COURT OF APPEALS
THIRD APPELLATE DISTRICT
MERCER COUNTY

LEIGH ANN BEOUGHER NKA
LEIGH ANN OSBORN

APPELLANT **CASE NUMBER 10-99-18**

v. **O P I N I O N**

MARK A. BEOUGHER

APPELLEE

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: April 21, 2000.

ATTORNEYS:

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For Appellee.

WALTERS, J. Appellant, Leigh Ann Beougher, n.k.a. Osborn, appeals a judgment of the Court of Common Pleas of Mercer County, Domestic Relations Division, which affirmed a magistrate's decision and order reducing the amount of child support owed by Appellant's former spouse, Appellee, Mark Beougher. For the reasons expressed below, we affirm the decision of the trial court.

The parties were married in October 1985. Two children were born as issue of the marriage, both of whom are minors. In 1988, Appellant filed a complaint for divorce. A subsequent decree terminated the parties' marriage and designated Appellant the residential parent of both children. The court granted Appellee visitation rights in accordance with the local rules and established a child support order in the amount of $86.50 per week.

On May 4, 1999, Appellant filed a motion to modify child support based upon the allegation that a significant change had occurred in both parties' incomes. A magistrate conducted a hearing on the matter on July 21, 1999. The parties stipulated that "their 1998 federal income tax returns are accurate reflections of the parties' respective incomes and expenses, and [they consented] to the admissibility of the same."

The evidence adduced at the hearing reveals that in 1998, Appellee earned $37,666 from a full-time factory job at Reynolds & Reynolds. Appellee also

earned $4,266 from a paper route that same year. In addition to these occupations, Appellee operates a hog farming business. Since its commencement in 1996, the farming operation has not turned a profit. In fact, the tax return documents indicate that in 1998, Appellee incurred a $32, 826 loss from hog operation.

Based upon this evidence, the magistrate calculated a new child support order under the provisions of R.C. 3113.215. In doing so, the magistrate reduced Appellee's earnings from the factory job and the paper route by subtracting the loss incurred on the farming operation. As a result, Appellee's total gross income equaled approximately $9,000. The magistrate's decision recommended that the court reduce Appellee's support payment to $162 per month.

Thereafter, Appellant filed objections to the magistrate's decision, which the trial court eventually overruled. A judgment entry adopting the new support order was issued on December 10, 1999. This timely appeal followed wherein Appellant asserts three assignments of error which we have elected to address outside of their original order.

II.

The trial court erred in finding that the Appellee's hog farming is a for-profit business and not a hobby.

This court has held that it is within the trial court's discretion to determine whether a venture is a business or a hobby. *Zuppardo v. Zuppardo* (Mar. 7, 1997), Allen App. No. 1-96-58, unreported. Although Appellant argues that the

consistent losses incurred by Appellee's farming venture clearly suggests that it is nothing more than a hobby, we find otherwise. It is true that the hog farming operation has not earned a profit since its 1996 inception. However, Doug Ontrop, head of hog farming operations at Fort Recovery Equity, testified that Appellee's operation is designed to make future profits. While Ontrop could not specify as to when these profits will be forthcoming, he stated that he was unaware of any other similar ventures that did not make money sometime after their commencement.

Additionally, Appellee stated that he considered the operation to be a business. Appellee described the daily activities involved in this type of undertaking and testified that he would not expend that much time, energy and capital on a hobby. Based upon this unrefuted evidence, we cannot conclude that the trial court abused its discretion in finding that Appellee was engaged in the hog farming operation for legitimate business purposes.

Appellant's second assignment of error is overruled.

I.

The trial court erred in computing child support by deducting a loss of $32,826 reported on Appellee's 1998 federal income tax return from [the] hog farming business * * *.

A trial court's decision with regard to child support issues is reviewed under an abuse of discretion standard. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112. An abuse of discretion is more than a mistake in judgment; rather, it is a

"perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

Initially, we note that in reviewing the magistrate's decision, the trial court considered the evidence, but also placed great weight on the aforementioned stipulation. The court stated that since Appellant agreed to the accuracy of the figures contained in the tax returns, she was precluded from objecting to the trial court's use of those figures for purposes of a child support calculation. We find it unnecessary to reach the issue of the effect of the stipulation since the evidence contained in the record provides adequate support for the trial court's decision.

Appellant maintains herein that the trial court erroneously permitted Appellee to voluntarily reduce his income by claiming a loss on the farming operation. In support of this argument, Appellant cites to our previous holding announced in *Clarridge v. Clarridge* (Sept. 23, 1994), Union App. No. 14-94-10, unreported. In that case, we found that the trial court correctly refused to reduce an obligor's income by subtracting losses incurred on a farming operation. Of significant importance was the fact that the obligor was engaged in the farming operation as a hobby rather than as a business. *See also Zuppardo v. Zuppardo* (Mar. 7, 1997), Allen App. No. 1-96-58, unreported.

Although Appellant claims that we should hold similarly in this case, we find the instant matter to be distinguishable. As we have previously stated, the

uncontested evidence demonstrates that Appellee is engaged in the hog farming venture with the intention to earn a profit and that none of the factors indicative of a mere hobby are present.

We acknowledge that the paramount concern in these cases is the best interests of the children. *Kamm v. Kamm* (1993), 67 Ohio St.3d 174. However, contrary to Appellant's assertions, the evidence in this case fails to demonstrate that the current support order would have a detrimental effect on the children, thus, warranting a deviation from the guidelines in order to offset such a result.

Based upon the foregoing, we conclude that the trial court did not err in calculating Appellee's income for child support purposes. Accordingly, Appellant's first assignment of error is overruled.

III.

The trial court erred by allowing Appellee to take a full deduction from his gross receipts from his hog farming business of depreciation expenses for real estate as set forth in his tax return contrary to the mandates of ORC 3113.215.

In this assignment of error, Appellant argues that even if the trial court was correct in reducing Appellee's income, the court erroneously deducted the full amount of the farming loss since that figure included certain depreciation expenses that are excluded by the child support statutes. Any child support order must begin with the calculation of the parents' gross income. R.C. 3113.215(A)(2) defines "gross income" as "the total of all earned and unearned income from all

sources during a calendar year, whether or not the income is taxable, and includes * * * self-generated income * * *."

> **"Self-generated income" means gross receipts received by a parent from self-employment, proprietorship of a business, joint ownership of a partnership or closely held corporation, and rent minus ordinary and necessary expenses incurred by the parent in generating the gross receipts.**

R.C. 3113.215(A)(3).

> **(a) "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 replacement business equipment as shown on the books of a business entity.***
>
> **(b) Except as specifically included in [the preceding section] * * * "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 income tax return of the parent or the parent's business.**

R.C. 3113.215(A)(4). [Emphasis added.]

Appellant specifically complains that the trial court allowed a $29,257 deduction for depreciation on two hog buildings and an addition to one of the structures. Appellant argues that such expenses are not ordinary and necessary, and further, that they cannot be considered replacement business equipment. The record in this case leads us to find Appellant's argument not well-taken.

During the hearing, Appellee introduced a "Book Depreciation Schedule" into evidence, which included the hog buildings and the addition. When

questioned about the exhibit, Appellee testified that each item on the schedule is a piece of replacement business equipment. Moreover, it was certainly reasonable for the trial court to infer that hog buildings are ordinary and necessary to a hog farming operation, and in the absence of evidence to the contrary, that they constituted replacement business equipment. Thus, we find that this unrefuted evidence supports the trial court's decision to allow a deduction in accordance with R.C. 3113.215(A)(4).

Appellant's third assignment of error is overruled.

Having found no error prejudicial to the Appellant herein, in the particulars assigned and argued, the judgment of the trial court is hereby affirmed.

Judgment affirmed.

HADLEY, P.J., concur.

SHAW, J., dissents.

SHAW, J., dissenting. The majority rules today that a child support obligor may indefinitely reduce and/or avoid his child support obligation by depleting his primary source of salaried income on a losing secondary business venture – as long as the secondary business venture does not appear to be just a "hobby" – the determination of which is apparently to be made primarily on the subjective good intentions of the obligor as opposed to any evidence of or timetable for financial success. I believe this is wrong for a number of reasons.

First, it is my view that until such time as a secondary business venture may in fact become the primary source of income, a child support obligor with an already existing primary source of salaried income should first use that income to pay the child support before spending the primary income on the secondary business venture. Second, I am not convinced that either the statutes or the decision of the Ohio Supreme Court in *Kamm v. Kamm* (l993), 67 Ohio St.3d 174, cited by the majority as purportedly governing the self-employment issue in this case, contemplate self-employment which is secondary to an existing primary source of income. However, even assuming they do, I see no evidence in this case that either the trial court or the majority have considered the six guidelines for deviation specifically set forth in the *Kamm* decision or have otherwise established how the ruling in this case could possibly be in the best interests of the children. See *id.* at 177-178.

Finally, I do not agree with the majority interpretation of our decisions in *Clarridge v. Clarridge* (September 23, 1994), Union App. No. 14-99-10, unreported 1994 WL 521189, and *Zuppardo v. Zuppardo* (March 7, 1997), Allen App. No. 1-96-58, unreported 1997 WL 101773, as promulgating some sort of subjective "hobby test" to be determined in the discretion of the trial court, based solely on the perceived good intentions of the child support obligor, or perhaps the custom of indefinite losses in a particular business, in lieu of applying the specific

tests set forth in the *Kamm* and *Clarridge* decisions. On the contrary, the off-hand characterization of the secondary business in *Clarridge* as a "hobby" was precisely because of the sort of consistent losses exhibited in the case before us. A careful reading of the essential holding of the *Clarridge* decision on this issue clarifies this point:

> **In interpreting R.C. 3113.215, the trial court reasoned that while depreciation may be deducted from gross income, it may only be deducted from for-profit businesses. The trial court concluded that to permit the Obligor to consistently take a loss on an activity that was secondary to his primary means of support would not be in the best interests of the children, because the Obligor would be permitted to accumulate assets, take a deduction on them, and have his child support lowered.**
>
> **We find the trial court's interpretation of the statute reasonable. The paramount test in deciding whether depreciation can be taken in order to create a net loss which is then deducted from gross income is the best interests of the children. *Kamm v. Kamm* (1993), 67 Ohio St. 3d 174. *In its journal entry, the trial court compared the Obligor's annual gross income from his factory job with the consistent losses he declared on his farm, and concluded that the Obligor was not engaged in the farming business to generate a profit. We agree with the trial court's reasoning that to allow a parent to voluntarily reduce his income by always claiming a loss on a nonprimary income source, in this case a farm operated primarily as a hobby, in order to reduce the amount of child support owed by that parent from his primary income source, would defeat the meaning of the statute. Clarridge,* unreported at 3. (Emphasis added.)**

In my view, the *Clarridge* decision stands for the proposition that a consistently losing nonprimary income source is *by definition* a "hobby" which

should never be used to reduce a child support obligation, unless perhaps the trial court can demonstrate that a finding to the contrary is somehow in the best interests of the children consistent with the guidelines of *Kamm*, – a circumstance which, frankly, I find it difficult to envision. In any event, I see no basis for such a finding in this record. Nor do I find any legitimate basis for the finding of the majority that despite a similar record of consistent losses, the nonprimary business in this case should be regarded any differently than the "hobby"in the *Clarridge* case. For all of these reasons, I respectfully dissent. I would reverse the decision of the trial court.