support obligation of $704.47 per month. After noting that Cynthia's modification motion was filed on August 27, 2009, the magistrate determined that Ron was entitled to a support deviation in the amount of $500 per month from September 1, 2009 to September 1, 2010 based on the frequency of his parenting time each week. The magistrate found that during that period, "Cameron was with [Ron] for six overnights in a two

week period."

{¶10} In light of its conclusion that Ron would no longer be permitted to exercise overnight parenting time with Cameron on Mondays and Wednesdays during the school year, effective September 1, 2010, the magistrate ordered Ron to pay child support in the amount of $704.47 per month in accordance with the basic child support worksheet. Ron was also ordered to pay an additional $102 per month toward the $500 monthly arrearage, for a total support obligation of $806.47.

{¶11} Ron filed objections to the magistrate's decision, which were overruled in part and sustained in part by the trial court. In its August 13, 2010 decision, the court found that the magistrate erred in eliminating Ron's overnight parenting time on Mondays and Wednesdays during the school year, and reinstated his parenting time pursuant to the 2006 parenting order.

{¶12} The trial court also found Ron's objection to the modification of his child support obligation well-taken in part. The court noted that the magistrate had mistakenly calculated Cynthia's gross annual income at $47,571.89. Using her correct income figure of $80,050, the court computed Ron's monthly child support obligation at $602.99. After concluding that the amount of support ordered pursuant to the basic worksheet was unjust, inappropriate, and not in Cameron's best interest, the court ordered a deviation, reducing Ron's support obligation to $408 per month retroactive to September 1, 2009. He was ordered to pay an additional $102 per month toward the arrearage, for a total monthly amount of $510.

{¶13} The parties appeal from the trial court's decision, with Ron raising one assignment of error, and Cynthia raising a single cross-assignment of error.

{¶14} Ron's Assignment of Error:

{¶15} "THE TRIAL COURT ERRED WHEN IT MODIFIED THE CHILD SUPPORT

ORDER, INCREASING [RON'S] CHILD SUPPORT OBLIGATION FROM ZERO TO $408 PER MONTH, SINCE NO SUBSTANTIAL CHANGE OF CIRCUMSTANCES HAD OCCURRED AS REQUIRED BY [R.C. 3119.79] GOVERNING THE RECALCULATION OF CHILD SUPPORT, AND BY [R.C. 3119.22 AND R.C. 3119.23] GOVERNING DEVIATIONS FROM THE STANDARD SUPPORT ORDER."

{¶16} In his sole assignment of error, Ron argues that Cynthia failed to demonstrate that a substantial change in circumstances occurred as required by R.C. 3119.79 to warrant an increase in his child support obligation. He also contends that the court erred in making the monthly support award retroactive to September 1, 2009, as the parties were operating under a shared expense arrangement during that time pursuant to the 2006 parenting order.

{¶17} The child support system is designed to protect the child and his best interest. *Richardson v. Ballard* (1996), 113 Ohio App.3d 552, 555. "'Whether a prior order for child support should be modified is within the sound discretion of the trial court, and its decision in that regard may be reversed on appeal only for an abuse of discretion.'" *Kauza v. Kauza*, Clermont App. No. CA2008-02-014, 2008-Ohio-5668, ¶10, quoting *Woloch v. Foster* (1994), 98 Ohio App.3d 806, 810. A trial court abuses its discretion if its decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶18} The modification of a child support order is governed by the requirements of R.C. 3119.79. *Cooper v. Cooper,* Clermont App. No. CA2003-05-038, 2004-Ohio-1368, ¶18. In order to justify the modification of an existing support order, the moving party must demonstrate a substantial change of circumstances which "render[s] unreasonable an order which once was reasonable." *Carson v. Carson*, 62 Ohio App.3d 670, 673, quoting *Bright v. Collins* (1982), 2 Ohio App.3d 421, 425. R.C. 3119.79(A) provides that a substantial change of circumstances occurs where a court recalculates the actual annual obligation required

pursuant to the schedule and worksheet and the resulting amount is ten percent greater or less than the existing actual annual child support obligation.

{¶19} Ron initially argues that in addition to meeting the ten percent change contemplated in division (A) of R.C. 3119.79, the party seeking a support modification must also establish the requirements of division (C) of the statute. Specifically, R.C. 3119.79(C) provides: "[i]f the court determines that the amount of child support required to be paid under the child support order should be changed due to *a substantial change of circumstances that was not contemplated at the time of the issuance of the original support order* * * *, the court shall modify the amount of child support required to be paid under the child support order to comply with the schedule and the applicable worksheet through the line establishing the actual annual obligation, unless the court determines that the amount calculated pursuant to the basic child support schedule and pursuant to the applicable worksheet would be unjust or inappropriate and would not be in the best interest of the child * * *." (Emphasis added).

{¶20} This court has previously determined that R.C. 3119.79(C) provides an independent basis for permitting modification of an existing child support order without consideration of the ten percent change discussed in subdivision (A) of the statute. See *Flege v. Flege*, Butler App. No. CA2003-05-111, 2004-Ohio-1929, ¶33. However, Ron cites to the Third Appellate District's decision in *Bonner v. Bonner*, Union App. No. 14-05-26, 2005-Ohio-6173, in support of his claim that under the circumstances of this case, division (A) of R.C. 3119.79 must be read in conjunction with division (C) of the statute.

{¶21} In *Bonner*, the appellant agreed to pay an upward deviation from the child support obligation established by the statutory schedule until the youngest of his three children reached the age of 18. Id. at ¶3-4. The parties agreed that the upward deviation was necessary for the children's mother to meet her financial needs and was in the best

interest of the children. Id. at ¶4. Thereafter, the appellant moved to modify his child support obligation while his youngest child was still under the age of 18, and the amount of support recalculated was more than ten percent less than the agreed amount that the appellant was currently paying. Id. at ¶6. Nevertheless, the trial court denied his motion to modify his support obligation. Id.

{¶22} On appeal, the appellate court affirmed the judgment of the trial court. Id. at ¶8. The court determined that in granting a modification of support, the trial court was required to find both "(1) a change of circumstances, and (2) that such a change of circumstances 'was not contemplated at the time of the issuance of the child support order.'" Id. at ¶11. The court concluded that although a change of circumstances within the meaning of R.C. 3119.79(A) was present, the circumstances surrounding the ten percent deviation were contemplated by the parties at the time of the issuance of the child support order. Id. at ¶15. As a result, the court found that the appellant had failed to establish the "second element under R.C. 3119.79(C) required for a modification of his child support obligation." Id.

{¶23} We find Ron's reliance on *Bonner* misplaced. Of central importance to the court of appeals was the fact that the appellant had *voluntarily agreed* to pay child support in an amount exceeding the guideline schedule at the time the original decree was entered. Id. at ¶13, 16. See, also, *Le v. Bird*, Butler App. No. CA2005-04-090, 2006-Ohio-204 (applying R.C. 3119.79(A) and (C) together where the party seeking modification of support voluntarily agreed to a fixed child support obligation as part of a negotiated agreement, with awareness of the surrounding circumstances and limitations). In this case, however, the 2006 support deviation was court-ordered based on its conclusion that Ron's calculated obligation was not in Cameron's best interest as a result of his significant parenting time and shared payment of

expenses. Accordingly, we conclude that the trial court was not required to read subdivision (A) of R.C. 3119.79 in conjunction with subdivision (C) of the statute.

{¶24} In the 2006 decree, the trial court deviated Ron's annual obligation of $6,240.75 to zero. This deviation was reflected on the original worksheet. Upon recalculating his support obligation using his 2009 income, Ron's annual obligation increased to $7,235.88, or $602.99 per month. Accordingly, more than a ten percent difference existed between the recalculated and existing child support order. When a court sets a zero-support order, a change of circumstances can occur anytime, and "the parties agree to such an order at their peril." *Sapinsley v. Sapinsley*, 171 Ohio App.3d 74, 2007-Ohio-1320, ¶15. In addition, a ten percent difference is "clearly met" when "'the amount of child support provided by the noncustodial parent is zero, but the [c]hild [s]upport [g]uidelines clearly establish that the noncustodial parent owes support.'" Id. at ¶16, quoting *DePalmo v. DePalmo,* 78 Ohio St.3d 535, 540, 1997-Ohio-184. As a result, we find no error on the part of the trial court in finding a change of circumstances under R.C. 3119.79(A).

{¶25} Pursuant to R.C. 3119.22, "[t]he court may order an amount of child support that deviates from the amount of child support that would otherwise result from the use of the basic child support schedule and the applicable worksheet * * * if, after considering the factors and criteria set forth in section 3119.23 of the Revised Code, the court determines that the amount calculated pursuant to the basic child support schedule and the applicable worksheet * * * would be unjust or inappropriate and would not be in the best interest of the child. If it deviates, the court must enter in the journal the amount of child support calculated pursuant to the basic child support schedule and the applicable worksheet * * * its determination that that amount would be unjust or inappropriate and would not be in the best interest of the child, and findings of fact supporting that determination."

{¶26} Among the 16 statutory factors in R.C. 3119.23 are: extended parenting time, significant in-kind contributions from a parent, the relative financial resources of each parent, and the standard of living the child would have enjoyed had the marriage continued. See R.C. 3119.23(D), (J), (K), and (L). The trial court referenced these factors when it reduced Ron's support obligation to $408 per month. Although Ron argues on appeal that the trial court should have deviated his support obligation to zero, the court also concluded that effective September 1, 2009, Ron would no longer be obligated to pay expenses for Cameron, except for his share of uncovered health care expenses and the routine expenses he incurred during his parenting time.

{¶27} In addition, although the trial court was not required to consider R.C. 3119.79(C) in modifying the support order, there was evidence before the court to establish a substantial change in circumstances not contemplated at the time of the original support order pursuant to that statutory sub-section. As the magistrate initially noted, the evidence indicated that the parties' agreement to share expenses was no longer working. We therefore find no abuse of discretion on the part of the trial court in ordering Ron to pay a monthly support obligation of $408.

{¶28} Ron also argues that the trial court should not have made his increased child support obligation retroactive to September 1, 2009. R.C. 3119.84 provides that a court "may modify an obligor's duty to pay a support payment that becomes due after notice of a petition to modify the court support order has been given to each obligee and to the obligor before a final order concerning the petition for modification is entered." Generally, because of the time it takes to modify child support orders, a modification order may be made retroactive to the date the motion was filed "unless special circumstances dictate otherwise." *Kauza*, 2008-Ohio-5668 at ¶21, citing *Hamilton v. Hamilton* (1995), 107 Ohio App.3d 132,

139-140. The determination of whether to make a child support modification order retroactive is within the discretion of the trial court and will not be reversed on appeal absent a showing of an abuse of discretion. See *Kauza* at ¶20; *Murphy v. Murphy* (1984), 13 Ohio App.3d 388, 389.

{¶29} Here, the court established a retroactive date of September 1, 2009 based on the filing date of Cynthia's motion to modify support. Nearly 12 months elapsed during the pendency of the motion, as the matter was heard in January and March of 2010, and the trial court's decision was rendered on August 13, 2010. At the hearing, both parties testified to and produced receipts showing payments made toward Cameron's expenses. Cynthia introduced evidence establishing her payments for Cameron's medical bills, school-related items and extra-curricular activities in 2008 and 2009. The receipts totaled approximately $2,970.60. Ron testified similarly that he paid for all of Cameron's expenses during his parenting time, and also produced receipts for school items and activities totaling in excess of $2,000. The receipts were dated from September 2006 through October 2009.

{¶30} It appears that during the pendency of Cynthia's motion to modify Ron's support obligation, he continued to exercise overnight parenting time with Cameron on Mondays and Wednesdays. It also appears that the parties were operating under the shared expense arrangement during this period. Although it is not clear from the record before us, the effect of the court's September 1, 2009 retroactive date could require Ron to pay child support for the period in which he had already paid for Cameron's expenses. Accordingly, we reverse the decision of the trial court with regard to the retroactive date of the modified child support order, and remand the matter for the court to determine the date on which Ron was no longer paying expenses for Cameron pursuant to the terms of the 2006 order.

{¶31} Based on the foregoing, Ron’s assignment of error is overruled in part and

sustained in part.

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

{¶33} "THE REINSTATEMENT OF [RON'S] OVERNIGHT WEEK DAY PARENTING TIME BY THE COURT WAS NOT, UPON THE EVIDENCE, IN THE BEST INTEREST OF THE CHILD."

{¶34} In her sole cross-assignment of error, Cynthia argues that the trial court erred in reinstating Ron's overnight parenting time with Cameron on Mondays and Wednesdays during the school year. A trial court enjoys broad discretion in deciding matters regarding the visitation rights of nonresidential parents, and its decision is subject to reversal only where there is an abuse of discretion. *Appleby v. Appleby* (1986), 24 Ohio St.3d 39, 41; *Bristow v. Bristow*, Butler App. No. CA2009-05-139, 2010-Ohio-3469, ¶18.

{¶35} According to the parties, under the 2006 parenting time arrangement, Ron returns Cameron to Cynthia's house at approximately 6:00 a.m. on Tuesday and Thursday mornings. Cynthia prepares Cameron for the school day and at approximately 8:18 a.m., takes her to a babysitter whose home is adjacent to Cameron's school. The babysitter then takes Cameron to school at 9:00 a.m.

{¶36} At the hearing, Cynthia claimed that as a result of Cameron's more rigorous school schedule, overnight visitation with Ron during the week was no longer in her best interest. Cynthia testified that Cameron would fall asleep in the car on the way to the babysitter's house in the morning, and that she had observed Cameron falling asleep in the car prior to her after-school activities on Tuesday afternoons.

{¶37} Ron testified that his overnight parenting time with Cameron is very valuable. He works with her after-school on homework and on developing her reading and math skills. During the evening hours, Ron bathes Cameron and they watch movies or read together

before bed. Ron testified that Cameron has had the same schedule since 2006 and has adjusted well to it. He also introduced her kindergarten and first grade school records into evidence at the hearing. Cameron's first grade interim progress report for 2009 stated that she was "eager to participate and is engaged in her learning activities." The parties stipulated at the hearing that Cameron was performing at grade level.

{¶38} In determining that the magistrate erred in eliminating Ron's overnight parenting time, the trial court applied the factors set forth in R.C. 3109.04(F)(1). Based on its independent review of the evidence, the court concluded that Cameron was well-adjusted to, and benefited from the overnight parenting time with her father. The court referenced the progress reports prepared by Cameron's teachers indicating that she was engaged and eager to learn during school and school activities. The court also noted that the progress reports revealed that each party dedicated considerable time and energy helping Cameron with her homework assignments and other educational exercises. Although the earlier wake up time necessitated extra work and planning by the parties, the court determined that there was "no credible evidence demonstrating that [Cameron] had been adversely affected by the earlier wake up time." The court concluded that the benefits of Ron having overnight parenting time with Cameron outweighed the disadvantages testified to at the hearing.

{¶39} Upon review, we note that the court should have considered the visitation and modification factors outlined in R.C. 3109.051 instead of those in R.C. 3109.04. "The modification test in R.C. 3109.04(E)(1)(a) is for use when a party seeks to 'modify a prior decree allocating parental rights and responsibilities for the care of the children.' This statute does not refer to modification of companionship, parenting time or [the] visitation schedule of the non-residential parent." *Campana v. Campana*, Mahoning App. No. 08 MA 88, 2009-

Ohio-796, ¶26.[1] See, also, *Braatz v. Braatz* (1999), 85 Ohio St.3d 40, 44; *In re Jones*, Butler App. No. CA2002-10-256, 2003-Ohio-4748, ¶10. Instead, when ordering a modification of parenting time or visitation, the trial court must consider the enumerated factors in R.C. 3109.051(D) as well as any other factor in the child's best interest. *Shafor v. Shafor*, Warren App. No. CA2008-01-015, 2009-Ohio-191, ¶8.

{¶40} Despite its misapplication of R.C. 3109.04, the trial court's decision referred to facts that correspond with the best interest factors outlined in R.C. 3109.051(D), including the interactions between Cameron and her father during parenting time, her adjustment to the current schedule, and the benefits she receives as a result of the overnight parenting time. See R.C. 3109.051(D)(1), (5) and (16). As a result, the court's failure to specifically consider the factors in R.C. 3109.051(D) constituted harmless error. See *Campana* at ¶4.

{¶41} Based on the evidence before the court, we find no abuse of discretion in its decision to reinstate Ron's weekday overnight parenting time with Cameron during the school year consistent with the 2006 parenting order.

{¶42} Cynthia's cross-assignment of error is overruled.

{¶43} Judgment affirmed in part, reversed in part, and remanded.

PIPER and HUTZEL, JJ., concur.

1. R.C. 3109.04(E)(1)(a) provides, in part: "[t]he court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child * * *."