

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

MELODI J. AMLIN (nka Wilkins)	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 15
v.	:	T.C. NO. 1999-DR-117
RICHARD KEITH AMLIN	:	(Civil appeal from Common Pleas Court, Domestic Relations)
Defendant-Appellant	:	
	:	
	

OPINION

Rendered on the 19th day of June, 2009.

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MELODI J. WILKINS, 8400 McCarty Road, Woodstock, Ohio 43084
Plaintiff-Appellee

G. S. WEITHMAN, Atty. Reg. No. 0018377, P. O. Box 109, Urbana, Ohio 43078
Attorney for Defendant-Appellant

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Richard Keith Amlin, filed August 25, 2008. On July 20, 1999, Richard and his wife, Melodi, dissolved their marriage and were granted a Decree of Dissolution. Two children were born of the marriage.

{¶ 2} On May 31, 2006, the trial court issued a Journal Entry that provides in part: “An administrative review of the child support in this case has been requested by Richard Keith

Amlin. The child support order amount has been calculated according to the child support guidelines using the financial information submitted by both parties. The calculations have been sent to both parties and both parties have submitted written agreement with the calculation. The calculations indicated that the Obligor * * * should be paying \$530.44 support per month plus administrative fee for two (2) minor children.” A child support computation worksheet is not attached to the journal entry.

{¶ 3} On June 14, 2006, the trial court issued a Journal Entry that provides in part that one of the parties’ minor children will be emancipated in May, 2006, and the entry directs Richard “to pay one-half of the previously ordered child support effective May 28, 2006.”

{¶ 4} On March 28, 2007, Melodi filed a motion to modify child support, and she requested a hearing.

{¶ 5} The record reflects that a hearing was held on May 17, 2007. A hearing was also held on June 26, 2007, and the record reflects that the matter was continued at Richard’s request in order to complete depositions. Another hearing occurred on September 11, 2007, and at each hearing Melodi appeared pro se while Richard was represented by counsel. Only the transcript from the third hearing is before us. At the hearing, the Magistrate indicated that the issue to be determined was Melodi’s income. Melodi testified that she originally worked for Air Conditioning and Refrigeration Service Company, Inc., a family-owned business. Melodi was so employed for 19 years. Melodi testified that she did all of the office work for the company, including answering the phone, paying the bills, scheduling appointments, filing, and payroll. In 2004, her income was \$26,222.00, and in 2005, her income was 25,482.00. On May 26, 2006, Melodi’s employment was terminated. In 2006, her income was \$10,003.00 and she also

collected \$6812.00 in unemployment, which ended at the end of December. The May 9, 2006, child support calculation worksheet admitted into evidence indicated an annual income for Melodi of \$28,933.84. Melodi stated that she has a high school diploma, and that she “took the typing and shorthand.” Melodi stated that she has sent out several resumes.

{¶ 6} Melodi testified that she has remarried and that her new husband is the sole proprietor of Rick Wilkins Heating and AC. Admitted as an exhibit was a Schedule C document entitled “Profit or Loss from Business (Sole Proprietorship),” listing Richard E. Wilkins as the proprietor. Melodi does Rick’s invoicing and payroll and pays the bills, but she does not receive a paycheck from the company. Melodi stated that her health is “pretty good.” When asked about her mental health she indicated it was “not good,” but when asked if her mental health would interfere with her ability to work, she stated, “Oh, no. I’m just an emotional person.”

{¶ 7} When asked what she thought she could earn in her locality with her background and education, she stated, “Well, in different like ads that you see, * * * income in different places you go, I mean, \$10.00 an hour or something like that is about what you see.”

{¶ 8} Rick Wilkins, Melodi’s husband, testified that he earned \$42,761.00 in 2004, and \$43,838.00 in 2005, and he started his business in 2006, showing a negative income of \$5,623.00 for the first year. Rick testified that he believes his business would not operate at a loss in 2007.

{¶ 9} A decision was issued October 15, 2007. The Magistrate determined that Melodi was underemployed and the Decision “imputes income to her based on the statutory standards, especially her testimony that she could earn \$10.00 per hour. The Magistrate notes that her

prior income was from a ‘family business’ and, therefore, does not find that Obligee could obtain the same wages without further evidence being submitted.” The Magistrate imputed \$20,800.00 in income to Melodi.

{¶ 10} Attached to the Magistrate’s decision, as “Appendix A,” is the Champaign County Child Support Enforcement Agency worksheet, which indicates that Richard received \$2,251.50 in rental income and indicates that Richard’s total annual gross income is \$38,943.08. Also attached to the decision, as “Appendix B,” is the Magistrate’s child support computation worksheet, which indicates that Richard received \$2,252.00 in rental income, and it indicates that Richard’s total annual gross income is \$43,480.00.

{¶ 11} Richard filed objections to the Magistrate’s Decision, and he also filed a “Supplemental Memorandum.” In his Supplemental Memorandum, Richard asserted in part that the Magistrate erred in attributing rental income to him when in fact he incurred a loss on his rental property of \$7,018.00, and that, after deducting the mortgage interest on the property of \$2,515.00, he is entitled to an income reduction of \$4,503.00 for purposes of child support.

{¶ 12} On February 12, 2008, the trial court issued a Journal Entry that provides in part:

{¶ 13} “The Court finds that the parties appear to have agreed that the only issue was Melodi’s income, and the CSEA figures for Richard’s income were correct.

{¶ 14} “However, the court finds that there is an inherent inconsistency in the CSEA worksheet. Line 6 of said worksheet appears to represent a positive rental income of [\$2,251.50.] However, the total annual gross income of \$38,943.08 (displayed on line 7 thereof) could only be reached by subtracting [\$2,251.50] from the remaining income.

{¶ 15} “Due to this inconsistency, the Court recommits the matter to the Magistrate for

reconsideration of this rental income issue. The Magistrate may hold additional hearings if the Magistrate determines such to be appropriate.

{¶ 16} “The Magistrate’s review may be limited to the rental income issue or, if the Magistrate finds it appropriate, the Magistrate may reconsider other child support issues including but not limited to: health care costs, self-employment income etc.” The court withheld ruling on Richard’s objections pending its receipt of an updated Magistrate’s Decision.

{¶ 17} On February 14, 2008, the trial court issued Magistrate’s Orders that provide in part:

{¶ 18} “The issues before the Magistrate will be limited to:

{¶ 19} “1. Rental income of each party;

{¶ 20} “2. Health insurance costs; and

{¶ 21} “3. Income derived by Melodi Wilkins from her one-half ownership in the heating and air conditioning business operated by her and her husband.”

{¶ 22} At the February 26, 2008 hearing, Richard testified that he owns a double in Mechanicsburg that he rents for \$380.00 a month. Richard provided no documentation regarding his income or expenses for the property, and the Magistrate retrieved Richard’s 2006 federal tax return from the parties’ file. The Magistrate noted on the return that Richard received rent of \$2,535.00 and that he listed expenses for mileage, cleaning and maintenance and insurance, mortgage interest, repairs, supplies, taxes and utilities for a total of \$7,424.00. Deducting the rent received from the expenses, Richard claimed a loss of \$7,018.00, which does not include depreciation of \$2,129.00. Richard testified that the property had been rented for the last four months. Richard’s 2006 tax return was admitted as an exhibit. Attached to the

exhibit are W-2 earnings summaries for 2006, 2005, and 2004. When asked if he lost money on the property in 2007, Richard replied, “ * * * We haven’t done our taxes yet so I don’t recall.”

{¶ 23} The following exchange occurred regarding the property:

{¶ 24} “THE MAGISTRATE: If I’m thinking of whether or not it’s a loss, do you have a guess of where it’s going to be compared to ‘06 and ‘07?

{¶ 25} “MR. AMLIN: No, no. I wouldn’t have a guess.

{¶ 26} “THE MAGISTRATE: * * * Now, it’s been rented for the last four months?

{¶ 27} “MR. AMLIN: Something like that.

{¶ 28} “THE MAGISTRATE: And how long was it not rented prior to being rented?

{¶ 29} “MR. AMLIN: One side was rented more than the other. I don’t recall how many months, but we supply all the appliances, and it seems like they have all gone out this year. It’s just, you know, without sitting down and looking at all the figures - - if it were rented all the time, it’s I think a hundred dollars, give or take, a month is what the income would be off of it.”

{¶ 30} At the conclusion of the hearing, the Magistrate stated, “One, I’m not sure taking the worst year is a fair way of figuring out what we should do about income on the rental. Two, if we do take the expenses off - - and just so everybody knows - - I certainly don’t expect to put the expenses on as income as I did the first time so I’ll have to change that.”

{¶ 31} There was no testimony from Melodi at the hearing.

{¶ 32} On March 24, 2008, following the hearing, the Magistrate issued a Decision that provided in relevant part:

{¶ 33} **“Rental income of each party:**

{¶ 34} “The Magistrate finds that Defendant had a loss associated with his rental property for the Tax Year in 2006. * * *

{¶ 35} “The Magistrate notes that on the Magistrate’s child support worksheet, Line 6 appears to represent a positive rental income of [\$2,251.50.] However, the total annual gross income of \$38,943.08 displayed on Line 7 thereof can only be reached by subtracting [\$2,252.50] from the remaining income. This would mean that the worksheet reflected a loss.

{¶ 36} “The treatment of a loss from rental property is problematic.

{¶ 37} “It is true that if an individual has a gain from rental income, it will be treated as income for purposes of child support calculation.

{¶ 38} “However, the converse is not necessarily true.

{¶ 39} “In determining what to do with a loss on a rental income, the Court should turn to the test of what is in the best interest of the child.

{¶ 40} “In this case, Obligor had some success with his rental property. However, Obligor recently has had trouble with keeping good tenants.

{¶ 41} “A question then arises. In the immediate future, will this investment be a good one or a poor one?

{¶ 42} “If the answer is that it is a good investment, then it would not make sense to use a loss in the computation of the child support.

{¶ 43} “If the answer is that the investment is likely to result in future losses, then Obligor ought to sell out of his investment. However, the child support computation should not punish the child for the parent’s bad investment.

{¶ 44} “Wherefore, it is appropriate to modify the previous child support worksheet to

reflect no gain with respect to rental income.

{¶ 45} “* * *

{¶ 46} ‘Interest in Spouse’s Business:

{¶ 47} “The Magistrate does not find that Melodi J. Amlin (nka Wilkins) is receiving any income from her husband’s business.”

{¶ 48} Attached to the decision is a child support computation worksheet that does not indicate rental income for Richard, and that provides that Richard’s total annual gross income is \$41,195.00. \$20,800.00 in income is imputed to Melodi.

{¶ 49} Richard filed objections to the Magistrate’s Decision on April 7, 2008. According to Richard, the “Magistrate in his calculation Appendix B other income line 6 a reflects [\$2,252.00] as a positive number whereas the factor should be considered negative number as in Appendix ‘A’ original calculation, at hearing Magistrate decided on his own that no deduction should [be] had and ruled that same should be zeroed out.” Richard also argued that the Magistrate erred by failing to include Melodi’s potential income as partial owner in her new husband’s business venture and by failing to consider her prior income in computing her income. On April 29, 2008, Richard filed further objections.

{¶ 50} On May 6, 2008, Melodi filed a pro se response to Richard’s objections, which provides, “In 2006 Melodi Wilkins earned \$10,003.00 at her job that she was laid off from in May 2006 and earned [\$6,812.00] from unemployment. Her husband’s business that is recognized as a sole proprietorship by the United States Government, took in as shown on the Schedule C that was submitted to the court previously, \$255,660.00 in 2006 and its total expenses for 2006 were \$261,283.00.”

{¶ 51} On May 15, 2008, the trial court overruled Richard's objections and adopted the {¶ 52} Magistrate's Decision. Regarding Richard's loss of rental income, the trial court found that "the [\$2,252.00] was properly not included as additional income, and similarly, was properly not deducted from Richard's total income" on the child support computation worksheet. The trial court relied in part upon *Combs v. Walsh*, Butler App. No. CA2005-07-198, 2006-Ohio-7026. (finding that the trial court did not abuse its discretion when it did not include approximately \$17,000.00 in self-employment losses from rental real estate, including repair expenses and depreciation, as reflected in Combs' 2003 federal income tax return, in determining Combs' income for child support purposes, where Combs was a full-time employee in addition to his real estate venture.)

{¶ 53} Regarding Melodi's income, the trial court found that Melodi is voluntarily underemployed, and that the imputed income amount of \$20,800.00 per year (\$10.00 an hour) was proper. The court noted that Melodi had worked for her parents for nineteen years and determined that it is unlikely that she could earn a comparable wage elsewhere.

{¶ 54} The court noted the lack of and conflicting evidence in the record regarding the nature of Melodi's and her husband's business. The court concluded that the business is a joint venture, citing the testimony of Melodi's husband at the September 11, 2007 hearing. That testimony was as follows:

{¶ 55} "Q. Would you agree with me in 2006, the beginning of that new business, you were married to Melodi?

{¶ 56} "A. Yes.

{¶ 57} "Q. * * * Would you consider that part of that business is now her business?

{¶ 58} “A. Yeah, half of it. Whatever is mine is hers.”

{¶ 59} The court then determined Melodi’s “share of the company’s profits may properly be included in computing her income for child support purposes.”

{¶ 60} The court went on to note that Melodi and her husband do not receive paychecks from the business. It was significant to the court that Melodi’s husband previously earned approximately \$43,000.00 while employed by the heating and air conditioning company owned by Melodi’s parents, and that when Melodi’s husband was previously in business for himself, he made between \$30,000.00 and \$40,000.00 in his best year.

{¶ 61} The court determined it to be “equitable to adjust the company’s balance sheet to

{¶ 62} reflect an annual salary for [Melodi’s husband] of [\$40,000.00] prior to calculating any profits to be divided by Wilkins and Melodi as owners.” According to the court, “equity requires viewing that sum as [Melodi’s husband’s] personal income and thus properly removed from any business profits attributable to Melodi when computing her income for child support purposes.” The court noted that the business is yet to produce a profit, and that Melodi and her husband had to take out various loans to pay their bills. Accordingly, the court determined, “at this point, imputation of additional income to reflect [Melodi’s] interest in [her husband’s] business is premature and that equity requires the Court deduct a fair salary for Wilkins from any profits the business receives before imputing additional income to Melodi.”

{¶ 63} Richard asserts two assignments of error. His first assignment of error is as follows:

{¶ 64} “THE COURT ERRED IN FIRST ASSIGNING POSITIVE INCOME NUMBER TO APPELLANT FOR RENTAL INCOME AND THEN FURTHER ERRED IN

NOT CONSIDERING RENTAL INCOME AS A NEGATIVE AND REFLECTING THE SAME IN CHILD SUPPORT CALCULATIONS.”

{¶ 65} According to Richard, “The Court has failed to deal with the issue of the original use of these figures as a deduction credit by the CSEA in its efforts toward arriving at the proper child support.”

{¶ 66} “A trial court had discretion related to the calculation of child support, and, absent an abuse of discretion, an appellate court will not disturb a child support order. *Pauley v. Pauly* (1997), 80 Ohio St.3d 386, 390, 686 N.E.2d 1108. To constitute an ‘abuse of discretion,’ the trial court must exhibit an attitude that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.” *Bertram v. Bertram*, Clark App. No. 2007 CA 135, 2009-Ohio-55, ¶ 16.

{¶ 67} In calculating child support, the trial court must determine the parents’ income by means of a child support computation worksheet. R.C. 3119.023. R.C. 3119.01(C)(5) defines “income” for child support calculation purposes as “either of the following: (a) For a parent who is employed to full capacity, the gross income of the parent; (b) For a parent who is unemployed or underemployed, the sum of the gross income of the parent and any potential income of the parent.”

{¶ 68} “Gross income means * * * the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable, and includes income from salaries, wages, overtime pay, and bonuses * * * * commissions; royalties; rents * * *.” R.C.3119.01(C)(7).

{¶ 69} R.C. 3119.01 includes self-generated income as gross income for the purposes of

child support calculations and defines it as “gross receipts received by a parent from self-employment, * * * * and rents minus ordinary and necessary expenses incurred by the parent in generating the gross receipts.” R.C. 3119.01(C)(13). “‘Ordinary and necessary expenses incurred in generating gross receipts’ means actual cash items expended by the parent or the parent’s business and includes depreciation expenses of business equipment as shown on the books of a business entity.” R.C. 3119.01(C)(9)(a). R.C. 3119.01(C)(9)(b), however, states that “‘ordinary and necessary expenses incurred in generating gross receipts’ does not include depreciation expenses and other noncash items that are allowed as deductions on any federal tax return of the parent or the parent’s business.”

{¶ 70} Having thoroughly reviewed the record, we find that the trial court did not abuse its discretion in failing to reduce Richard’s gross income due to his rental expenses. The source of the \$2,252.00 figure that the court determined should not be included in, or deducted from, Richard’s income is unclear, although the Magistrate suggested that it represented “expenses.” While Richard argues that he is entitled to reduce his gross income based on his rental loss, Richard produced no documentation, such as receipts or expense vouchers, to demonstrate actual cash item expenditures that were ordinary and necessary to his rental. The only evidence before the trial court at the 2008 hearing was Richard’s 2006 tax return. “In *Marcus v. Marcus* (July 30, 1999), Greene App. No. 98CA 83, unreported, 1999 WL 960772, we explained that:

{¶ 71} “the purposes underlying the Internal Revenue Code and the child support guidelines are vastly different. The tax code permits or denies deduction from gross income based on myriad economic and social policy concerns which have no bearing on child support. The child support guidelines in contrast are concerned solely with determining how much

money is actually available for child support purposes. * * *. ” *O'Herron v. Tomson*, Montgomery App. No. 19111, 2002-Ohio-1796. “A trial court is not required to ‘blindly accept all of the expenses * * * deducted in previous [tax] returns as ordinary and necessary expenses incurred in generating gross receipts.’” *Dressler v. Dressler*, Warren App. No. CA2003-05-062, 2004-Ohio-2072, ¶ 10.

{¶ 72} Since Richard has failed to show an abuse of discretion, his first assignment of error is overruled.

{¶ 73} Richard’s second assignment of error is as follows:

{¶ 74} “THE COURT ERRED IN SUSTAINING MAGISTRATE’S DETERMINATION OF APPELLEE’S INCOME AND ITS DETERMINATION IS CAPACIOUS [sic], BEYOND THE EVIDENCE SUBMITTED.”

{¶ 75} R.C. 3119.01(11) provides, “‘Potential income’ means both of the following for a parent who the court pursuant to a court support order, or a child support enforcement agency pursuant to an administrative child support order, determines is voluntarily unemployed or voluntarily underemployed:

{¶ 76} “(a) Imputed income that the court or agency determines the parent would have earned if fully employed as determined from the following criteria:

{¶ 77} “(1) The parent’s prior employment experience;

{¶ 78} “(ii) The parent’s education;

{¶ 79} “(iii) The parent’s physical and mental disabilities, if any;

{¶ 80} “(iv) The availability of employment in the geographic area in which the parent resides;

{¶ 81} “(v) The prevailing wage and salary levels in the geographic area in which the parent resides;

{¶ 82} “(vi) The parent’s special skills and training;

{¶ 83} “(vii) Whether there is evidence that the parent has the ability to earn the imputed income;

{¶ 84} “(viii) The age and special needs of the child for whom child support is being calculated under this section;

{¶ 85} “(ix) The parent’s increased earning capacity because of experience;

{¶ 86} “(x) Any other relevant factor.

{¶ 87} “(b) Imputed income from any nonincome-producing assets of a parent * * *.”

{¶ 88} Having reviewed the record, we cannot determine that the trial court abused its discretion in imputing income to Melodi in the amount of \$20,800.00 annually. The court considered the relevant statutory criteria, in particular that Melodi’s past 19 years experience and income at a family owned business was unique in nature and not likely to be obtainable elsewhere. The court considered her limited education, her health, and her testimony regarding the prevailing wage levels in her area. We note in her brief that Melodi states she is currently employed at a podiatrist’s office making \$9.50 an hour. We see no abuse of discretion in the trial court’s calculation of Melodi’s income, and Richard’s second assignment of error is overruled.

{¶ 89} Regarding the trial court’s determination that Rick’s business is a joint venture with Melodi, the Schedule C document admitted into evidence lists Rick as a sole proprietor. Clearly, the income of a spouse operating a sole proprietorship would not be income of the

parent, Melodi, for child support purposes. Although the trial court indicated that it would be currently premature to impute income from the business to Melodi until Rick has received “a fair salary,” the trial court left open such a possibility in the future. While Melodi argues in her brief that the business is a sole proprietorship, she did not make her argument the subject of a cross appeal. We note the issue only to raise awareness of the need for close scrutiny of the financial documents entered into evidence in child support cases.

{¶ 90} There being no abuse of discretion, and having overruled both assignments of error, the judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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Hon. Roger B. Wilson