[Cite as *Deasey v. Deasey*, 2003-Ohio-3576.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARY ELIZABETH DEASEY	:	JUDGES:
	:	William Hoffman, P.J.
Plaintiff-Appellant	:	John Wise, J.
	:	Julie Edwards, J.
-vs-	:	
	:	Case No. 02 CAF 09 044
STEPHEN MICHAEL DEASEY, SR.	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Delaware County Court Of Common Pleas Case 94 DRA 03-081
JUDGMENT:	Affirmed in Part, Reversed in Part, and Remanded
DATE OF JUDGMENT ENTRY:	June 27, 2003

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
MARK A. SERROTT ANGELA ALBERT BROWN 536 South High Street Columbus, OH 43215	GERALD J. BABBITT 503 South Front Street, Suite 200 Columbus, OH 43215

Edwards, J.

{¶1} Plaintiff-appellant Mary Elizabeth Deasey appeals from the August 28, 2002, Judgment Entry of the Delaware County Court of Common Pleas which modified both a shared parenting plan and child support obligation. Defendant-appellee is Stephen Michael Deasey, Sr.

STATEMENT OF THE FACTS AND CASE

{¶2} Plaintiff-appellant Mary Elizabeth Deasey [hereinafter appellant] and defendant-appellee Stephen Michael Deasey, Sr. [hereinafter appellee] were divorced on August 19, 1994, by an Agreed Judgment Entry Decree of Divorce. The Judgment Entry approved a Shared Parenting Plan which had been entered into by the parties. Appellee was ordered to pay appellant a total of $2,067.00 per month in child support for the parties' three minor children: Stephen, age 18 (emancipated on June 8, 2002), Brendon, age 17, and Brian, age 14. Appellee was to pay additional child support in the sum of 2% of his gross annual bonus per child. After appellee's spousal support obligation to appellant terminated, appellee was to pay 3% of his gross annual bonus per child to appellant.

{¶3} On November 14, 1998, the parties entered into an Agreed Judgment Entry whereby the Shared Parenting Plan was modified to name appellee the primary residential parent for Stephen. Appellee was ordered to pay $2,300.00 per month in child support for the two remaining children residing with appellant. Additionally, the bonus provision was increased whereby appellee was ordered to pay appellant 5.5% of his gross annual bonus and company stock match to appellant per child as child

support.[1] Appellee was to provide appellant with quarterly documentation as to his bonus.

{¶4} On June 22, 2001, appellee filed a motion to modify child support based upon R. C. 3119.04(B) (eff. March 22, 2001.) Appellee filed the motion based upon his belief that he was entitled to a reduction in child support due to the recent change in the law. On August 29, 2001, appellee filed a motion for reallocation of parental rights and responsibilities in order to be named the primary residential parent for Brendon. On February 19, 2002, appellant filed a motion in contempt against appellee for appellee's failure to provide a bonus payment to appellant since September, 1999.

{¶5} On May 20, 2002, a Magistrate heard the evidence. The Magistrate issued a ruling on May 21, 2002. The Magistrate's Decision recommended that appellee be designated the primary residential parent for Brendon. The Magistrate further recommended that the child support bonus provision be eliminated effective July 1, 2001, for bonuses paid to appellee for fiscal years after June 30, 2001. The Magistrate also recommended that child support payable from appellee to appellant be reduced to $1,215.00 effective September 1, 2001. Finally, the Magistrate's Decision recommended that appellee pay appellant $50,206.86, which was 11% of his bonus for the fiscal year ending 2001. Appellee was to receive credit from September 1, 2001, for overpayment of child support to appellant, thereby reducing the bonus payment to $41,044.96.

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[1] Appellee is president of SYGMA Network of Ohio, a division of SYSCO Corp. Appellee receives a salary and, in some years, a bonus. Appellee's salary is $245,000.00. Appellee has received the following bonuses: 1998 - $194,729.00; 1999 - $136,516.00; 2000 - $0.00 and 2001 - $456,426.00.

{¶6} Appellant filed Objections to the Magistrate's Decision on May 31, 2002. By Judgment Entry filed August 28, 2002, the trial court overruled the Objections and adopted the Decision of the Magistrate. It is from the August 28, 2002, Judgment Entry that appellant appeals, raising the following assignments of error:

{¶7} "I. THE TRIAL COURT ERRED IN RULING THAT O. R. C. [SEC.] 19.04(B) ESTABLISHED A PER SE COMBINED INCOME CAP OF $150,000 FOR CHILD SUPPORT CALCULATIONS WITHOUT CONSIDERING THE PARTICULAR FACTS OF THIS CASE.

{¶8} "II. THE TRIAL COURT ERRED IN RULING THAT THE ENACTMENT OF O.R.C. [SEC.] 3119.04(B) BY ITSELF CONSTITUTED A CHANGE IN CIRCUMSTANCES WARRANTING MODIFICATION OF THE EXISTING CHILD SUPPORT ORDER.

{¶9} "III. THE TRIAL COURT ERRED IN REFUSING TO HOLD THE APPELLEE IN CONTEMPT WHEN THE EVIDENCE ESTABLISHED THE APPELLEE FAILED TO COMPLY WITH THE COURT'S PRIOR ORDERS REGARDING PAYMENT OF THE BONUS AS CHILD SUPPORT AND PROVIDING QUARTERLY STATEMENTS."

I

{¶10} In the first assignment of error, appellant contends that the trial court erred when it held that every child support order for parties with a combined gross income over $150,000.00 was automatically capped at the guideline calculation for child support for $150,000.00. We agree.

{¶11} The trial court found that the gross income of the parties exceeded $150,000.00.[2] Revised Code 3119.01(B) provides the following concerning calculation of child support: "If the combined gross income of both parents is greater than one hundred fifty thousand dollars per year, the court, with respect to a court child support order, or the child support enforcement agency, with respect to an administrative child support order, shall determine the amount of the obligor's child support obligation on a case-by-case basis and shall consider the needs and the standard of living of the children who are the subject of the child support order and of the parents. The court or agency shall compute a basic combined child support obligation that is no less than the obligation that would have been computed under the basic child support schedule and applicable worksheet for a combined gross income of one hundred fifty thousand dollars, unless the court or agency determines that it would be unjust or inappropriate and would not be in the best interest of the child, obligor, or obligee to order that amount. If the court or agency makes such a determination, it shall enter in the journal the figure, determination, and findings."

{¶12} The trial court held that R.C. 3119.01(B) states that when the parties' combined gross income is over $150,000.00, courts are to compute the basic child support obligation at $150,000.00 and use that amount disregarding any income over $150,000.00 for purposes of the worksheet. The trial court then found that there were no grounds to deviate from the basic child support obligation in this case.

{¶13} We find that the trial court misinterpreted R.C. 3119.01(B). Revised Code 3119.01(B) states that when the parties' combined gross income exceeds $150,000.00,

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[2] The trial court found that appellant earned $27,000.00 plus $2,200.00 in cash profit sharing, for a total of $29,200.00 in 2001. Appellee earned $245,000.00 plus a bonus of $456,426.00 in 2001 for a total of $701,426.00. Thus, the parties combined gross income was $730,626.00.

courts should consider the amount of child support to be paid on a case-by-case basis, considering the needs and standard of living of the children and parents involved. The court may not award less than the child support obligation corresponding to a combined gross income of $150,000.00 unless it finds that it would be unjust or inappropriate and not in the best interest of the child, obligor or oblige to order that amount. However, the trial court may award more than that amount, on a case-by-case basis, after consideration of the needs and standard of living of the children and parents involved. In accord, *Fisher v. Fisher*, Henry App. No. No. 7-01-12, 2002-Ohio-1297. Therefore, we find that the trial court erred when it interpreted R.C. 3119.01(B) to place a cap on child support at the amount of child support set forth in the child support guidelines for combined incomes of $150,000.00 when the combined gross incomes of the parents exceed $150,000.00

{¶14} We find that this matter must be reversed and remanded for the trial court to determine the appropriate amount of child support after consideration of the needs and standard of living of the children and parents, in compliance with R.C. 3119.01(B) and this decision.

{¶15} Appellant's first assignment of error is sustained.

II

{¶16} In the second assignment of error, appellant contends that the trial court erred when it ruled that the enactment of R.C. 3119.01(B), in and of itself, constituted a change of circumstances warranting modification of the existing child support order. However, we find that we do not reach appellant's issue.

{¶17} Civil Rule 53(E)(3)(b) states that "[a] party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule." The Magistrate's Decision changed the child support obligation. However, the issue of a change of circumstances sufficient to warrant a change was not raised in the Objections to the trial court. Therefore, we find that appellant failed to preserve this matter for appeal.

{¶18} Appellant's second assignment of error is overruled.

III

{¶19} In the third assignment of error, appellant contends that the trial court erred in refusing to hold appellee in contempt when the evidence established that appellee failed to comply with the trial court's prior orders concerning payment of a portion of appellee's bonus as child support and providing quarterly statements. We disagree.

{¶20} Decisions in contempt proceedings are reviewed under the abuse of discretion standard. *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11 , 417 N.E.2d 1249. Thus, we are obliged to affirm the trial court's decision unless its judgment reflects an attitude that is unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶21} A November 4, 1998, Agreed Order stated the following, in pertinent part: "The husband shall provide notice from the chief financial officer of the bona fide estimated amounts of the Husband's bonus on a quarterly basis and shall pay 5.5% per

child thereon quarterly." Appellant claimed that appellee failed to comply with this Order and filed a motion for contempt.

{¶22} Appellee responded that the only bonus of relevance was paid to appellee in mid-August, 2001. Appellee argues that the bonus was paid to him after he had filed his motion to modify child support obligation on June 22, 2001, and the trial court had jurisdiction to change the child support obligation. Appellee further argues that he believed that the bonus was not earned by him until July 1, 2001, since if he had died or terminated his employment prior to July 1, 2001, he would not have received any bonus in mid-August. Thus, appellant asserts that he had a reasonable belief that his mid-August bonus was income earned by him subsequent to the date of filing of his motion. Appellant concludes that as such, he had a reasonable belief that the trial court would issue a new child support order which would not include a direct payment to appellant of his bonus income. Further, appellee testified at the trial before the Magistrate that he believed that he and appellant had established a pattern of conduct whereby appellee, with what he believed was appellant's consent, only paid appellant her share of the bonus when the bonus was received by appellee.

{¶23} As to the failure to provide quarterly bonus information from his employer, appellee testified that he did not always receive such notices and that the notices were not reliable in calculating the actual bonus which was paid to appellee at the end of the company's fiscal year. Again, appellee claimed that he believed that he and appellant had established a pattern of conduct whereby appellee, understanding that it was with appellant's consent, only provided the year end statement. Lastly, appellee testified

that he did not provide appellant with the notice for fiscal year 2000 as there was no bonus available to him that year.

{¶24} The trial court held that "[t]he Husband [appellee] had a colorable argument that the Husband would not have to pay the percent of the bonus for the fiscal year ending 2001. Thus the Husband is not in contempt. If the Husband continues to fail to pay that percentage, findings of contempt may lie." Judgment Entry, Aug. 28, 2002.

{¶25} Upon review, we find that the trial court did not abuse its discretion in failing to find appellee in contempt of court. The trial court heard appellee testify and concluded appellee had a colorable defense. Although other courts may have decided differently, we find no abuse of discretion.

{¶26} Appellant's third assignment of error is overruled.

{¶27} The judgment of the Delaware County Court of Common Pleas is affirmed, in part, and reversed, in part, and this matter remanded for proceedings consistent with this opinion.

By: Edwards, J.

Hoffman, P.J. and

Wise, J. concur