[Cite as *Moore v. Moore*, 2010-Ohio-2499.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
ERIC P. MOORE	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. 09 CA 21
	:	
	:	
CHRISTINA M. MOORE (GIBBS)	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil Appeal from Guernsey County Court of Common Pleas Case No. 99-DS-192
JUDGMENT:	Affirmed In Part and Reversed and Remanded In Part
DATE OF JUDGMENT ENTRY:	June 2, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ANDREW J. WARHOLA, Esq. 110 North 7th Street Cambridge, Ohio 43725	JAMES R. KRISCHAK, Esq. Gottlieb, Johnston, Beam & Dal Ponte PLL 320 Main Street P.O. Box 190 Zanesville, Ohio 43702-0190

Edwards, P.J.

{¶1} Defendant-appellant, Christina Moore (Gibbs), appeals from the June 12, 2009, Entry of the Guernsey County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Christina Moore (Gibbs) and appellee Eric Moore were married in April of 1993. Two children were born as issue of such marriage, namely, Shelby (DOB 8/10/94) and Austin (DOB 5/17/97).

{¶3} On April 23, 1999, a Petition for Dissolution of Marriage was filed along with a Separation Agreement. The Agreement provided that appellee would pay $100.00 every two weeks in child support in accordance with the parties' Shared Parenting Plan.[1] The Shared Parenting Plan provided that the children would make their residence with each parent on an approximately equal basis. The Shared Parenting Plan further provide in paragraph 2 as follows:

{¶4} "So long as the present arrangement continues, and each party is providing approximately equal care, the husband shall pay to the wife the sum of One Hundred Dollars ($100.00) every two weeks (which includes processing fee) for support for the two minor children. The support shall be payable every two weeks by wage withholding through the Child Support Enforcement Agency, Guernsey County, Ohio. The parties agree that this support obligation represents a deviation from the basic child support schedule and is justified due to the visitation schedule of the parties, the additional costs that will be paid by the father as further set forth herein, and the medical expenses and insurance paid by the father."

[1] This amounted to $216.67 per month.

{¶5} Pursuant to the terms contained in paragraph 8 of the Shared Parenting Plan, each parent agreed to pay one half of the expenses for the children for clothing, school expenses, and lessons or activities.

{¶6} A hearing was held before a Magistrate on June 1, 1999, on the parties' Petition for Dissolution of Marriage. The Magistrate, in a Decision filed on June 11, 1999, recommended that the parties' Separation Agreement and Shared Parenting Plan be adopted. The Magistrate, in his Decision, stated, in relevant part, as follows**:**

{¶7} "The Court finds that the payments that the father shall make to the mother for the support of the children as set forth in the Separation Agreement and Shared Parenting Plan are within reasonable limits taking into consideration income and financial standing of the parties as well as the needs of the children**.** The court having considered the factors and criteria set forth in R.C. Section 3113.215(B)(3), hereby determines that the amount calculated pursuant to the basic children support schedule in R.C. 3113.215(D) and applicable worksheet would be unjust and inappropriate and would not be in the best interest of the minor children. The amount of child support calculated pursuant to the basic child support schedule is $610.36 per month. The Court makes the following findings of fact in support of its decision to deviate from the basic child support schedule:

{¶8} "1. The minor children will be spending relatively equal amounts of time with each parent.

{¶9} "2. The husband is responsible for health care insurance coverage for the minor children.

{¶10} "3. Each parent has agreed to pay one-half of the expenses for the minor children for clothing, school costs, and lessons or activities.

{¶11} "The Court therefore specifically finds that the child support obligation as agreed to in the Separation Agreement and Shared Parenting Plan, is in the best interests of the minor children."

{¶12} Pursuant to a Judgment Entry filed on June 11, 1999, the trial court adopted the Magistrate's Decision, approved the parties' Separation Agreement and granted a dissolution of marriage.

{¶13} Following a hearing held on March 13, 2007, on pending contempt motions, the Magistrate, in a Decision filed on April 16, 2007, recommended that the Shared Parenting Plan of the parties be modified in certain respects. The Magistrate recommended that, in accordance with the agreement of the parties, the children stay with appellee overnight on Sundays and Mondays, and that appellee take the children to school on Mondays and Tuesdays. The Magistrate also recommended that appellee pick up the children from school on Tuesdays through Fridays and take them home with him until appellant picked them up after work. The trial court approved and adopted the Magistrate's Decision as memorialized in an Entry filed on April 16, 2007. After appellee filed objections to the Magistrate's Decision, the trial court, pursuant to an Entry filed on May 31, 2007, again approved and adopted the Magistrate's Decision.

{¶14} Subsequently, appellant filed a Motion for Contempt against appellee. A hearing on such motion was held on October 30, 2007. The Magistrate, in a Decision filed on November 1, 2007, recommended that the terms set out in paragraph 8 of the

parties' Shared Parenting Plan be terminated. The Magistrate further recommended as follows:

{¶15} "2. In the event that either parent wishes to enroll any of the children in an extra circular activity, they must first notify the other parent in writing of such a desire. If the other parent agrees in writing, then both parties shall equally share the cost of expense related to that extra circular activity. However, in the event that the other parent disagrees with the enrollment of the child, then the parent who elects to enroll the child in such activity shall bear the sole cost of such expense related that activity.

{¶16} "3. The father shall reimburse the mother for the purchase of school clothes in the amount of $250.00 per child per calendar year. The mother shall be further required to provide to the father copies of the receipts for the items purchased within fourteen (14) days. Thereafter, the father shall have thirty (30) days to reimburse the mother." The trial court approved and adopted the Magistrate's Decision pursuant to an Entry filed on November 1, 2007.

{¶17} On or about October 15, 2008, the Guernsey County Child Support Enforcement Agency (CSEA) held an administrative hearing in the parties' case. In a decision sent on October 15, 2008, the CSEA recommended that appellee's child support obligation be increased from $216.67 per month plus an additional 2% processing fee to $522.21 per month plus 2% processing fee effective October 1, 2008. After appellee requested a hearing, a hearing in the trial court was held on January 6, 2009.

{¶18} At the hearing, appellee testified that he was employed at Noble Correctional Institution as a corrections lieutenant, and that he had been employed

there at the time of the dissolution. He testified that appellant was not employed at the time of the dissolution, but was currently employed. Appellee testified that, right after the dissolution, he used to pick his children up during the summer months when he got out of work in the morning and then would keep them until appellant got off of work. He testified that during the school months, he would pick the children up after school and take them home with him until he reported to work at 9:00 p.m.

{¶19} Appellee testified that there had been a deviation in the parenting time. He testified that he still picked his children up after school on Tuesdays, Wednesdays, Thursdays and Fridays and that appellant then picked them up when she got out of work between 3:30 p.m. and 6:30 or 7:00 p.m. If the parties' daughter had cheerleading after school, appellant would pick her up. Appellee testified that, during the summer months, he was supposed to pick his children up at noon every day during the week, but that he picked them up at noon on Sunday and kept them through Tuesday until appellant got out of work. He indicated that this was in accordance with the modification that the parties had agreed to in April of 2007. Appellee testified that he took the children to school on Mondays and Tuesdays.

{¶20} With respect to the children's expenses, appellee testified that he and appellant agreed to split the costs for cheerleading, wrestling and football, but that he was a little behind in paying his daughter's fees for shoes and gymnastics. Appellee further testified that he owed appellant money for clothing for the children although he did not know how much. Appellee also testified that he had paid appellant approximately $250.00 for clothing for the children and that he intended to pay appellant the money that he owed to her.

{¶21} Appellee has a total of six children all subject to child support orders except one. He testified that the parties' two minor children are on his family medical plan and that he pays around seventy dollars a month for them. Excluding appellee, a total of seven people were covered on appellee's family medical plan. Appellee testified that the last time he earned overtime was in August of 2008 because the warden of the prison had eliminated overtime.

{¶22} On cross-examination, appellee testified that he earned approximately half as much when he entered into the Shared Parenting Plan as opposed to what he was earning at the time of the hearing. Appellee testified that he had agreed that his daughter could go on a Washington, DC school trip and agreed to pay half of the cost for the trip. He admitted that he had not paid his share by the December 15th due date, but testified that he had contacted the school to make arrangements to pay.

{¶23} Appellee testified that he was paid every two weeks and that, for 2008, he earned a little over $62,000.00. He indicated that he was paid at the rate of $26.13 an hour and was guaranteed a forty hour week and 52 weeks a year. He also testified that he was not entitled to any more step increases in salary.

{¶24} Linda Ann Voytko, the Human Capital Management Analyst at Noble Correctional Institution, testified that appellee earned $62,964.39 through December 20 or 21st of 2008. She testified that based on appellee's biweekly gross income of $2,660.71, through the end of 2008, appellee would have earned roughly $64,200.00 in 2008. According to Voytko, appellee worked 107.7 hours of overtime in 2008 and that his hourly wage was $27.15 staring on July 1, 2008. She further testified that appellee

had maxed out his step increases in pay and was not entitled to any other step increase in wages, only to longevity increases.

{¶25} Voytko testified that appellee's gross earnings were $58,081.99 in 2007 and that he had 112.52 hours in overtime and that his gross earnings in 2006 were $51,929.31 with a half hour of overtime. Appellee was paid time and a half for overtime. She also testified that appellee was covered under Ohio Med which provides single coverage for $46.97 and family coverage for $128.30 a month.

{¶26} On cross-examination, Voytko testified that it was unlikely that there would be any additional overtime.[2] She further testified that appellee could not work more than 80 hours in a pay period and that his pay would be $56,472.00 unless he had overtime.

{¶27} Richard Heddleson, a hearing officer with the Guernsey CSEA, testified that, excluding the two children in this case, appellee paid $10,748.96 in child support in 2008 including processing charges. He admitted that while the agency had given appellee credit for paying $13,887.69 in child support, appellee had not paid such amount in 2008. Because no one objected to the figure, it was never changed.

{¶28} Appellant was the final witness to testify at the January 6, 2009 hearing. Appellant testified that she was an admissions assistant at Beckett house and that she was paid biweekly. She testified that her hourly rate was $10.91 and that her gross year to date income for 2008 was $28,094.40, which included overtime.[3] Appellant testified that she worked more hours than usual in 2008 because her boss was on medical leave and that she expected to work fewer hours. Appellant also testified that in addition to the

[2] Voytko testified that it would be unlikely that there would be overtime for exempt employees because "they work twelve shifts, and they flex out their hours so it reduces drastically the amount of overtime." Transcript at 40.
[3] Appellant earned $20,843.55 in 2007 and $19,964.14 in 2006.

parties' two children, she had one other child living with her for whom she received child support in the amount of $2,895.60 a year.

{¶29} Appellant testified that she had not received half the cost for her daughter's cheerleading expenses from appellee and that approximately $162.99 was owed to her. She also testified that appellee failed to pay her $250.00 a year per child for clothing expenses as the parties agreed. The following testimony was adduced when she was questioned about the amount of time the children spent with her and the amount that they spent with appellee:

{¶30} "Q. What's the current allocation of time between you and Eric [appellee] concerning the time the kids are with you and the time the kids are with Eric?

{¶31} "A. Like after school?

{¶32} "Q. Like I mean the total time on a week's basis, how many days does Eric [appellee] have the children with him?

{¶33} "A. He doesn't have them that often.

{¶34} "Q. Does he have them from Sunday at noon until Monday or Tuesday?

{¶35} "A. Tuesday yes.

{¶36} "Q. Okay.

{¶37} "A. Other days may vary.

{¶38} "Q. Does he take the children to school Tuesday morning when they have school?

{¶39} "A. Yes.

{¶40} "Q. So in an average week, he has two out of seven days a week?

{¶41} "A. Yes.

{¶42} "Q. Does he always pick the kids up from school on Tuesday, Wednesday, Thursday and Friday?

{¶43} "A. Not always.

{¶44} "Q. And why is that he doesn't always pick them up?

{¶45} "A. Activity schedules. Shelby she has cheerleading practice after school until six and there is no reason for him to pick her up from school, because she has practice." Transcript at 51-52.

{¶46} She further testified that appellee did not pick up the children at noon each day of the week during the summer because if they wanted to stay at appellant's house, appellee let them.

{¶47} On cross-examination, appellant testified that appellee had the children fewer hours than he did before. According to appellant, appellee owed her approximately $300.00 for clothing for the children.

{¶48} The Magistrate, in a Decision filed on January 13, 2009, found that there was no change of circumstances that would warrant eliminating the child support deviation granted at the time of the parties' dissolution and recommended that appellee's child support obligation remain at $200.00 a month, including processing fees. The Magistrate found that "the prior agreement of the parties is still in the best interest of the children."

{¶49} Appellant filed objections to the Magistrate's Decision on January 26, 2009 and supplemental objections on March 3, 2009. Pursuant to an Entry filed on April 8, 2009, the trial court denied the objections and approved and adopted the Magistrate's Decision. On April 10, 2009, appellant filed a Request for Findings of Fact and

Conclusions of Law. The trial court, in an Order filed on April 17, 2009, ordered both parties to file proposed Findings of Fact and Conclusions of Law within fourteen days. Appellant filed her proposal on April 29, 2009.

{¶50} As memorialized in an Entry filed on June 11, 2009, the trial court concluded that the Magistrate's Decision already contained Findings of Fact and Conclusions of Law, that the trial court had adopted the same and that there was no need for further Findings of Fact and Conclusions of Law. The trial court denied appellant's objection and adopted the Magistrate's Decision. A Nunc Pro Tunc Entry to correct an error was filed on June 12, 2009.

{¶51} Appellant now raises the following assignments of error on appeal:

{¶52} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION WHEN IT FINDS THAT THE AMOUNT OF CHILD SUPPORT, AS RECALCULATED, IS MORE THAN TEN (10%) PERCENT GREATER AND, NONETHELESS, CONCLUDES AS MATTER OF LAW THAT NO CHANGE OF CIRCUMSTANCES HAS OCCURRED, AND FAILS TO PROPERLY APPLY O.R.C. § 3119.79.

{¶53} "II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION WHEN IT DEVIATES FROM THE GUIDELINE SUPPORT CALCULATIONS WITHOUT ENTERING IN THE JOURNAL FINDINGS OF FACT SUPPORTING ITS DETERMINATION TO DEVIATE IN A SHARED PARENTING PLAN AS REQUIRED BY O.R.C. § 3119.24.

{¶54} "III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION WHEN IT CALCULATES CHILD SUPPORT WHERE THE COURT FAILS TO COMPLY WITH O.R.C. § 3119.05."

I

{¶55} Appellant, in her first assignment of error, argues that the trial court erred when it found that the amount of child support, as recalculated by the Magistrate, was more than 10% greater than the amount that appellee was required to pay pursuant to the existing child support order, but concluded that there was no change of circumstances substantial enough to require a modification of child support pursuant to R.C. 3119.79.

{¶56} 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.

{¶57} 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." (Emphasis added).

{¶58} 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.

{¶59} Appellant argues that there was a more than 10% variation from the amount that appellee was paying pursuant to the existing child support order, which was

$200.00 a month, and the amount that the Magistrate, in her January 13, 2009, Decision, found would be appellee's monthly child support obligation, which was $548.51 a month. This amount was based on a new child support worksheet. The Magistrate, in her Decision, found no change of circumstances that would warrant eliminating the deviation granted at the time of the dissolution.

{¶60} However, the resulting figure ($548.51) was more than ten percent larger than the amount of child support originally ordered to be paid ($200.00 a month). Thus, pursuant to *DePalmo v. DePalmo* (1997), 78 Ohio St.3d 535, 679 N.E.2d 266 and R.C. 3119.79(A), there was a change of circumstances.

{¶61} We now turn to the *Marker* standard. In *Marker v. Grimm* (1992), 65 Ohio St.3d 139, 601 N.E.2d 496, the Ohio Supreme Court addressed the issue of when a trial court should deviate from the child support figure arrived at by using a child support worksheet. In *Marker,* the Ohio Supreme Court stated that the amount calculated using the child support worksheet is rebuttably presumed to be the correct amount of child support due.[4] R.C. 3119.03. Despite this presumption, the trial court may order child support in an amount that deviates from the calculation obtained from the schedule and worksheet. R.C. 3119.24(A)(1). See, also, R.C. 3119.22. The deviation is permitted if the trial court determines that the "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 R.C. 3119.23." R.C. 3119.24(A)(1).

[4] The analysis of *Marker* was based upon R.C. 3113.215(B)(1). This section of the Revised Code has been recodified but the Revised Code continues to state that the amount of child support calculated pursuant to the basic child support schedule and applicable worksheet is "rebuttably presumed" to be the correct amount of child support due. See R.C. 3119.03.

{¶62} Thus, in order to deviate from the amount of child support calculated by using a child support worksheet, a trial court must find that the calculated figure is unjust or inappropriate to order as child support and would not be in the child's best interest. However, there is no need to make the reverse findings, ie. that the amount of child support as calculated by using the child support worksheet is just and appropriate and in the child's best interest, if the trial court intends to order the calculated amount of child support. The amount arrived at by using the child support worksheet and guidelines is rebuttably presumed to be in the child's best interest.

{¶63} We find, based on the foregoing, that because the amount of child support as recalculated by the Magistrate was more than 10% larger than the amount of child support appellee originally was ordered to pay, the trial court erred in finding that there was no change of circumstances. The trial court, therefore, was required to find that the calculated figure was unjust or inappropriate and would not be in the children's best interest before deviating from the amount of child support as calculated. The trial court however, did not do so.

{¶64} Appellant's first assignment of error is, therefore, sustained.

II

{¶65} Appellant, in her second assignment of error, argues that the trial court erred when it deviated from the child support guideline calculations without entering in the journal findings of fact supporting its determination to deviate in the shared parenting plan as required by R.C. 3119.24.

{¶66} Pursuant to R.C. 3119.03, "the amount of child support that would be payable under a child support order, as calculated pursuant to the basic child support

schedule and applicable worksheet through the line establishing the actual annual obligation, is rebuttably presumed to be the correct amount of child support due." However, in the context of a shared-parenting order, R.C. 3119.24 authorizes the court to deviate from the guideline calculation if that 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."

{¶67} The "extraordinary circumstances" enumerated in R.C. 3119.24(B) include (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.

{¶68} In turn, R.C. 3119.23 provides as follows:

{¶69} "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:

{¶70} "(A) Special and unusual needs of the children;

{¶71} "(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;

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

{¶73} "(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;

{¶74} "(E) The obligor obtaining additional employment after a child support order is issued in order to support a second family;

{¶75} "(F) The financial resources and the earning ability of the child;

{¶76} "(G) Disparity in income between parties or households;

{¶77} "(H) Benefits that either parent receives from remarriage or sharing living expenses with another person;

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

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

{¶80} "(K) The relative financial resources, other assets and resources, and needs of each parent;

{¶81} "(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;

{¶82} "(M) The physical and emotional condition and needs of the child;

{¶83} "(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;

{¶84} "(O) The responsibility of each parent for the support of others;

{¶85} "(P) Any other relevant factor."

{¶86} R.C. 3119.24(A)(2) further provides that if the court deviates from the child-support guidelines, it "shall enter in the journal the amount [of child support calculated pursuant to the basic child-support schedule and the applicable worksheet], its determination that the amount would be unjust or inappropriate and would not be in the best interest of the child, and findings of fact supporting its determination." See, also, *Marker v. Grimm* (1992), 65 Ohio St.3d 139, 601 N.E.2d 496, paragraph three of the syllabus. We must find an abuse of discretion if a trial court orders a deviation that is not supported by findings of fact journalized in the record. *DePalmo v. DePalmo* (1997), 78 Ohio St.3d 535, 538, 679 N.E.2d 266.

{¶87} In the case sub judice, the Magistrate, in her Decision, which was adopted by the trial court, found that based on the attached child support guideline worksheet, appellee's monthly child support obligation would be $548.51. The Magistrate further found that there was "no change of circumstances that would warrant eliminating the deviation granted at the time of the dissolution" and that "the prior agreement of the parties is still in the best interest of the children."

{¶88} As is stated above, at the time of the dissolution, appellee was ordered to pay child support in the amount of $200.00 a month even though the amount of support calculated pursuant to the child support schedule at that time was $610.36 per month. The Magistrate, in support of the decision at that time to deviate from the basic child support schedule, noted that the minor children would be spending relatively equal amounts of time with each parent, that appellee was responsible for health insurance

coverage for the minor children, and that the parties had agreed to equally split expenses for the minor children for clothing, school costs and lessons or activities.

{¶89} We concur with appellant that the Magistrate, in her January 13, 2009, Decision that was adopted by the trial court, did not comply with R.C. 3119.24. We find that the trial court has failed to state exactly how it arrived at the amount of the deviation from the statutory child-support calculation. There are no specific findings in the Magistrate's Decision or the trial court's entry adopting the same as to the reasons for the deviation in child support.

{¶90} Appellant's second assignment of error is, therefore, sustained.

III

{¶91} Appellant, in her third assignment of error, argues that the trial court erred when, in calculating child support, it failed to comply with R.C. 3119.05. We agree in part.

{¶92} R. C. 3119.05(D) governs the calculation of gross income, providing:

{¶93} "(D) When the court or agency calculates the gross income of a parent, it shall include the lesser of the following as income from overtime and bonuses:

{¶94} "(1) The yearly average of all overtime, commissions, and bonuses received during the three years immediately prior to the time when the person's child support obligation is being computed;

{¶95} "(2) The total overtime, commissions, and bonuses received during the year immediately prior to the time when the person's child support obligation is being computed."

{¶96} However, as noted by the court in *Thomas v. Thomas*, Lucas App. No. L03-1267, 2009-Ohio-1034, "[t]his formula applies only to regular or expected overtime, and, thus, is not applicable where an obligor no long expects to receive such income." Id. at footnote 2. See also *Anthony v. Clark*, Richland App. No. 07-CA-117, 2009-Ohio-894. Both appellee and Linda Ann Voytko testified that it was unlikely that appellee would be receiving overtime in the future. The trial court, as trier of fact, was in the best position to assess their credibility. For such reason, we find that the trial court did not err in not complying with R.C. 3119.05(D).

{¶97} Appellant further contends that the trial court failed to comply with R.C. 3119.05(B). R.C. 3119.05(B) provides: "When a court computes the amount of child support required to be paid under a court child support order or a child support enforcement agency computes the amount of child support to be paid pursuant to an administrative child support order, all of the following apply:* * *

{¶98} "(B) The amount of any pre-existing child support obligation of a parent under a child support order and the amount of any court-ordered spousal support *actually paid* shall be deducted from the gross income of that parent to the extent that payment under the child support order or that payment of the court-ordered spousal support is verified by supporting documentation." (Emphasis added.)

{¶99} At the hearing, testimony was adduced that while appellee "actually paid" $10,748.96 in child support in 2008 including processing charges, CSEA, in recalculating child support, gave appellee credit for paying $13,887.69 in child support. The Magistrate, in the child support worksheet attached to her Decision, indicated that appellant had paid child support in the amount of $13,887.60. We find that it was error

to use such figure when the testimony established that appellee “actually paid” less than that in child support in 2008.

{¶100} Appellant’s third assignment of error is, therefore, sustained in part and overruled in part.

{¶101} Accordingly, the judgment of the Guernsey County Court of Common Pleas is affirmed in part and reversed in part and this matter is remanded to the trial court for further proceedings.

By: Edwards, P.J.

Gwin, J. and

Farmer, J. concur

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JUDGES

JAE/d0222

[Cite as *Moore v. Moore*, 2010-Ohio-2499.]

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ERIC P. MOORE Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CHRISTINA M. MOORE (GIBBS) Defendant-Appellant	:	CASE NO. 09 CA 21

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Guernsey County Court of Common Pleas is affirmed in part and reversed in part and remanded to the trial court for further proceedings. Costs assessed 35% to appellant and 65% to appellee.

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JUDGES