[Cite as *In re D.E.W.*, 2009-Ohio-4116.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

IN THE MATTER OF:	:	
	:	C.A. CASE NO. 2009 CA 2
D.E.W., J.L.W. and P.O.W.	:	T.C. NO. 20530226 20530227, 20530359
	:	(Civil appeal from Common
	:	Pleas Court, Juvenile Division)
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O P I N I O N

Rendered on the 14th day of August, 2009.

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MICHELLE J. GEARHARDT, Atty. Reg. No. 0023329, Dungan & LeFevre Co., LPA, 210 West Main Street, Troy, Ohio 45373
Attorney for Plaintiff-Appellant, Thomas S. Ward

FRANK J. PATRIZIO, Atty. Reg. No. 0055468, McCulloch Felger Fite & Gutmann Co., LPA, 123 Market Street, P. O. Box 910, Piqua, Ohio 45356
Attorney for Defendant-Appellee, Jennifer Rue

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HARSHA, J. (by assignment)

{¶ 1} Thomas S. Ward appeals an order modifying his child support obligation in the context of a shared parenting plan. He claims he is entitled to credit for the same expenses the children's mother received and an offset of his

support obligation. However, the record does not reveal any types or amounts of expenses for which the mother received credit that Ward did not. And the court properly rejected the offset approach in favor of the standard child support computation, which is based upon the sole residential parent model, combined with an appropriate deviation for extraordinary circumstances. Thus, we reject his arguments.

I. Facts

{¶ 2} Thomas S. Ward and Jennifer Rue have three minor children, D.E.W., J.L.W., and P.O.W. In 2006, the Miami County Juvenile Court issued a Judgment Decree of Shared Parenting, which provided that the parties would share their time with their children equally, i.e. each parent having the children 50% of the time. The Shared Parenting Plan also provided that Ward's child support obligation was $108.81 per month for the three children. Subsequently, the parties agreed to increase Ward's child support obligation to $261.65 per month for the three children.

{¶ 3} In 2007, the Miami County Child Support Enforcement Agency ("CSEA") filed a "Submission for Review Hearing Pursuant to O.R.C. Section 3119.66" and recommended that Ward pay $762.39 per month in child support for the three children. After the agency issued an administrative modification of Ward's child support obligation, he appealed that decision to the Miami County Court of Common Pleas, Juvenile Division.

{¶ 4} Following two days of hearings, the Juvenile Court Magistrate issued a decision that provides:

{¶ 5} " * * *

{¶ 6} "22. Taking into account the reasons for deviation set forth in Ohio Revised Code Sections 3119.22, 3119.23, and 3119.24, Father is entitled to a deviation of 72% from the child support calculated in accordance with Ohio Revised Code Section 3119.022. The factor most critical to this deviation is the amount of time the children are with their father.

{¶ 7} "23. Due to the length of time this has been pending in the administrative and the court modification process, it is necessary to calculate the support twice taking into account the changes in day care costs over the past several months and can be anticipated through the next school year.

{¶ 8} "24. Effective October 1, 2007, the day that the administrative modification would have been effective, Father's support obligation should be $311.09 per month for three children, plus two percent administrative fee for a total of $317.31. This is more than a ten percent deviation from the previous child support order of $261.65 per month for three children and thus qualifies for a change of circumstances.

{¶ 9} "25. In completing a child support calculation for the next year, that beginning October 1, 2008, the child support would be $306.41 per month for three children. This is a de minimis change of $4.68 per month and does not constitute a change of circumstances.[1]

{¶ 10} "* * *"

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[1]The Juvenile Court Magistrate also overruled Ward's motion to divide child care expenses equally but that issue is not before us in this appeal.

{¶ 11} Rue filed objections to the Magistrate's decision and asserted: "the Magistrate erred in providing Plaintiff Ward a 72% deviation for his child support obligation." The juvenile court issued a "Journal Entry Overruling in Part and Sustaining Objections in Part." Although finding a deviation was in order, the court found that the Magistrate had awarded a greater reduction in support than the circumstances justified. The court concluded:

{¶ 12} " * * * The parents have a parenting time allocation which results in a 50/50 share in time where each parent is considered the residential parent. A deviation is appropriate in accordance with Ohio Revised Code Section 3119.22 and 3119.23(D). It does appear, however, that due to the parents' respective work schedules, Thomas Ward does have the children in his physical possession somewhat more during the time he is responsible for their care than Jennifer Rue is able to exercise. Yet the Court finds that the additional time, amounting to a few hours a week, does not justify the 72% deviation calculated by the Magistrate. It is the finding of the Court that a deviation of 52% is more appropriate. Finding of Fact No. 22 is modified to reflect a 52% deviation to the child support obligation. The full child support obligations of $1,111.08 per month and $1, 272.43 per month for the time periods discussed above are unjust, inappropriate and not in the children's best interests. The Court finds that after applying a deviation of 52%, Thomas Ward should pay child support in the amount of $533.32 per month plus two percent administrative fee for the period of October 1, 2007, to September 30, 2008 and $610.76 plus two percent administrative fee commencing October 1, 2008."

{¶ 13} Ward appeals from that judgment.

II. Assignment of Error

{¶ 14} Ward presents the following "Statement of Issues" rather than an Assignment of Error:

{¶ 15} "THE TRIAL COURT ERRED IN OVERRULING THE MAGISTRATE'S SEVENTY-TWO PERCENT (72%) DEVIATION FROM THE CHILD SUPPORT COMPUTATION IN THAT SAID DEVIATION IS REQUIRED BY STATUE [sic] IN ORDER TO COMPLY WITH THE STATUTORY REQUIREMENTS THAT THE EXPENSES OF EACH OF THE PARENT [sic] BE CONSIDERED IN COMPUTING CHILD SUPPORT IN A SHARED PARENTING CONTEXT AND SAID COMPUTATION VIOLATES THE EQUAL PROTECTION CLAUSE OF THE OHIO CONSTITUTION."

{¶ 16} According to Ward, the trial court "determined what Appellant Ward's child support obligation to Appellee Rue would be and then reduced same by the percentage of time Appellant Ward expended with his children, i.e. fifty-two percent (52%). The gross error in computing child support in this manner is that same is violative of the statute [sic] mandate in that only the expenses that Appellee Rue incurs in raising the children was considered by the Court. Appellant Ward respectfully submits that he also has expenses in raising the children. Consequently, the only equitable way to compute child support in a fifty/fifty (50/50) shared parenting arrangement where the parent's [sic] income are comparable is to offset each parties's child support obligation to the other. Same satisfies the statutory mandate that both parties' expenses in rearing the children be

considered."

{¶ 17} The basic thrust of Ward's argument is that the trial court erred in not using an offset approach to calculating Ward's support obligation. He claims this is so because a shared parenting support computation that uses a sole residential parent model, combined with a deviation based upon the amount of parenting time, does not give equal credit to both parties for their parenting expenses.

III. Standard of Review

{¶ 18} "In accordance with Civ.R. 53, the trial court must conduct an independent review of the facts and conclusions contained in the magistrate's report and enter its own judgment." *Dayton v. Whiting* (1996), 110 Ohio App.3d 115, 118. Thus, the trial court's standard of review of a magistrate's decision is de novo.

{¶ 19} Claims of trial court error must be based on the actions taken by the trial court itself, rather than the magistrate's findings or proposed decision. When an appellate court reviews a trial court's adoption of a magistrate's decision, it uses an abuse of discretion standard. Thus, an appellate court must affirm the judgment unless it appears that the trial court's actions were unconscionable, arbitrary, or unreasonable. *Proctor v. Proctor* (1988), 48 Ohio App.3d 55, 60-61. Presumptions of validity and deference to a trial court as an independent fact-finder are embodied in the abuse of discretion standard. *Whiting,* supra.

{¶ 20} "An abuse of discretion means more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When

applying the abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. *Berk v. Mathews* (1990), 53 Ohio St.3d 161." *Randall v. Randall,* Darke App. No. 1739, 2009-Ohio-2070, ¶ 8-10.

IV. Offset v. Deviation

{¶ 21} Ward relies primarily upon *Weddell v. Weddell* (June 29, 1994), Montgomery App. No. 14274, to support his argument that the trial court should have used an offset approach in calculating child support. In *Weddell* we held an "obligor" parent in a shared parenting context is entitled to have his child support obligation during the time the obligor acts as the residential parent "considered as spent on the child, and therefore * * * not part of the child support order." Focusing upon R.C. 3113.215(C), we concluded such a parent is entitled to an "offset" when calculating the child support award.

{¶ 22} However, the Supreme Court of Ohio has rejected the *Weddell* analysis. In *Pauley v. Pauley*, 80 Ohio St.3d 386, 1997-Ohio-105, the Court held that former R.C. 3113.215(B)(6)(a)[2] should be used to compute child support payments under a shared parenting plan, and not R.C. 3113.215(C), because "the

[2]"If the court issues a shared parenting order in accordance with section 3109.04 of the Revised Code, the court shall order an amount of child support to be paid under the child support order that is calculated in accordance with the schedule and with the worksheet set forth in division (E) of this section, through line 24, except that, if application of the schedule and the worksheet, through line 24, 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 or criteria set forth in division (B)(3) of this section, the court may deviate from the amount of child support that would be ordered in accordance with the schedule and worksheet. ***." Former R.C. 3113.215(B)(6)(a), which has been replaced by R.C. 3119.24, eff. 3-22-01.

right to a setoff under division (C) applies only to a parent with split parental rights and responsibilities, and not to a shared parenting situation." Id. at 388. The *Pauly* Court determined, "R.C. 3113.215(B)(6) does not provide for an automatic credit in child support obligations under a shared parenting order. Rather, a trial court may deviate from the amount of child support calculated under R.C. 3113.215(B)(6) if the court finds that the amount of child support would be unjust or inappropriate to the children or either parent and would not be in the best interest of the child." *Pauley* at syllabus. "Thus, the court reasoned that this method of calculating child support in shared parenting situations 'permits a court to make an evaluation on a case-by-case basis and to deviate when it finds it is in the best interest of the child' and thus allows a court 'to take into account the specific facts of each case.'" *Roddy v. Roddy* (Jan. 11, 1999), Pike App. No. 97 CA 6000, quoting *Pauley,* 80 Ohio St.3d at 389. Therefore, to the extent Ward asserts the trial court erred by not using an offset approach, he is mistaken.

V. Credit for Parenting Expenses

{¶ 23} Ward also argues that in making a 52% deviation, the trial court failed to consider his expenses for "necessities" and based its deviation solely upon the percentage of time he acted in a residential capacity. Ward contends although Rue got credit for all her parenting expenses, he did not.

{¶ 24} R.C. 3119.24 provides:

{¶ 25} "(A)(1) A court that issues a shared parenting order in accordance with section 3109.04 of the Revised Code shall order an amount of child support to be paid under the child support order that is calculated in accordance with the

schedule and with the worksheet set forth in section 3119.022 of the Revised Code, through the line establishing the actual obligation, except that, 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 or criteria set forth in section 3119.23 of the Revised Code, the court may deviate from that amount.

{¶ 26} "(2) The court shall consider extraordinary circumstances and other factors or criteria if it deviates from the amount described in division (A)(1) of this section and shall enter in the journal the amount described in division (A)(1) of this section its determination that the amount would be unjust or inappropriate and would not be in the best interest of the child, and findings of fact supporting its determination.

{¶ 27} "(B) For the purposes of this section, 'extraordinary circumstances of the parents' includes all of the following:

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

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

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

{¶ 31} "(4) Any other circumstances the court considers relevant."

{¶ 32} Ward specifically directs our attention to R.C. 3119.24 (B)(3), underlining the phrase, "Each parent's expenses" in his brief.

{¶ 33} R.C. 3119.24 provides the trial court may also use the factors set out in R.C. 3119.23 in determining an amount of deviation. R.C. 3119.23 provides a list of statutory criteria a court may consider when determining whether to deviate from the child support schedule, including "* * * (D) Extended parenting time or extraordinary costs associated with parenting time * * * ."

{¶ 34} As we already noted, there is no automatic right to any "offset" in these sections. Instead, under R.C. 3119.24(A)(2), the "trial court must make three findings: (1) the amount of the calculated child support from the worksheet; (2) a determination that the amount would be unjust or inappropriate and not in the best interests of the children; (3) findings of fact supporting that determination." *Bockhorn v. Bockhorn*, Greene App. No. 2005-CA-145, 2006-Ohio-6226, ¶22 . Moreover, "[t]he amount of child support calculated using the child support guidelines and worksheet is rebuttably presumed to be the correct amount of child support." R.C. 3119.03.

{¶ 35} The parties stipulated that Ward's annual gross income is $46,000.00, while Rue's is $41,000.00. On each worksheet, Ward's income was adjusted for annual court-ordered support he pays for another child ($3,804.84), and for the amount of local income taxes he pays ($920.00), leaving him with an adjusted annual gross income of $41,275.16. Rue's gross income was adjusted by her local income taxes ($820.00), resulting in an adjusted annual gross income of $40,180.00. The juvenile court determined that the parties' basic combined child support obligation is $16,702.96 on each worksheet, that Ward's annual obligation is $8,463.39, and that Rue's annual obligation is $8,239.57.

{¶ 36} The juvenile court then adjusted the parties' child support obligations based upon Ward's and Rue's expenses for health insurance for the children, and Rue's annual child care expenses. On each sheet, Ward's obligation was adjusted by $643.24 in necessary health insurance. Rue's obligation was adjusted by $8,120.00 in child care expenses, and $2,116.66 in necessary health insurance on the first sheet, and by $11,941.20 in child care expenses, and by $2,116.66 in necessary health insurance on the second sheet. The juvenile court determined that Ward's actual annual obligation is $13,333 on the first sheet, and $15,269.20 on the second sheet. Accounting for the 52% deviation, Ward's final child support obligation is $543.99 per month on the first sheet, and $622.98 on the second sheet (including processing charges).

{¶ 37} In its journal entry, the juvenile court made the determination that "[t]he full child support obligations of $1,111.08 per month and $1,272.43 per month for the time periods discussed above are unjust, inappropriate and not in the children's best interest." (The juvenile court computed those amounts by dividing Ward's actual annual obligation on each sheet by twelve.)

{¶ 38} Finally, the juvenile court made a finding of fact supporting that determination. Citing in part R.C. 3119.23(D), the court noted that Ward has "the children in his physical possession somewhat more during the time he is responsible for their care" than Rue, yet, based upon the record, the court concluded that the additional time is only a few hours a week and does not justify the 72% deviation calculated by the Magistrate. Having reviewed the testimony of the parties, as well as that of Angela Perkins, the site supervisor for Kid's Learning

Place where the parties' children receive daycare, it is clear that Ward does spend additional time with the children during Rue's parenting time, but it is not enough to justify a major deviation as suggested by Ward.

{¶ 39} Although Ward contends that his expenses in caring for his children were not considered by the juvenile court as R.C. 3119.24(B)(3) requires, "a general principle of appellate review is the presumption of regularity; that is, a trial court is presumed to have followed the law unless the contrary is made to appear in the record." *Thomas v. Thomas* (Sept. 1999), Clark App. No. 98-CA-55. In his brief Ward has not directed us to a single reference in the record establishing that Rue received credit for any parenting expense that was not properly credited to him. He makes that assertion but does not provide any evidence to substantiate it. The failure to do so is fatal to his argument.

{¶ 40} Further, Ward did not file a Civ.R. 52 request for findings of fact and conclusions of law. Civ.R. 52 states: "When questions of fact are tried by a court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise * * * *in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law. " The failure to request findings of fact and conclusions of law ordinarily results in a waiver of the right to challenge the trial court's lack of an explicit finding concerning the issue. See *Paulus v. Bartrug* (1996), 109 Ohio App.3d 796; *Wangugi v. Wangugi* (Apr. 12, 2000), Ross App. No. 2531; *Ruby v. Ruby* (Aug. 11, 1999), Coshocton App. No. 99CA4. When a party fails to request findings of fact and conclusions of law, we must presume the regularity of the trial court proceedings.

See, e.g., *Bunten v. Bunten* (1998), 126 Ohio App.3d 443, 447; see, also, *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 356; *Sec. Nat. Bank & Trust Co. v. Springfield City Sch. Dist. Bd. of Educ.* (Sept. 17, 1999), Clark App. No. 98-CA-104; *Donese v. Donese* (April 10, 1998), Greene App. No. 97-CA-70. In the absence of findings of fact and conclusions of law, we must presume the trial court applied the law correctly and must affirm if there is some evidence in the record to support its judgment. See, e.g., *Bugg v. Fancher,* Highland App. No. 06CA12, 2007-Ohio-2019, at ¶10, citing *Allstate Financial Corp. v. Westfield Serv. Mgt. Co.* (1989), 62 Ohio App.3d 657.

{¶ 41} Here, the record reflects that Rue's expenses for the children exceed Ward 's. Moreover, Ward did not provide evidence of his own "child care expenses, school tuition, medical expenses, dental expenses, and any other expenses," such that a 72% deviation is "mandated." In fact, the trial court overruled Ward's motion to divide the childcare expenses equally, but he did not appeal that issue.

{¶ 42} We acknowledge that the underlying premise in Ward's argument has a logical underpinning. In a shared parenting context where each parent has the children 50% of the time and each parent has nearly the same income and expenses, the final child support obligations should be nearly the same, i.e. result in a de facto offset . But here, Ward has failed to establish his expenses were the same as Rue's.

{¶ 43} Finally, Ward argues that the sole residential child support worksheet gives a credit to the primary residential parent for necessary household expenses.

That worksheet is used when calculating the obligations of the parents in a shared parenting arrangement, so he is entitled to a credit for the same household expenses. But as an "obligee" parent, he did not receive it. Although the logic behind Ward's argument appears credible, he has not established how or where Rue receives an actual credit for her household expenses in the worksheet calculations. Ward's assertion may be correct, but we cannot reach that conclusion when the record fails to substantiate it.

{¶ 44} When we look at the child support worksheet, it appears that Ward's ultimate financial obligation equals about half of Rue's costs for day care and insurance after crediting Ward for his insurance expense. By giving appellant a 52% deviation, the trial court has made the parties' obligations essentially equal, which is the purpose behind shared parenting and the result Ward is seeking. In other words, the total documented expenses from lines 19 and 20 for both parents are $14,701.10 (mother's $14,057.86 + father's $643.24). Dividing that sum by two results in an annual obligation of $7,340.55, compared to the court's annual support order of $7,329.12. In light of this fact, we find neither a statutory nor constitutional violation exists in the absence of some specific evidence in the record to the contrary.

{¶ 45} There being no abuse of discretion, we overrule Ward's "Statement of Issues" and affirm the judgment of the juvenile court.

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BROGAN, J. and FROELICH, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Michelle J. Gearhardt
Frank J. Patrizio
Hon. W. McGregor Dixon, Jr.