

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: M.J.

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C.A. CASE NO. 23856

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T.C. NO. JC071325

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(Civil appeal from Common
Pleas Court, Juvenile

Division)

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OPINION

Rendered on the 13th day of August, 2010.

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MEGAN JENNER, 3309 Old Troy Pike, Dayton, Ohio 45404
Plaintiff-Appellee

MICHAEL A. HOCHWALT, Atty. Reg. No. 0017688, 500 Lincoln Park Blvd., Suite
216, Dayton, Ohio 45429
Attorney for Defendant-Appellant

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of James Angel, filed January 29, 2010. Angel appeals from the juvenile court's "Decision and Judgment Concerning Objections to the Decision of the Magistrate," in which the court imputed income to Angel in calculating his child support obligation for his

daughter, M.J., who was born July 6, 2006.

{¶ 2} On February 5, 2007, the Montgomery County Child Support Enforcement Agency filed a Complaint for Support for M.J., having determined through DNA testing that she is the biological daughter of Angel. Megan Jenner is M.J.'s mother, and she has custody of the child. After a pretrial hearing regarding the complaint for support, the magistrate ordered Angel to pay child support in the amount of \$1203.11 per month and to provide health insurance coverage for M.J., commencing March 1, 2007.

{¶ 3} On July 2, 2008, Jenner filed a "Motion for Contempt * * * Motion to Recalculate Support * * * Request for Attorney Fees." According to the Motion, an arrearage in child support existed. Further, Jenner asserted that pursuant to "an Administrative Adjustment Recommendation filed on May 30, 2008, child support was reduced from \$1203.11 per month to \$158.40 per month plus an additional \$240.62 per month was ordered on the arrearage." Jenner asserted that Angel's commissions and bonuses were not included in the support calculation, and that her child care expenses were omitted as well.

{¶ 4} A hearing was held on Jenner's motion on February 12, 2009, at which Angel and Jenner testified. Angel has five children, one of whom, in addition to M.J., is subject to a child support order. According to Angel, he has a bachelor of science degree in business administration from Ohio State University, and he is employed by Bluegrass Mortgage Services as a sales manager. Angel testified that he used to originate subprime mortgage loans for the company, but that "the crisis we're in now is just I think a direct result of maybe lending that was a little too

easy. But I rode that wave for along time, and * * * unfortunately right now it's gone away." Angel was originally paid strictly on a commission basis while originating subprime loans, but he earns a salary in his current position. Angel earned \$32,112.00 in 2008, and he expected to earn \$41,600.00 in 2009. Between 2000 and 2007, however, Angel earned over \$100,000.00 a year each year, earning \$298,357.00 in 2006 and \$239,451.00 in 2007. When asked about his substantial cut in pay, Angel testified, "when you looked at where the market was at that point, I was happy to take that position."

{¶ 5} Angel's wife, Ola, also works for Bluegrass Mortgage Services, and Angel is her supervisor. Ola originates FHA, VA, Freddie Mac, and Fannie Mae governmental loans. According to Angel, Ola earned \$220,000.00 in 2007 and \$200,000.00 in 2008. On direct examination, Angel testified that Ola has different training than he has to handle FHA loans, and that he does not have that training. Angel testified as follows on cross-examination:

{¶ 6} "Q. Now, you are licensed to handle government mortgage transactions, correct?

{¶ 7} "A. Our company is licensed to do FHA, that's correct.

{¶ 8} "Q. * * * But there was nothing that prevented you from sliding over and doing FHA, VA, Freddie Mac, Fannie Mae type lending had you chosen to, correct?

{¶ 9} "A. No, * * * 99 percent of the people that go into that fail. You know, when you look at my year to date on my 2008 pay stubs, I couldn't afford to do that. You know, if I failed, then what do I do.

{¶ 10} “Q. My question is: There’s nothing from a licensing standpoint or from your company’s restrictions that would have prevented you from sliding over into that other area of lending, correct?”

{¶ 11} “A. If I would have been willing to take that chance, you’re right.

{¶ 12} “Q. * * * Ola is doing exceptionally well in that area, in government lending, correct?”

{¶ 13} “A. That’s one of the reasons I married her.

{¶ 14} “ * * *

{¶ 15} “Q. Now, essentially, one of the benefits that you’ve received as a result of marrying Ola is the ability to share living expenses, correct?”

{¶ 16} “A. If Ola and I hadn’t gotten married, I’d be living with my parents right now.

{¶ 17} “Q. Either that or you’d be working somewhere else, wouldn’t you?”

{¶ 18} “A. Trying to make more money, that’s for sure.”

{¶ 19} According to Angel, he has not “actively pursued [another job], but I kind of asked around.” He stated that he had not looked for a job within the last six months prior to the hearing. The following exchange occurred:

{¶ 20} “Q. And your skills that you’ve had in the mortgage business transfer potentially over to banks or other institutions, do they not?”

{¶ 21} “A. That’s correct.

{¶ 22} “Q. * * * And you’ve got management experience as well, correct?”

{¶ 23} “A. That’s correct.

{¶ 24} “Q. * * * So while your niche had been subprime mortgages, you

weren't necessarily locked in to that very narrow layer in your mind; you had lots of other skills and talents that could lead you to another type of position?

{¶ 25} "A. I was - - my next move was to go to Somerville * * * Bank and be a branch manager there." According to Angel, he would make \$40,000.00 to \$41,000.00 a year as a bank branch manager.

{¶ 26} Angel testified that he borrowed money from his father twice to keep his child support current after he became a sales manager. According to Angel, "[m]y dad is 80 years old, but my dad is smart enough, he saved money." Angel stated that he has not seen M.J. since January 1, 2008, because Jenner has denied his visitation rights. He further stated, however, that he took no action to enforce his right to visitation.

{¶ 27} Jenner testified that she made \$36,624.00 in 2008, working at Wilcon Corporation as a contract administrator. In 2007, she made \$28,775.00, and she made \$28,662.00 in 2006. She has a GED and attended "some college." She expected to make \$37,500.00 in 2009.

{¶ 28} The following exchange occurred regarding Angel's visitation with M.J.

{¶ 29} "A. The conversation that I had with James, I left a voice mail with him explaining - - we were having trouble - - I was having trouble getting support on time regularly. The reasoning for that phone call was not to revoke his rights. I'm not able to do that. But I explained to him that we would follow the court order to visitation because I was not going to accommodate him any longer because there was times that he did not show, and I expected him to accommodate me and be on time if he wanted me to be flexible with his schedule.

{¶ 30} “Q. * * * And after that discussion did he ever contact you regarding seeing [M.J.]?”

{¶ 31} “A. Never again, no.”

{¶ 32} On March 16, 2009, the magistrate issued a decision that denied Jenner’s motion for contempt and attorney fees but that granted her motion for a recalculation of child support. According to the magistrate, in relevant part, Angel is employed, earning an annual salary of \$40,000.00, and Jenner is also employed, with an annual salary of \$37,500.00. Jenner has work-related day care expenses of \$6500.00 a year. The magistrate further determined, “although the father is currently earning only \$40,000.00 this year, the Court finds it appropriate to average the father’s past three years incomes to calculate support. The father testified that if it were not for his wife, he would be looking for work that paid more than his current position. In addition, the father testified that he was qualified to perform the same work as his wife, who works at the same company he does. His wife is currently earning in excess of \$200,000.00 per year. As such, the Court finds that the father is currently voluntarily underemployed and averages his last three years incomes and uses that figure, \$190,058.58 per year, to calculate support. The court notes that the calculation exceeds a combined gross income of \$150,000.00 per year. However, the Court finds that calculated amount to be fair and equitable.” Angel was ordered to pay child support in the amount of \$1480.18 per month and \$200.00 per month on the arrearage.

{¶ 33} Angel filed objections to the magistrate’s decision, and Jenner responded. In adopting the decision of the magistrate, the trial court determined in

part:

{¶ 34} “ * * * Mr. Angel’s sole argument is that he is incapable of maintaining a substantial income due to the destruction of the sub prime mortgage industry during 2007 and 2008. However, Mr. Angel admits that had he not married his current wife, who earns an income in excess of \$200,000, he’d be ‘trying to make more money.’ * * * Further, Mr. Angel’s testimony revealed that he is qualified to perform the same work as his wife, who is also employed at Bluegrass Mortgage Services. * * * Lastly, Mr. Angel admitted that upon the ‘collapse’ of the sub prime mortgage industry, he did not actively pursue other employment and had not done so within sixth [sic] months of the hearing in this case. The Court finds that the magistrate was correct in finding Mr. Angel to be voluntarily underemployed, thereby considering the average of his income over the previous three years to determine his support obligation.”

{¶ 35} Mr. Angel asserts two assignments of error which we will consider together. They are as follows:

{¶ 36} “THE TRIAL COURT ERRED AND COMMITTED AN ABUSE OF DISCRETION WHEN IT BASED APPELLANT’S INCOME ON A THREE YEAR AVERAGE, WHEN TWO OF THE YEARS ARE FROM SUBPRIME MORTGAGE COMMISSIONS WHEN THE INDUSTRY TOTALLY COLLAPSED.” And,

{¶ 37} “THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DID NOT TAKE INTO ACCOUNT THE FACTS AND DO AN ANALYSIS USING R.C. 3119.01(c) FACTORS AND BY DETERMINING SUPPORT OVER AND ABOVE \$150,000.00 TO BE FAIR AND EQUITABLE WHEN APPELLANT

WAS A COMMISSIONS BASED EMPLOYEE AND HIS INDUSTRY COLLAPSED THROUGH NO FAULT OF HIS OWN.”

{¶ 38} “Initially, it should be noted that 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*.” *Randall v. Randall*, Darke App. No. 1739, 2009-Ohio-2070, ¶ 8.

{¶ 39} “[T]he question whether a parent is * * * voluntarily underemployed is a question of fact for the trial court. Absent an abuse of discretion that factual determination will not be disturbed on appeal.’ (Citation omitted).” *Aldo v. Angle*, Clark App. No. 09-CA-103, 2010-Ohio-2008, ¶ 33. “‘Abuse of discretion’ has been defined as an attitude that is unreasonable, arbitrary or unconscionable. (Internal citation omitted). It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 40} “A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 41} To calculate the appropriate amount of child support, the trial court

must evaluate the income of each parent. R.C. 3119.01(C)(5) defines income as follows:

{¶ 42} “(a) For a parent who is employed to full capacity, the gross income of the parent;

{¶ 43} “(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.”

{¶ 44} R.C. 3119.01(C)(11) defines “potential income.” Subsections (a) and (b) include as potential income the following items: (a) imputed income that a parent would have earned if fully employed, as determined from statutory criteria; and (b) imputed income from any non-income producing asset of a parent. The criteria used to determine the income a parent would have earned if fully employed under R.C. 3119.01(C)(11)(a) include:

{¶ 45} “(i) The parent’s prior employment experience;

{¶ 46} “(ii) The parent’s education;

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

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

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

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

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

{¶ 52} “(viii) The age and special needs of the child for whom child support is

being calculated under this section;

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

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

{¶ 55} “Before the court reaches the question of what items should be included within imputed income, the court must first find that a parent is voluntarily underemployed or voluntarily unemployed.” *Devir v. Devir*, Montgomery App. No. 23509, 2010-Ohio-3111, ¶ 34.

{¶ 56} “In *Robinson v. Robinson*, 168 Ohio App.3d 476, 2006-Ohio-4282, we explained: ‘[T]he court is not required to determine whether it was the obligor’s subjective purpose to avoid his support obligation. Instead, the only reasons relevant to a finding of voluntary underemployment are those set out in R.C. 3119.01(C)(11)(i) through (x), concerning which the court is permitted in its discretion to give an obligor’s stated reasons for changing jobs whatever weight it wishes.’ *Id.* at 484.

{¶ 57} “This court has recognized that a drop in income due to a voluntary choice ‘does not necessarily demonstrate voluntary underemployment.’ (Citation omitted). ‘The test is not only whether the change was voluntary, but also whether it was made with due regard to the obligor’s income-producing abilities and her or his duty to provide for the continuing needs of the child * * * concerned.’ (Citation omitted). ‘[T]o avoid the imputation of potential income, the parent must show an objectively reasonable basis for terminating or otherwise diminishing employment. Reasonableness is measured by examining the effect of the parent’s decision on the interests of the child.’ (Citation omitted).

{¶ 58} “While a child support obligor may no longer be a completely “free agent” in terms of having an unlimited range of employment choices due to the child support obligation, courts must consider that some reasonable choices which result in short-term consequential reductions in income may in the long-term substantially benefit the living standards of the children. There are times when a court must respect the reasonable choice of an obligor to attempt to better his or her life in hope that such a choice will ultimately benefit the lives of the children.” (Citations omitted). *Aldo*, at ¶ 34-36.

{¶ 59} The trial court determined that Angel was voluntarily underemployed. Both of Angel’s assigned errors are addressed to the amount of income the trial court imputed to him in calculating his child support obligation, namely that it erred by averaging three years of his income, two of which years represented commissions earned in the now defunct subprime market, and also that it failed to apply the factors set forth in R.C. 3119.01(C) to determine that Angel has the ability to earn the resulting imputed income. Having reviewed the record before us, we see no abuse of discretion in the trial court’s decision.

{¶ 60} Angel works for the same mortgage company as his wife, whom he supervises. While he testified that he does not have the same training that Ola has, he also stated that there was nothing to prevent him from originating government loans. He chose to work as a manager instead, making substantially less money than a loan officer, as evidenced by Ola’s income. The trial court was free to give Angel’s stated reasons for the job change, namely the collapse of the subprime market, as well as the fact that he failed to look for other work due to

Ola's income, whatever weight it wished. The court clearly concluded that Angel did not change jobs with due regard to his own income producing abilities and his duty to provide for M.J. This conclusion is supported by Angel's lack of effort to exercise his visitation rights. Further, there was no evidence that the reduction in income would result in any long term benefits to M.J.'s standard of living. In imputing income to Angel, the trial court averaged his incomes for 2006 and 2007, when he received commissions, and 2008, when he received a salary. The resulting figure, \$190,058.00, represents approximately what Ola makes doing work that Angel has the ability to perform. We find nothing unreasonable in the trial court's determination. Angel's assigned errors are overruled, and the judgment of the trial court is affirmed.

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FAIN, J. and VUKOVICH, J., concur.

(Hon. Joseph J. Vukovich, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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