[Cite as *Gunka v. Gunka*, 2015-Ohio-1888.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HANCOCK COUNTY

JUSTIN J. GUNKA,

PLAINTIFF-APPELLEE, **CASE NO. 5-14-31**

v.

DANEE L. GUNKA, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Hancock County Common Pleas Court
Trial Court No. 2013-DR-00072

Judgment Affirmed

Date of Decision: May 18, 2015

APPEARANCES:

Dennis M. Fitzgerald **for Appellant**

Dean Henry **for Appellee**

SHAW, J.

{¶1} Defendant-appellant, Danee L. Gunka ("Danee"), appeals the October 16, 2014 judgment of the Hancock County Court of Common Pleas, Domestic Relations Division, granting the complaint for divorce filed by plaintiff-appellee, Justin J. Gunka ("Justin"). Danee assigns as error the trial court's award of child support to her in the amount of $566.87 a month, or approximately $6,802.38 per year.

{¶2} The parties were married on June 25, 2005 and have three children together: Sydnee (born January 2007), Maximus (born September 2009), and Kolbie (born December 2010). The parties separated on December 22, 2012.

{¶3} On March 1, 2013, Justin filed a complaint for divorce. On the same day, Justin also filed a motion for temporary relief. In this motion, Justin requested the trial court grant him equal parenting time with the children whom had been residing in the martial home with Danee since the date of separation. Justin also requested that the trial court order the parties to share in the payment of the YMCA child care expenses and marital debt. Danee subsequently filed an answer and a motion for temporary orders requesting that she be named the children's temporary residential parent and that the court issue an order for Justin to pay child support while the action was pending.

{¶4} On June 7, 2013, the magistrate conducted a hearing on Justin's motion for temporary relief. On July 18, 2013, the magistrate issued temporary orders naming Danee as the children's residential parent. The magistrate also ordered Justin to continue to pay the YMCA daycare expenses of approximately $391.00 per week and to pay Danee child support in the amount of $236.77 per month. Danee was ordered to maintain health insurance and dental coverage on the children and to be responsible for the first $100.00 of uncovered medical, dental, orthodontia, and psychological expenses for each child. The magistrate noted that his orders were subject to review and modification after further hearing.

{¶5} On September 18, 2013, Justin filed a proposed shared parenting plan providing for the parties to have equal parenting time with the children on alternating weeks with no child support obligation on either party.

{¶6} On November 22, 2013, the parties appeared before the magistrate for a final hearing on contested issues, which included the allocation of parental rights and responsibilities and child support. At the hearing, Justin maintained his position for equal parenting time in the form of shared parenting. Justin also disputed the need for the parties to continue to incur a substantial childcare expense at the YMCA during the summer months when he was not working as a high school teacher and was available to care for the children. For her part, Danee expressed a desire to be named the children's residential parent with Justin having

visitation and a child support obligation. She opposed Justin's proposal of shared parenting. Danee was also adamant about continuing to send the children to the YMCA during the summer months for the structure and education its programs provided. At the close of the hearing, the magistrate stated the following with respect to shared parenting.

> **As to shared parenting, before I can consider shared parenting, I have asked for additional plans from the parties. This is a suggestion. I will open it up to both parties. Either party may submit a proposed shared parenting plan or an amended shared parenting plan as the case may be that adopts the schedule during the school year. It was recommended or suggested by Ms. Gunka with expanded visitation to accommodate Mr. Gunka's scheduling during the summer and we'll go from there. If I get those plans in time, I will consider those in my decision**.

(Doc. No. 77 at 337).

{¶7} On January 8, 2014, Danee filed a "motion and/or suggested shared parenting plan." In her shared parenting plan, Danee proposed that Justin have two weekday visitations during the school year on Wednesday and Thursday from after school until 7:30 p.m. and that Justin also have parenting time with the children on alternating weekends. Danee's plan further provided that the parties follow local court rule visitation for holidays and days of special meaning. During the summer, Danee proposed Justin to have three weekday visitations with the exchanges taking place "at 5:30 p.m. and on one of the three (3) weekday visitations the exchange shall take place at 7:30 p.m." (Doc. No. 68 at 4).

Danee's shared parenting plan also provided for the parties to use the YMCA on two weekdays. In addition, each party was entitled to up to two weeks of vacation companionship with the children. Notably, with respect to child support Danee's proposed shared parenting plan stated that:

> **Based upon a sharing of costs, the parties agree to waive any child support obligation. While this may be a deviation from the child support guidelines, the parties feel that this agreement is in the best interest of the children.**

(Id. at 5).

{¶8} On February 11, 2014, the magistrate issued a decision outlining his recommendations to the trial court. The magistrate acknowledged that Justin filed a proposed shared parenting plan prior to the final hearing and noted that while Danee opposed shared parenting and wanted to be named residential parent at the final hearing, she subsequently filed a proposed shared parenting plan. After discussing the best interest factors in R.C. 3109.04(D)(1)(a)(iii) and (F), the magistrate determined that Danee's proposed shared parenting plan was in the children's best interest and approved the plan with the exception of the provision waiving the imposition of a child support obligation on either party and the health care provision, which called for Justin to be responsible for maintaining health insurance on the children through his employer. Specifically, the magistrate determined that "[a] zero dollar child support order would be unjust and

inappropriate and would not [sic] in the best interest of the children." (Doc. No. 66 at 9).

{¶9} The magistrate reviewed the evidence of each party's respective incomes which showed that Justin earned $56,806.10 annually as an Intervention Specialist at Hopewell Louden High School and that Danee earned $62,384.00 annually as a Customer Services Manager at Bowling Green State University. Taking into account local taxes and certain expenses, such as Danee's cost to insure the children on her medical plan and the cost of daycare at the YMCA, the magistrate completed the child support computation worksheet and determined that without adjustment Justin's child support obligation would be $17,001.02 a year. In light of the parties' similar incomes, the fact that both parties specified in their proposed shared parenting plans that no child support be exchanged, and the fact that Danee's plan provided Justin with more parenting time than the court's standard parenting schedule, the magistrate found the amount of $17,001.02 a year to be "unjust and inappropriate to [Justin] and the children and is not in the current best interest of the children." (Doc. No. 66 at 9).

{¶10} The magistrate then recommended that Justin be responsible for his portion of the YMCA child care expenses and the cost of the children's health insurance. Thus, the magistrate recommended a downward deviation of $10,198.64 from the child support computation worksheet and concluded that it

would be "just, appropriate, and in the best interest of the children for [Justin] to pay child support in the amount of $6,802.38 a year, or $566.87 per month." [1] (Id. at 10). The magistrate attached Danee's proposed shared parenting plan to his decision as "Exhibit A." [2]

{¶11} On February 25, 2014, Danee filed objections to the magistrate's decision with her supplemental objections filed on May 28, 2014. Danee specifically objected to the magistrate's determination regarding the amount of Justin's child support obligation. Danee now argued that not only should Justin be obligated to pay child support but also that the amount recommended by the magistrate was inadequate and should be more. Danee acknowledged that she provided for no child support to be exchanged in her proposed shared parenting plan, but claimed that provision was included based on her presumption that the magistrate would incorporate the temporary orders into his decision and hold Justin solely responsible for paying the YMCA daycare expenses of approximately

[1] As for the magistrate's recommendation not to adopt the health insurance provision in Danee's shared parenting plan, the magistrate noted that "[w]henever a court issues a child support order the Court must determine the person or persons responsible for the health care of the children." (Doc. No. 66 at 11, citing R.C. 3119.30). There was no evidence presented at the final hearing of the terms or cost to insure the children under Justin's employer's health care plan. Accordingly, the magistrate recommended that Danee continue to maintain health insurance for the children through her employer with Justin paying his percentage of the costs. Justin's portion of the children's health insurance cost was included in the amount computed by magistrate in his child support recommendation.

[2] The magistrate also recommended that the temporary orders be terminated on November 22, 2013, but noted that at the time of the final hearing the child support ordered in the temporary orders had not begun to be deducted from Justin's paycheck, despite evidence in the record that Justin submitted all the necessary paperwork to the appropriate agency. Therefore, the magistrate further recommended that "[a]ll arrearages and overpayments accrued under the temporary orders should be preserved. The arrearages created by this recommendation should be reduced by any child care payments made by [Justin] to the YMCA for child care provided to the children between November 22, 2013 and the filing date of a Judgment Entry adopting this recommendation." (Doc. No. 66 at 10).

$14,000.00 a year. Notably, there was no provision in Danee's proposed shared parenting plan specifically addressing which party was to be responsible for the YMCA daycare expenses, or a request to incorporate the temporary orders into the final decree.

{¶12} Nevertheless, Danee asserted that her plan did not provide for an equal division of parenting time and that it was more on the "periphery of a 'shared parenting plan.' " (Doc. No 79 at 3). Accordingly, Danee maintained that it would be unjust, inappropriate and not in the children's best interest for the trial court to not at the minimum require Justin to be solely responsible for the payment of the YMCA daycare expenses. Justin responded to Danee's objections and claimed it would be unfair to require him to pay all the YMCA daycare expenses, especially when he was available to care for the children during the summer months and opposed the continuation of incurring that expense.

{¶13} On July 14, 2014, the trial court issued a decision on Danee's objections. Specifically with respect to her objection regarding child support, the trial court stated that it could not discern the basis of the child support deviation from the magistrate's decision. As a result, the trial court remanded the matter to the magistrate for clarification of the division of work-related child care expenses and the basis for the significant downward deviation in Justin's child support obligation.

{¶14} On August 8, 2014, the magistrate issued a clarification of his prior decision on child support. The magistrate again noted that Danee's proposed shared parenting plan called for no child support obligation on either party. The magistrate also pointed out that the cost-sharing provision in Danee's shared parenting plan was vague and did not enumerate specific expenses. The magistrate identified "two substantial expenses in this case that are not adequately addressed in the plan; health insurance and day care expenses." (Doc. No. 88 at 4). In light of these significant expenses, the increased parenting time given to Justin in Danee's plan, and notwithstanding the fact that "it is reasonable to expect the parties to pay the expenses they incur during their parenting time and to work together to divide other expenses of parenting such as clothing, school fees, and extracurricular activity expenses," the magistrate determined that a zero dollar child support order as proposed in Danee's plan and the full obligation of $17,001.02 annually pursuant to the child support guidelines would be unjust and inappropriate to Justin and the children and not in the best interest of the children. (Id.)

{¶15} The magistrate explained that his recommended child support amount of $6,802.38 a year represented Justin's portion of the YMCA daycare expenses and children's health insurance costs based on his percentage of the parties' total income, or 47.67%, as calculated in the child support computation

worksheet. Accordingly, the amount recommended by the magistrate of $6,802.38 equaled a downward deviation of $10,198.64 from the full obligation amount of $17,001.02 calculated pursuant to the child support guidelines.

{¶16} On August 18, 2014, Danee renewed her objection to the magistrate's clarification on remand.

{¶17} On August 20, 2014, the trial court issued its decision on Danee's objection regarding child support and overruled her objection.

{¶18} On October 16, 2014, the trial court issued a judgment entry representing the final decree of divorce. In the final decree, the trial court ordered Justin to pay child support $566.87 a month (approximately $6,802.38 annually) when private health insurance is being provided, and $423.77 a month when private health insurance is not being provided.

{¶19} Danee filed this appeal asserting the following assignment of error.

ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A DEVIATION FROM CHILD SUPPORT.

{¶20} In her sole assignment of error, Danee challenges the trial court's adoption of the magistrate's decision recommending that Justin have an annual child support obligation of $6,802.38.

{¶21} Initially, Danee claims that the trial court was required to find a change in circumstances before modifying the July 18, 2013 temporary orders

which made Justin solely responsible for paying the cost of childcare at the YMCA and also ordered him to pay Danee $236.77 a month in child support. However, we note that " '[a] temporary order is merely an order to provide for the needs of the parties during the pendency of the [ ] action. The trial court has discretion to order an amount different from the temporary order after final hearing, even without evidence of a change in circumstances.' " *Massey v. Lambert*, 7th Dist. Columbiana No. 09 CO 29, 2011-Ohio-1341, ¶ 51, quoting *Schumann v. Schumann*, 8th Dist. Cuyahoga Nos. 83404, 83631, 2005–Ohio–91, ¶ 50. Moreover, the Supreme Court of Ohio has held that, "[i]n a domestic relations action, interlocutory orders are merged within the final decree, and the right to enforce such interlocutory orders does not extend beyond the decree, unless they have been reduced to a separate judgment or they have been considered by the trial court and specifically referred to within the decree." *Colom v. Colom*, 58 Ohio St.2d 245 (1979), syllabus. Thus, the trial court was free to modify the temporary orders regarding child support and the allocation of child care expenses in the final decree of divorce without finding a change in circumstances.

{¶22} Next, Danee asserts that the trial court's child support order is unsupported by the evidence in the record. Specifically, Danee claims that the trial court's "deviation" of child support from the amount calculated pursuant to the child support guidelines is contrary to the testimony and exhibits establishing

the parties' incomes and their time spent with the children under her shared parenting plan. Danee also claims the trial court did not properly consider the statutory factors permitting a trial court to deviate from the child support worksheet.

{¶23} The trial court's decision on whether to deviate from the statutory support schedule and child support worksheet calculations will not be disturbed absent an abuse of discretion. *Booth v. Booth*, 44 Ohio St.3d 142 (1989). The 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. However, when a shared parenting plan is utilized, such as in this case, R.C. 3119.24(A) grants the trial court the discretion to deviate from the worksheet amount if the guideline 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* * *."

{¶24} Specifically, R.C. 3119.24(B) refers to the following as "extraordinary circumstances" for purposes of a deviation from the child support guidelines amount when a shared parenting plan is in place:

> **(B) For the purposes of this section, "extraordinary circumstances of the parents" includes all of the following:**
>
> **(1) The amount of time the children spend with each parent;**

> **(2) The ability of each parent to maintain adequate housing for the children;**
>
> **(3) Each parent's expenses, including child care expenses, school tuition, medical expenses, dental expenses, and any other expenses the court considers relevant;**
>
> **(4) Any other circumstances the court considers relevant.**

{¶25} In addition, R.C. 3119.23 also contains a list of factors a trial court may consider in determining whether to deviate from the amount of child support as computed in the child support worksheet:

> **The court may consider any of the following factors in determining whether to grant a deviation pursuant to section 3119.22 of the Revised Code:**
>
> **(A) Special and unusual needs of the children;**
>
> **(B) Extraordinary obligations for minor children or obligations for handicapped children who are not stepchildren and who are not offspring from the marriage or relationship that is the basis of the immediate child support determination;**
>
> **(C) Other court-ordered payments;**
>
> **(D) Extended parenting time or extraordinary costs associated with parenting time, provided that this division does not authorize and shall not be construed as authorizing any deviation from the schedule and the applicable worksheet, through the line establishing the actual annual obligation, or any escrowing, impoundment, or withholding of child support because of a denial of or interference with a right of parenting time granted by court order;**
>
> **(E) The obligor obtaining additional employment after a child support order is issued in order to support a second family;**

(F) The financial resources and the earning ability of the child;

(G) Disparity in income between parties or households;

(H) Benefits that either parent receives from remarriage or sharing living expenses with another person;

(I) The amount of federal, state, and local taxes actually paid or estimated to be paid by a parent or both of the parents;

(J) Significant in-kind contributions from a parent, including, but not limited to, direct payment for lessons, sports equipment, schooling, or clothing;

(K) The relative financial resources, other assets and resources, and needs of each parent;

(L) The standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued or had the parents been married;

(M) The physical and emotional condition and needs of the child;

(N) The need and capacity of the child for an education and the educational opportunities that would have been available to the child had the circumstances requiring a court order for support not arisen;

(O) The responsibility of each parent for the support of others;

(P) Any other relevant factor.

{¶26} On appeal, Danee focuses on the percentage of the parties' parenting time to assert that the trial court abused its discretion in ordering a deviation from the amount computed in the child support worksheet. Specifically, Danee

maintains that a "paltry" $6,802.38 is insufficient given the fact that the children are in her care the majority of the time. (Appt. Brief at 7). Aside from the fact that the trial court in essence ordered an "upward deviation" of $6,802.38 from her shared parenting plan which called for no child support obligation to be imposed on Justin, in challenging the trial court's child support order Danee overlooks two highly contested issues that were ruled upon in her favor in the trial court's final decree of divorce.

{¶27} First, at the hearing Justin ardently argued for equal parenting time with his children. Danee vehemently opposed the idea of the parties having equal parenting time on the basis that it would create too much instability in the children's lives at their tender ages. The parties agreed that Danee would receive the marital home as a result of the divorce and, as she pointed out to the court at the final hearing, the children had lived in that home "since they've been born and they have their things, and they have their dog and they have their dependability there." (Doc. No. 77 at 243). In his decision, the magistrate noted that the children have strong relationships with each party and the record suggests that the parties were on equal ground with respect to being capable parents to their three children. Nevertheless, the magistrate and the trial court were persuaded by Danee's position and *approved her shared parenting plan* which awarded her the

majority of the parenting time with the children, leaving Justin with a fraction of the parenting time.

{¶28} The second contested issue between the parties was the use of the YMCA during the summer months when Justin was not teaching and ready, willing, and able to care for his children during the week while Danee was working. Justin opposed using the YMCA for childcare during the summer because it would restrict his time with the children and he also viewed it as an unnecessary expense since he would not be working during that time. Danee was steadfast in her position that the YMCA was crucially beneficial for the children because they had been attending the facility since they were infants and its programs provided them stability, structure, and education. Again, the magistrate and trial court were persuaded by Danee's arguments and *approved her shared parenting plan* which further limited Justin's parenting time so that the children could participate in the YMCA activities and programs.

{¶29} It is also notable that one of the reasons the magistrate found an award of zero child support, as provided for in Danee's plan, to be unjust, inappropriate and not in the children's best interest was due to the magistrate's belief that Justin would be unlikely to readily share some of the YMCA child care expenses, especially in the summer. Yet, despite being a major point of contention at the final hearing, Danee neglected to address the parties' responsibilities with

respect to sharing this cost in her shared parenting plan. Accordingly, the magistrate computed a child support amount that specifically included Justin's portion of the annual YMCA child care expenses in an effort to ameliorate this burden on Danee as the named residential parent.

{¶30} Given the fact that Danee received all the parenting time proposed in her shared parenting plan, a court order mandating the children attend the YMCA to the exclusion of Justin's time with them in the summer, and an award of child support which was not included in her shared parenting plan, we are not persuaded by Danee's argument that the trial court erred in deviating from the amount of child support computed in the worksheet based on the percentage of the parties' parenting time.

{¶31} As previously discussed, the magistrate in his decision, which was adopted by the trial court, stated the grounds supporting his recommendation to deviate from the amount computed in the children support worksheet in consideration of the statutory factors listed above. In particular, the magistrate found, and the trial court agreed, that the similarity of the parties' incomes, the fact that both parties' submitted shared parenting plans providing for no child support to be exchanged, Justin's increased parenting time relative to the court's standard parenting schedule, and the "contemplation of the parties' establishing an effective means of sharing the cost of raising the children" all provided the basis

for the magistrate's and trial court's conclusions that ordering Justin to pay the child support worksheet amount of $17,001.02 a year would be unjust, inappropriate and not in the children's best interest. (Doc. No. 66 at 10; Doc. No. 88 at 4; Doc. No 91 at 5).

{¶32} Notwithstanding this fact, Danee claims that the trial court abused its discretion in adopting the magistrate's decision because the evidence in the record demonstrates that the parties cannot establish an effective means of sharing the cost of raising the children due to the contentious state of their relationship. At the final hearing, Danee claimed that she was afraid of Justin and made allegations that there was a history of physical and verbal abuse during their marriage. Justin denied these allegations. Nevertheless at the final hearing, it was Justin who expressed a willingness to effectively communicate with Danee for the sake of their children, while Danee refused to communicate with Justin by any means other than text messaging.

{¶33} We note that the magistrate was in the best position to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, eye movements, and gestures as they testified before him. *See Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Based on their testimony at the final hearing, the magistrate concluded that the parties would be able to set aside their animosity for one another and act in their children's best interest by

establishing an effective means of sharing the cost of raising the children. We find nothing in the record warranting the reversal of the trial court's adoption of the magistrate's decision on this basis.

{¶34} For all these reasons, we overrule the assignment of error and affirm the judgment of the trial court.

Judgment Affirmed

ROGERS, P.J. and WILLAMOWSKI, J.,

/jlr