[Cite as *Beiers v. Phillips*, 2009-Ohio-3278.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMI BEIERS	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08CA0127
BARRY PHILLIPS	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Domestic Relations Division, Case No. 07-DR-00121 RAS
JUDGMENT:	AFFIRMED IN PART; REVERSED AND REMANDED IN PART
DATE OF JUDGMENT ENTRY:	July 1, 2009

APPEARANCES:

For Plaintiff-Appellant:	For Defendant-Appellee:
SCOTT E. TORGUSON 12 W. Locust St. Newark, OH 43055	VICKY CHRISTIANSEN 172 Hudson Ave. Newark, OH 43055

Delaney, J.

{¶1} Plaintiff-Appellant, Jami Beiers, appeals the judgment of the Licking County Court of Common Pleas, Domestic Relations Division, determining the amount of child support owed by Defendant-Appellee, Barry Phillips. For the reasons that follow, we affirm the decision of the trial court in part, and reverse and remand in part.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant and Appellee are the parents of C.P., born on August 10, 2005. C.P. is the second child born as issue of their relationship. L.P., born on February 5, 1999, is subject to the jurisdiction of the Knox County Court of Common Pleas. Appellant and Appellee are not married.

{¶3} On January 26, 2007, the Licking County Court of Common Pleas, Domestic Relations Division, entered a judgment of parentage for C.P., naming Appellee as the father. The Licking County Child Support Enforcement Agency ("CSEA") filed an administrative order on February 7, 2007, awarding Appellant $400.91 in child support per month from Appellee.

{¶4} Appellant requested the trial court review the administrative order and the matter was heard before the magistrate. Both parties appeared pro se. The CSEA also appeared at the hearing. On June 20, 2007, the magistrate issued his decision. At the time of the hearing, Appellant was unemployed and planned on attending school full-time starting in August 2007. The magistrate found Appellant was voluntarily underemployed and imputed to her an annual income of $19,676.80, the amount that she earned at her previous employment. The magistrate then imputed day care costs to Appellant in the amount of $125 per week or $6,500 per year. Appellee is employed

by Kokosing Construction Company. The magistrate took evidence on Appellee's gross income and found it was $64,000 per year. By utilizing the child support calculation worksheet, the magistrate determined that Appellee should pay $899.06 per month, plus processing charges, as child support.

{¶5} Appellee filed objections to the magistrate's decision. He argued the magistrate failed to consider Appellee's union dues in accounting for his gross income. He further stated the magistrate was incorrect in imputing day care costs to Appellant because Appellant did not pay for childcare, but utilized C.P.'s grandmother for childcare. On September 5, 2007, the trial court remanded the matter to the magistrate. Specifically, the trial court ordered that the magistrate obtain copies of the documents referenced during the first hearing, such as Appellee's 2006 W-2 and profit sharing information.

{¶6} The magistrate held a hearing on remand on March 24, 2008. At this hearing, both parties were represented by counsel. More detailed evidence regarding Appellee's gross income was presented. On March 31, 2008, the magistrate issued his decision finding that Appellee should pay $628.80 per month, plus processing charges, as child support. The magistrate found that Appellee's gross income for 2007 was $73,139.08. The magistrate credited Appellee union dues, local income taxes and apprentice fees. At the hearing, Appellant testified that instead of returning to school full-time, she worked for her parents' company making $7.50 per hour for 20-30 hours per week. Her annual income was $9,750. By leaving her previous employment, Appellant testified that she was able to minimize her day care expenses because she could take C.P. to work with her. In his decision, the magistrate found that Appellant

was voluntarily underemployed and imputed to her an annual income of $19,676. The magistrate did not impute day care expenses to Appellant.

{¶7} Appellant filed objections to the magistrate's decision on May 19, 2008. She argued the magistrate incorrectly calculated Appellee's gross income and failed to credit Appellant day care expenses when the magistrate imputed income to Appellant. Appellee also filed an objection to the magistrate's decision. In his objection, Appellee argued the magistrate incorrectly computed child support for C.P. when taking into consideration the child support Appellee currently paid for L.P. In the magistrate's calculation worksheet, the magistrate credited Appellee $6,348 for child support paid for L.P. Appellee pays $529 per month in child support for L.P. Appellee argued in his objection that based upon the child support set by the magistrate, the total monthly child support payment for the two children would be $1,157.80. Appellee attached a revised calculation worksheet, which resulted in a total support payment for the two children in the amount of $995.58 per month. As such, the child support payment for C.P. would be $466.58 per month.

{¶8} The trial court issued its opinion on the parties' objections on July 14, 2008 and its judgment entry on September 9, 2008. The trial court overruled Appellant's objections, but for a finding that the magistrate should not have deducted Appellee's apprenticeship fee from Appellee's gross income. The trial court then sustained Appellee's objection to the calculation of child support, finding that because Appellee was paying $529 per month in child support for L.P., Appellee's child support payment for C.P. should be $452.86 per month.

{¶9} It is from these decisions Appellant now appeals.

{¶10} Appellant raises four Assignments of Error:

{¶11} "I. THE TRIAL COURT COMMITTED AN ERROR OF LAW AND ABUSED ITS DISCRETION BY IMPUTING INCOME TO APPELLANT WITHOUT GIVING HER THE DAYCARE DEDUCTION NECESSARY TO ALLOW HER TO EARN THE AMOUNT IMPUTED TO HER.

{¶12} "II. THE TRIAL COURT COMMITTED AN ERROR OF LAW AND ABUSED ITS DISCRETION BY DEVIATING FROM THE CHILD SUPPORT WORKSHEET WITHOUT MAKING THE PROPER FINDINGS OF FACT.

{¶13} "III. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING APPELLEE A DEDUCTION FROM HIS INCOME FOR CITY OF NEWARK LOCAL INCOME TAX.

{¶14} "IV. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO INCLUDE ALL APPELLEE'S INCOME IN ITS COMPUTATION OF APPELLEE'S GROSS INCOME."

STANDARD OF REVIEW

{¶15} We will first discuss the general standard of review applicable to Appellant's Assignments of Error. In *Booth v. Booth* (1989), 44 Ohio St.3d 142, 541 N.E.2d 1028, the Ohio Supreme Court determined an abuse of discretion standard is the appropriate standard of review in matters concerning child support. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Furthermore, as an appellate court, we are not the trier of fact. Our role is to determine

whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (February 10, 1982), Stark App. No. CA-5758, 1982 WL 2911. Accordingly, a judgment supported by some competent, credible evidence will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶16} Appellant's arguments implicate Appellant's request of the trial court to modify the amount of child support. R.C. 3119.79 states, in relevant part, as follows; "(A) If an obligor or obligee under a child support order requests that the court modify the amount of support required to be paid pursuant to the child support order, the court shall recalculate the amount of support that would be required to be paid under the child support order in accordance with the schedule and the applicable worksheet through the line establishing the actual annual obligation. If that amount as recalculated is more than ten per cent greater than or more than ten per cent less than the amount of child support required to be paid pursuant to the existing child support order, the deviation from the recalculated amount that would be required to be paid under the schedule and the applicable worksheet shall be considered by the court as a change of circumstance substantial enough to require a modification of the child support amount."

{¶17} In order to determine if a change in circumstances has occurred, the trial court must complete a new child support worksheet, recalculating the amount of support required through the line establishing the actual obligation. R.C. 3119.79(A). If the recalculated amount is more than 10 percent less or greater than the amount previously required as child support, it is considered a change in circumstances substantial enough

to require modification of the child support amount. Id. The amount calculated in the child support schedules is "rebuttably presumed to be the correct amount of child support due." R.C. 3119.03; *Schultz v. Schultz* (1996), 110 Ohio App.3d 715, 720, 675 N.E.2d 55.

{¶18} Pursuant to these standards, we will now address Appellant's Assignments of Error.

I

{¶19} Appellant argues in her first Assignment of Error the trial court erred in imputing an income to Appellant without giving Appellant a daycare deduction necessary to allow her to earn the amount imputed to her. We agree.

{¶20} At the first hearing before the magistrate on June 13, 2007, Appellant testified that she was employed by Abercrombie and Fitch but ceased her employment in May 2007. (T. 9). Appellant earned $9.46 per hour for 40 hours per week, resulting in an annual income of $19,676.80. (T. 13). Appellant testified that she was going to start attending school full-time in August 2007. (T. 9). Appellant also testified to her day care situation. While working at Abercrombie and Fitch, she used child care for C.P. (T. 10). She stated that because she was going to be a full-time student, she would require child care for C.P. (T. 9). She testified that child care for C.P. would cost $25 per week. (T. 14).

{¶21} Based upon the Appellant's testimony, the magistrate determined in his original decision that Appellant was voluntarily underemployed and that she would continue to be so while Appellant attended school. (Magistrate's Decision, June 20, 2007). The magistrate imputed to Appellant an annual income of $19,676.80 "together

with a weekly day care amount of $125.00 or $6,500.00 annually. These figures will be used for the first petitioner [Appellant] for calculation purposes." (Magistrate's Decision, June 20, 2007). On the Child Support Computation Worksheet attached to the June 20, 2007 entry, the magistrate entered the amount of $6,500 for actual expense under the Child Care Credit section of the worksheet. The magistrate then reduced the child care costs by the Federal child tax credit in the amount of $960, resulting in a net child care credit of $5,540. The figure of $5,540 was entered into Line 19 of the Child Support Computation Worksheet as a "Net Child Care Expense Paid" by Appellant.

{¶22} Upon remand by the trial court, a second hearing was held before the magistrate on March 24, 2008. Testimony was taken regarding Appellant's employment status. Appellant had worked at Abercrombie and Fitch in 2006 and 2007, but the position required her to be there at 5:45 a.m., which resulted in difficulties obtaining child care. (T. 19). After she left that employment, she worked at the Hilton for a week, but the position was at night. (T. 17-18). She also waitressed at two different restaurants, but the jobs were also at night. (T. 19-20). Appellant testified that she was currently employed by her parents at Dugan Trucking. (T. 15). She worked 25 hours per week, earning $7.50 per hour, which resulted in an annual income of $9,750. (T. 21). Appellant testified that she left her employment with Abercrombie and Fitch to minimize her day care expenses to once every two days, at $25 per day, because she could take her child to work with her. (T. 21-22). She stated that she could get a job that paid more, but she could not afford the child care. (T. 21).

{¶23} The magistrate found that Appellant was voluntarily underemployed at 25 hours per week and imputed an annual income of $19,676 to Appellant, based upon her

previous employment with Abercrombie and Fitch. (Magistrate's Decision on Remand, March 31, 2008). The decision stated,

{¶24} "At the time of the first hearing with this Magistrate, the $19,676.00 figure was used because the first petitioner was going to go to school. Evidently this never happened. She has had other part-time jobs as a server at Hooters and the Alumni Club. The Magistrate finds her capable of earning much more than the $9,750.00 for her parents. She testified that she is paid in cash and there are several reasons why this work is more attractive to her than the warehouse work at Abercrombie. Neither party raised the $19,676 figure as an issue at this instant hearing."

{¶25} In his decision upon remand, the magistrate did not give Appellant a credit for child care expenses. In his decision the magistrate stated, "[t]he Magistrate will agree with her reasoning to a certain extent because at 5 days at $25.00 per day for day care, the cost is still $7,800.00 annually. The Magistrate will still enter a finding that she is voluntarily underemployed at 25 hours per week and she is imputed to earn $19,676.00 annually. The previous calculation used this figure for her income and the figure of $6,500.00 for her day care. This goes contrary to her testimony that her day care expense was prohibitive and that was why she left Abercrombie." (Magistrate's Decision on Remand, March 31, 2008).

{¶26} In her objections to the trial court, Appellant argued that the magistrate should not have imputed a higher income to Appellant. Appellant argued in the alternative that if the trial court found it was proper to impute income to Appellant, then Appellant should have received a child care credit in order to earn the imputed income. The trial court overruled Appellant's objection, finding, "[n]o where in the child support

guidelines does it provide that childcare costs incurred by the residential parent should be deducted from their gross income to arrive at a child support order for the non-residential parent." (Opinion, July 14, 2008).

{¶27} Appellant raises her objections before this Court, first arguing the trial court should have utilized Appellant's current income of $9,750 and should not have imputed a higher income to Appellant. She states the trial court abused its discretion in finding that Appellant was voluntarily underemployed.

{¶28} The Second District Court of Appeals in *Woloch v. Foster* set forth the following test for determining whether a parent is voluntarily underemployed:

{¶29} "The fact that the obligor's income has been reduced as a result of his or her voluntary choice does not necessarily demonstrate voluntary underemployment. 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 or children concerned. *Woloch v. Foster* (1994), 98 Ohio App.3d 806, 811." *Moauro v. Moauro* (Nov. 6, 2000), Stark App. No. 1999CA00364, 1999CA00409.

{¶30} Upon a review of the record, we find the trial court did not abuse its discretion in finding Appellant was voluntarily underemployed and imputing a higher income to Appellant. Appellant testified to her income-producing capabilities in that she stated she could find a higher paying job but for her difficulties in obtaining child care. We find there was competent, credible evidence for the trial court to determine Appellant was voluntarily underemployed.

{¶31} In the alternative, if imputing a higher income to Appellant was proper, Appellant argues the trial court should have allowed a deduction of imputed child care expenses. The trial court specifically responded to this objection in its opinion. As stated above, the trial court found that pursuant to R.C. 3119.01 et seq., child care costs are not required to be deducted from the residential parent's gross income to determine child support. The trial court is correct in its statement of the law. Under the circumstances of this case, however, we find the trial court abused its discretion in not imputing a child care credit to Appellant. The magistrate imputed an income to Appellant utilizing her annual income from her previous employment. In order for Appellant to earn that income and maintain that employment, she was required to incur the expense of child care.

{¶32} In a similar case, the Tenth District Court of Appeals found the trial court did not abuse its discretion when it imputed child care expenses to the mother after it had also imputed income to her. In *Tonti v. Tonti*, Franklin App. Nos. 03AP-494, 03AP-728, 2004-Ohio-2529, the court stated:

{¶33} "We find that the trial court did not exceed its authority in imputing child care expenses to appellee. In *Beekman v. Beekman* (Oct. 25, 1996), Huron App. No. H-96-002, the court found that '[a]lthough R.C. 3113.215 does not specifically provide for the imputation of child care expenses, the basic child support computation worksheet does provide for the consideration of child care expenses where the custodial parent is employed and must incur this expense to maintain employment.' The court held that the deduction of imputed child care expenses was appropriate

where the court previously imputed income to a parent and properly deviated from the child support schedule and worksheet.[1]

{¶34} "We further find that the trial court did not abuse its discretion in imputing child care expenses to appellee. 'Judgments supported by some competent, credible evidence * * * will not be reversed by a reviewing court as being against the manifest weight of the evidence.' *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. The amount of child care expenses imputed to appellee is supported by competent, credible evidence. Appellee testified that she was uncertain of the cost of child care alternatives, as the parties previously had in-home child care. However, she indicated that the latch-key program during the school year would cost approximately $30 to $40 per week per child. She further stated that during the children's summer break from school she would probably hire a high school or college student and pay them approximately $5 per hour for 10 hours a day for the 5 work days she would have possession of the children in a two-week period. The trial court did not abuse its discretion in relying upon appellee's testimony and imputing child care expenses along with the imputation of income." Id. at ¶ 74-75.

{¶35} As stated above, we found the trial court did not abuse its discretion in finding Appellant was voluntarily underemployed and imputing Appellant's previous income to her. In order for Appellant to earn that higher income, however, she required the use of child care. The magistrate imputed child care expenses to Appellant in his first decision, but not in his decision upon remand. The magistrate created the same legal fiction when imputing Appellant's annual income to arrive at the child support

[1] Section 3113.215 of the Ohio Revised Code was repealed effective March 22, 2001, and replaced by R.C. 3119.01 et seq.

worksheet amount; but for that legal fiction to be complete, child care expenses should have also been imputed. We find there is competent, credible evidence in the record to support the amount of child care expenses to be imputed to Appellant. Appellant testified at both hearings before the magistrate that it cost $25 per day, or $125 per week, for C.P.'s child care. We find the trial court abused its discretion in not imputing child care expenses to Appellant, when it imputed a higher income to her that would logically necessitate the use of child care to earn that higher income.

{¶36} Appellant's first Assignment of Error is overruled in part and sustained in part.

II

{¶37} Appellant argues in her second Assignment of Error the trial court erred in deviating from the Child Support Computation Worksheet without making the proper findings of fact. In the trial court's September 9, 2008 judgment entry, the trial court stated,

{¶38} "1. The Father, as obligor, shall pay child support to the Mother, as obligee, in the amount of $452.86/mo. effective January 3, 2007. * * *

{¶39} "Pursuant to R.C. 3119.23(C) [other court-ordered payments] of the Revised Code, the Court finds that it is inappropriate and not in the Child's best interest to require the payment of support at the guideline amount of $632.51/month. The Father is paying support for the parties' other child through a Knox County child support order."

{¶40} Revised Code 3119.22 states:

{¶41} "The court may order an amount of child support that deviates from the amount of child support that would otherwise result from the use of the basic child support schedule and the applicable worksheet, through the line establishing the actual annual obligation, if, after considering the factors and criteria set forth in section 3119.23 of the Revised Code, the court determines that the amount calculated pursuant to the basic child support schedule and the applicable worksheet, through the line establishing the actual annual obligation, would be unjust or inappropriate and would not be in the best interest of the child.

{¶42} "If it deviates, the court must enter in the journal the amount of child support calculated pursuant to the basic child support schedule and the applicable worksheet, through the line establishing the actual annual obligation, its determination that that amount would be unjust or inappropriate and would not be in the best interest of the child, and findings of fact supporting that determination."

{¶43} Revised Code 3119.23 states:

{¶44} "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:

{¶45} "* * *

{¶46} "(C) Other court-ordered payments;

{¶47} "* * *"

{¶48} In its judgment entry, the trial court stated, albeit succinctly, that it granted a deviation from the amount of child support calculated pursuant to the basic child support schedule and worksheet because Appellee paid child support ordered by the

Knox County Court of Common Pleas for the parties' other child. We find the trial court met the requirements of R.C. 3119.22 in rendering its decision.

{¶49} Appellant's second Assignment of Error is overruled.

IV

{¶50} We will next address Appellant's fourth Assignment of Error in the interest of clarity, as it influences the arguments and calculations made in Appellant's third Assignment of Error. Appellant argues in her fourth Assignment of Error that the trial court abused its discretion by failing to include all Appellee's income in its computation of Appellee's gross income. Specifically, Appellant argues that Appellee's pension, annuity, apprenticeship fund and excess life paid by Appellee's employer should have been included in his 2007 income.

{¶51} At the second hearing before the magistrate, Chris Fox, the payroll manager of Kokosing Construction Company testified. Mr. Fox identified Appellant's Exhibit 1, Appellee's final "check stub" of 2007. (T. 24). Mr. Fox testified that Appellee received gross wages for the year 2007 in the amount of $73,139.08. Id. Mr. Fox testified that Appellee's gross wages were calculated by adding Appellee's regular time, holiday pay, regular prior, profit sharing, plan time off and long-term disability. Id.

{¶52} Mr. Fox then testified that Appellee's employer paid Appellee benefits that were in addition to his gross wages for 2007, but not included in his gross wages. (T. 24-26). These additional benefits included a pension in the amount of $5,824, an annuity of $2,288, an apprenticeship fund in the amount of $520, and excess life in the amount of $9.72. Id. Appellee's employer also paid Appellee's union dues in the amount of $2,723.08. Id.

{¶53} Appellee's W-2 for 2007 showed that Appellee was paid $73,148.80 in wages. Id. Mr. Fox testified that the pension and annuity were not included on the W-2 because while they were benefits paid for the employee, they were not taxable benefits. (T. 29).

{¶54} On the magistrate's Child Support Computation Worksheet, the magistrate listed Appellee's total annual gross income (Line 7) as $73,139.08. (Magistrate's Decision on Remand, Attached Worksheet, March 31, 2008). On Line 12, work-related deductions, the magistrate deducted Appellee's apprenticeship fund and union dues in the amount of $3,243.08. Including other deductions, the adjusted gross income (Line 14) was $61,860.87.

{¶55} Appellant objected to the magistrate's calculations, arguing that Appellee's pension, annuity, apprenticeship fund and excess life should have been included in Appellee's gross income. The resulting amount would have been $81,780.08. In overruling Appellant's objections, the trial court stated,

{¶56} "The testimony was that items 7 [pension], 8 [annuity], & 9 [apprenticeship fund] were benefits paid by the company and not included in the second petitioner's gross income. It is unknown why these items were not included in [the] gross income of the second petitioner.

{¶57} "Certainly if the items 7 and 8 were not vested, it would be material, regardless if they were accrued to second petitioner during his employment. Similarly item 9 (the apprenticeship fund) did not directly benefit second petitioner if it were a required union deduction.

{¶58} “Consequently, the Court finds that based upon what the magistrate received as evidence, reliance upon the W-2 was sufficient to establish a gross income for the second petitioner.” (Opinion, July 14, 2008).

{¶59} Later in the opinion, the trial court finds that the magistrate should not have included the apprenticeship fund as a union deduction and should not have deducted the apprenticeship fund from Appellee’s gross income.

{¶60} Gross income is defined in R.C. 3119.01(C)(7) as follows:

{¶61} “‘Gross income’ means, except as excluded in division (C)(7) of this section, the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable, and includes income from salaries, wages, overtime pay, and bonuses to the extent described in division (D) of section 3119.05 of the Revised Code; commissions; royalties; tips; rents; dividends; severance pay; pensions; interest; trust income; annuities; social security benefits, including retirement, disability, and survivor benefits that are not means-tested; workers' compensation benefits; unemployment insurance benefits; disability insurance benefits; benefits that are not means-tested and that are received by and in the possession of the veteran who is the beneficiary for any service-connected disability under a program or law administered by the United States department of veterans' affairs or veterans' administration; spousal support actually received; and all other sources of income. ‘Gross income’ includes income of members of any branch of the United States armed services or national guard, including, amounts representing base pay, basic allowance for quarters, basic allowance for subsistence, supplemental subsistence allowance, cost of living adjustment, specialty pay, variable housing allowance, and pay for training or

other types of required drills; self-generated income; and potential cash flow from any source."

{¶62} Appellant argues that while the pension, annuity, apprenticeship fund and excess life are non-taxable benefits, per R.C. 3119.01(C)(7) those benefits paid to Appellee by the employer should have been included in Appellee's gross income for purposes of calculating child support. While we agree with Appellant that R.C. 3119.01(C)(7) includes non-taxable income as gross income for purposes of calculating child support, we find the trial court did not abuse its discretion in finding the pension and annuity should not be included in calculating Appellee's gross income.

{¶63} In *Guertin v. Guertin* (June 23, 1998), Franklin App. No. 97APF09-1264, the Tenth District Court of Appeals held that an employer's pension contributions on an employee's behalf were not available to the obligor as a disposable income, therefore the pension contributions did not constitute gross income under R.C. 3113.215(A)(2) [now R.C. 3119.01(C)(7)]. The Tenth District distinguished the case of *Parzynski v. Parzynski* (1992), 85 Ohio App.3d 423, 620 N.E.2d 93, which found that R.C. 3113.215(A)(2) required that the pension contribution made by Lake Wilmer OB/GYN on the obligor's behalf be included in his gross income. In *Parzynski,* the obligor was a fifty percent owner of Lake Wilmer OB/GYN. Id. at 436. In the *Guertin*, supra, the obligor was not an owner of the company he worked for and did not have the ability to decide how the contributions to the pension plan on his behalf should be invested.

{¶64} In the present case, there was no evidence presented that Appellee was an owner of the company for which he worked, or that he could control the deposits to his pension or annuity so that he could convert them to disposable income. We find this

same rationale to be applicable to the apprenticeship fund; there was no evidence presented that this income was available to Appellee.

{¶65} Accordingly, we find the trial court did not abuse its discretion in calculating Appellee's gross income for child support purposes.

{¶66} Appellant's fourth Assignment of Error is overruled.

III

{¶67} In her third Assignment of Error, Appellant argues the trial court abused its discretion in allowing Appellee a deduction from his income for City of Newark local income tax. Appellant references her May 19, 2008 objections to the Magistrate's Decision on Remand in support of this Assignment of Error. Upon review of the objection, we find that Appellant objected to the use of the local income tax rate for Mt. Vernon, not the City of Newark. Appellant argues in the body of her Assignment of Error regarding the use of the Mt. Vernon local income tax rate. As such, we will assume Appellant intended to argue against the application of the local income tax rate for Mt. Vernon.

{¶68} At the March 24, 2008 hearing, Appellee testified he was not sure what rate of local income tax he paid for the year 2007. (T. 7). Appellant is employed by Kokosing Construction Company and his local income tax rate is dependent on where his job location is. (T. 6-7). Appellant lives in Mt. Vernon so he assumed he paid local income taxes there. (T. 10). He thought the local income tax rate for Mt. Vernon was 6%. (T. 7).

{¶69} Mr. Fox testified to Appellee's last payroll of 2007. (T. 24). Mr. Fox testified that in 2007, Appellee paid local income tax for Columbus in the amount of

$203.90. (T. 26). Appellee also paid local income tax for Dayton for $7.58 and Vandalia for $12.87. Id.

{¶70} The Magistrate's Decision on Remand stated, "A total of $224.35 is shows [sic] as deductions for local income taxes on the second petitioner's [Appellee's] pay stub so he will receive credit for this." On its Child Support Computation Worksheet attached to the March 31, 2008 Magistrate's Decision on Remand, the magistrate calculated Appellee's local tax rate to be 2.307%. Applied to Appellee's annual gross income of $73,139.08, Appellee's local tax payable (Line 11) was $1,687.13.

{¶71} Appellant argued in her objections to the Magistrate's Decision on Remand, she stated that the Mt. Vernon local income tax rate was 1.5%. Applying Appellee's annual gross income of $73,139 to the 1.5% local income tax rate would result in a local tax of $1097.09. Appellant argued this was the correct figure to use to determine Appellee's local income tax payable. The trial court overruled Appellant's objection, finding that there was no evidence before the magistrate that the use of 2% of Appellee's gross income plus the additional local taxes paid to Columbus, Dayton and Vandalia were in error. (Opinion, July 14, 2008).

{¶72} As stated above, we review a trial court's determination of child support under an abuse of discretion standard. *Booth*, supra. Based upon the record before us, we find the trial court did not abuse its discretion in overruling Appellant's objection and setting Appellee's local income tax rate at 2.307%.

{¶73} Appellant's third Assignment of Error is overruled.

{¶74} Accordingly, the judgment of the Licking County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part.

{¶75} The trial court's decision is reversed as to the amount of child support ordered based upon the imputation of child care expenses to Appellant, and remanded for the limited purpose of recalculating Appellee's child support obligation by including in its determination Appellant's child care adjustment pursuant to Line 19 of the Child Support Computation Worksheet.

By: Delaney, J.

Gwin, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

PAD:kgb

[Cite as *Beiers v. Phillips*, 2009-Ohio-3278.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JAMI BEIERS	:	
	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BARRY PHILLIPS	:	
	:	
	:	Case No. 08CA0127
Defendant-Appellee	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part. It is remanded to the trial court for the limited purpose of recalculating Appellee's child support obligation by including in its determination Appellant's child care adjustment pursuant to Line 19 of the Child Support Computation Worksheet. Costs to be split between the parties.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS