[Cite as *Ramey v. Ramey*, 2009-Ohio-2909.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRYAN K. RAMEY

Plaintiff-Appellant

-vs-

MELINDA B. RAMEY

Defendant-Appellee

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. Julie A. Edwards, J.

Case No. 08-CA-38

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Common Pleas Court, Domestic Relations Division, Case No. 06 DR 241
JUDGMENT:	Affirmed in part; Reversed in part; and Remanded
DATE OF JUDGMENT ENTRY:	May 28, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
L. JACKSON HENNIGER L. Jackson Henniger & Associates 150 North Market St. Logan, Ohio 43138	THOMAS C. LIPP 123 S. Broad St., #309 P.O. Box 2240 Lancaster, Ohio 43130

Hoffman, J.

{¶1} Plaintiff-appellant Bryan K. Ramey ("Husband") appeals the May 5, 2008 Judgment Entry/Decree of Divorce/Shared Parenting Decree entered by the Fairfield County Court of Common Pleas, Domestic Relations Division, relative to the trial court's award of child support and allocation of the dependency tax exemption. Defendant-appellee is Melinda B. Ramey ("Wife").

STATEMENT OF THE FACTS AND CASE

{¶2} Husband and Wife were married on July 31, 2001. One child was born as issue of said union, to wit: Lincoln (DOB 9/13/2003). Husband filed a Complaint for Divorce on April 20, 2006. Wife filed a timely Answer and Counterclaim. On September 25, 2007, the parties entered into a Memorandum Entry in which they settled all matters at issue except for child support and the dependency tax exemption for odd-numbered years. The parties agreed to equal shared parenting time whereby the minor child resides with each parent on an alternating week-to-week basis. The parties further agreed in the event he/she was unable to care for the child for a period in excess of four (4) hours, the other party would have the right of first refusal to care for the child during that time.

{¶3} The trial court conducted a non-oral hearing on the unresolved issues, and filed its Decision relative thereto on November 1, 2007, Husband requested findings of fact and conclusions of law, which the trial court issued on January 8, 2008.

{¶4} Prior to the filing of his divorce complaint, Husband was employed with George J. Igle & Co. in commercial construction. Husband had eleven (11) years experience in this field. During the years 2004, 2005, and 2006, Husband's average

income was $54,033. Husband did not receive paid holidays, vacations, sick leave, or personal days through his employer. Although his employer provided health insurance, such did not provide a high level of coverage. On July 30, 2007, Husband accepted a position with the City of Columbus as a water maintenance worker. He earned an annual salary of $31,000, and received yearly benefits of paid holidays, one paid personal day, two weeks paid vacation, paid sick leave, and an employer paid pension.

{¶5} Wife is a phlebotomist. Her most recent employment was with Fairfield Medical Center, where she earned an annual salary of $29,000/gross. During the pendency of the divorce, Wife became unemployed. She received unemployment compensation benefits in the amount of $295/week, for an annual gross income of $15,340.

{¶6} For the purposes of calculating child support, the trial court found Husband was voluntarily under-employed, and imputed income to him in the amount of $54,033/year. The trial court found Wife was involuntarily unemployed and imputed income to her in the amount of $15,340/year. The trial court found extraordinary circumstances which warranted a deviation from the actual obligations. Specifically, the trial court examined the amount of time the child spent with each parent, noting because of Husband's work schedule, the child was with Wife frequently during Husband's parenting week. The trial court added Wife incurred additional expenses as a result while Husband saved on daycare expenses. Accordingly, the trial court ordered Husband to pay child support in the amount of $409.55/month. The trial court awarded Wife the dependency tax exemption for the 2007 tax year and odd years thereafter.

{¶7} The trial court filed the final Judgment Entry/Decree of Divorce/Shared Parenting Decree on May 5, 2008.

{¶8} It is from this judgment entry Husband appeals, raising the following assignments of error:

{¶9} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THE PLAINTIFF-APPELLANT TO BE VOLUNTARILY UNDEREMPLOYED.

{¶10} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THE DEFENDANT-APPELLEE TO BE INVOLUNTARILY UNEMPLOYED.

{¶11} "III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CALCULATED CHILD SUPPORT USING AN AUTOMATIC OFFSET."

I, II

{¶12} Husband's first and second assignments of error require similar analysis and shall be discussed together. In his first assignment of error, Husband asserts the trial court abused its discretion in finding him voluntarily under-employed. In his second assignment of error, Husband maintains the trial court abused its discretion in finding Wife involuntarily unemployed.

{¶13} "The question whether a parent is voluntarily (i.e., intentionally) unemployed or 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." *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112. An abuse of discretion suggests more than an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. It implies the trial court's attitude was unreasonable, arbitrary, or unconscionable. Id. When applying the abuse of discretion standard, an appellate court may not substitute

its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶14} To determine the amount of child support each parent is responsible for paying, the court must determine the annual income of each parent. “Income” is defined under R.C. 3119.01(C)(5) as either of the following: “[f]or a parent who is employed to full capacity, the gross income of the parent; * * * [f]or a parent who is unemployed or underemployed, the sum of the gross income of the parent and any potential income of the parent.”

{¶15} R.C. 3119.01(C)(11) defines “potential income” as:

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

{¶17} “(i) The parent's prior employment experience;

{¶18} “(ii) The parent's education;

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

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

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

{¶22} “(vi)The parent's special skills and training;

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

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

{¶25} "(ix) The parent's increased earning capacity because of experience;

{¶26} "(x) Any other relevant factor.

{¶27} "(b) Imputed income from any nonincome-producing assets of a parent, as determined from the local passbook savings rate or another appropriate rate as determined by the court or agency, not to exceed the rate of interest specified in division (A) of section 1343.03 of the Revised Code, if the income is significant."

{¶28} Herein, Husband maintains he provided the trial court with a number of objectively reasonable bases for his change of employment. Husband notes his former position was seasonal in nature, required long hours and long commutes during those times he was working, and provided him with minimal benefits. On the other hand, Husband receives paid vacation, personal time, and sick leave as well as a regular work schedule and significantly better benefits through his employment with the City of Columbus. Husband adds his current position, although initially resulting in a reduction in his salary, provides him with greater income earning potential.

{¶29} We find Husband presented rational and specific reasons for his change of employment. The value of sick days, vacation days, health care, and pension benefits added to a salary of $31,000, equates to a benefit near to or higher than the prior monetary amount Husband earned. With today's increased costs of health care to employers, such benefit alone can amount to a value of over $6,000, to $7,000 per year for a family plan. Additionally, given the seasonal nature of Husband's previous employment and the marked decline of employment in the construction industry in this time of economic downturn, we find Husband made a positive choice in changing jobs to

protect his assets and family. Accordingly, we find the trial court abused its discretion in finding Appellant voluntarily underemployed.

{¶30} We further find the trial court did not abuse its discretion in finding Wife to be involuntarily unemployed. Wife lost her position with Fairfield Medical Center and, as a result, was receiving unemployment compensation benefits. Although Husband suggests Wife's unemployment was due to improper conduct on her part, the record is devoid of any evidence to support this position. In fact, Fairfield Medical Center did not contest Wife's application for unemployment compensation benefits, which the employer could have done had there been cause for removing Wife from its employ.

{¶31} Husband's first and second assignments of error are overruled.

III

{¶32} In his third assignment of error, Husband asserts the trial court abused its discretion when it applied an offset approach in calculating child support. Husband argues although the trial court purported to apply R.C. 3119.24(A)(1) in making its calculations, the trial court actually utilized the offset approach which is not applicable in shared parenting situations such as exists herein.

{¶33} A trial court has broad discretion related to the calculation of child support, and, absent an abuse of discretion, an appellate court will not disturb a child support order. *Pauly v. Pauly***,** 80 Ohio St.3d 386, 390, 686 N.E.2d 1108, 1997-Ohio-105.

{¶34} The amount of child support calculated using the child support guidelines and worksheet is rebuttably presumed to be the correct amount of child support, although the trial court may deviate from that amount. R.C. 3119.03. R.C. 3119**.**24(A) applies in the case of shared parenting. *Pauly v. Pauly* (1997), 80 Ohio St.3d 386, 390.

Under that statute, the trial court may deviate from the amount of child support in the worksheet if it determines 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 listed in R.C. 3119.23.

{¶35} R.C. 3119.24(B)(1) through (4) defines "extraordinary circumstances of the parents," and includes: (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; and (4) any other circumstances the court considers relevant.

{¶36} As stated, supra, R.C. 3119.24 provides the trial court may use the factors set out in R.C. 3119.23 in determining the amount of the deviation. R.C. 3119.23 provides a list of the statutory criteria a court may consider when determining whether to deviate from the child support schedule, including: (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; and (P) any other relevant factor.

{¶37} Upon review of the record and the trial court's findings of fact and conclusions of law filed January 8, 2008, we find no evidence to affirmatively demonstrate the trial court utilized the offset approach. We find the trial court properly determined, based upon the evidence before it, extraordinary circumstances existed which warranted a deviation in the guideline amount of child support. Specifically, the trial court found because of the parties' "right of first refusal" arrangement, the child was frequently in Wife's care during Husband's parenting time. As a result, Wife incurred additional expenses while Husband saved daycare expenses.

{¶38} Husband further contends the trial court failed to consider any of the factors set forth in R.C. 3119.23, and such failure amounts to an abuse of discretion. As indicated above, R.C. 3119**.**24 provides the trial court may deviate from the guideline amount if such would be unjust or inappropriate ***and*** would not be in the best interest of the child or either parent because of (1) extraordinary circumstances of the parents ***or*** (2) any other factors or criteria set forth in R.C. 3119**.**23. The statute uses the word "or" indicating consideration of the R.C. 3119.23 factors by the trial court is not mandatory. Accordingly, we find the trial court did not abuse its discretion in calculating the amount of child support.

{¶39} Husband's third assignment of error is overruled.

{¶40} The judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed, in part, and reversed, in part, and remanded for further proceedings.

By: Hoffman, J.

Farmer, P.J. and

Edwards, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRYAN K. RAMEY	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
MELINDA B. RAMEY	:	
Defendant-Appellee	:	Case No. 08-CA-38

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed, in part, reversed, in part, and remanded for further proceedings in accordance with our opinion and the law. Costs to be divided equally.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Julie A. Edwards
HON. JULIE A. EDWARDS