

[Cite as *Zbydnowski v. Zbydnowski*, 2010-Ohio-3198.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93863

RHONDA L. ZBYDNOWSKI

PLAINTIFF-APPELLEE

vs.

ROBERT J. ZBYDNOWSKI

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-311965

BEFORE: Rocco, P.J., Celebrezze, J., and Boyle, J.

RELEASED: July 8, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, Robert Zbydnowski, appeals from a judgment of the common pleas court, domestic relations division, granting the parties a divorce from one another, adopting their shared parenting plan, awarding child support, and dividing the parties' assets and liabilities. He asserts that the court erred and abused its discretion by (1) considering evidence outside the parameters of the parties' written submissions, (2) improperly calculating appellant's child support obligation, (3) improperly calculating the parties' gross annual incomes, (4) improperly determining temporary child support and arrearages, and (5) improperly allocating the tax exemptions for the dependent children. He further argues that the court's decision is against the manifest weight of the evidence. We find the court's decision was not unreasonable, arbitrary, or unconscionable, and was supported by competent, credible evidence. Therefore, we affirm.

Procedural History

{¶ 2} Plaintiff-appellee, Rhonda Zbydnowski, now known as Rhonda Rote, filed her complaint for divorce on August 10, 2006; appellant answered and counterclaimed for divorce. On August 14, 2007, the magistrate ordered appellant to pay temporary child support to appellee of \$888.17 per month plus a 2 percent processing charge, for a total of \$905.93 per month effective

August 10, 2006. The magistrate specifically held that any arrearages that had accrued between the date the order became effective and the date the order was issued would be addressed at the final hearing and would not be collected administratively during the pendency of the action.

{¶ 3} On December 28, 2007, the court entered judgment on the parties' agreed shared parenting plan. This order deferred consideration of child support and health insurance issues.

{¶ 4} Trial of the remaining issues in the case commenced February 17, 2009. The parties ultimately resolved the issues of spousal support and the division of their assets and liabilities, leaving open the question of temporary and future child support, tax exemptions, outstanding medical expenses, and health insurance coverage. The magistrate then ordered the parties to submit, on or before April 6, 2009,

- "1. Sworn affidavits, along with briefs and arguments;
- "2. Additional financial documents as to their respective incomes, including W-2's and 1099's for 2006, 2007 and 2008;
- "3. Federal income tax returns for 2006 through 2008 and the most current pay stubs and unemployment benefits;
- "4. Verification of outstanding medical expenses and balances, including insurance payments[;]
- "5. Objections to exhibits; and
- "6. Written closing arguments."

{¶ 5} The magistrate issued his decision on June 1, 2009. He concluded that the order for temporary support should have become effective July 30, 2007, not August 10, 2006, because the parties lived together until

July 1, 2007. He further found that the “local wages” reported on the parties’ Internal Revenue Service forms W-2 for 2007 should be used to calculate temporary support. Appellee’s gross earnings in 2007 were \$50,719 and appellant’s gross earnings were \$74,667. The magistrate found that use of these figures increased the amount of temporary support appellant was required to pay to \$1,035.84 per month plus a 2 percent processing charge. As of January 1, 2009, increased health insurance costs for appellee created a change in circumstances requiring modification of the temporary support order to \$1,210.48 per month. The magistrate further determined that appellant owed appellee 60 percent of the unreimbursed medical expenses for the children, or \$417.95, and calculated that appellant owed an arrearage of \$3,058.20 as of December 31, 2008.

{¶ 6} The magistrate next calculated the parties’ future child support obligations. The court determined that appellant consistently earned more than \$70,000 per year while appellee was presently unemployed, having been involuntarily terminated from her job of 18 years at Ford Motor Company; she received unemployment compensation of \$23,036 annually. The magistrate rejected appellant’s request that the court impute income to appellee, but found a modest deviation of \$200 per month from the guidelines was appropriate based on the substantial parenting time appellant exercised and his agreement to pay for medical insurance for the children. The

magistrate determined that appellant's support obligation was \$777.14 per month plus a 2 percent processing charge.

{¶ 7} With respect to the tax exemption for the children as dependents, the magistrate determined that it was in the children's best interests for appellant to claim both children as dependents for tax year 2009, but for each party to claim one child each year thereafter. The magistrate made appellant's ability to claim the children as dependents contingent upon being substantially current in the payment of child support.

{¶ 8} Appellant objected to the magistrate's decision. The court overruled appellant's objections and, with exceptions not relevant here, adopted the magistrate's decision and entered judgment accordingly.

Law and Analysis

{¶ 9} In his first assignment of error, appellant complains about the court's reliance on evidence submitted at trial. He asserts that the parties agreed to submit the remaining issues solely on the briefs and evidentiary materials attached to the briefs. We find no evidence in the record that the parties made any such agreement or that the court ever accepted it. Accordingly, we overrule the first assignment of error.

{¶ 10} Appellant argues his second, third, and fourth assignments of error together, so we address them together. Appellant urges that the court abused its discretion in calculating the amount of his future child support

obligations. He claims that, in calculating the amount of each party's obligation, the court should have imputed income to appellee equal to the amount she previously earned while she was employed. Income may be imputed only if the court finds that the party is voluntarily unemployed or underemployed. R.C. 3119.01(C)(5)(b) and (11). The court found that appellee was not voluntarily unemployed. This finding was supported by competent, credible evidence in the form of appellee's affidavit. Therefore, we reject this argument.

{¶ 11} Appellant next claims that the court did not properly take into account the substantial parenting time he has with the children in calculating his temporary support obligation. He asserts that although the parties' shared parenting agreement provided for substantially equal parenting time for both appellant and appellee, in fact he has had possession of the children more than half of the time. He supports this assertion with an affidavit in which he states that he has had the parties' two minor children in his possession more than 50 percent of the time, and has been the primary caretaker of the children since the parties separated in late July 2007. He also submitted a "visitation schedule" indicating the times he was in possession of the children over a four-month period from May 1, 2008 to August 31, 2008.

{¶ 12} R.C. 3119.22 to 3119.24 allows the court to deviate from the calculations that would otherwise result from the applicable child support schedule and worksheet if it determines that this amount would be unjust, inappropriate, or not in the best interests of the child. Extended parenting time is one of the factors the court may consider in deciding whether to deviate.

{¶ 13} Appellant has not demonstrated that the court abused its discretion by failing to deviate from the worksheet and schedule as to the award of temporary support. His simple assertion that he had possession of the children more than half the time does not show that the existing temporary support order was unjust or inappropriate.¹

{¶ 14} Accordingly, we overrule the second, third, and fourth assignments of error.

{¶ 15} Fifth, appellant complains that the court abused its discretion by improperly allocating the tax exemptions for the dependent children. He contends that more tax savings will be generated if he is awarded the tax exemptions for both children indefinitely. He also argues that he should not be precluded from claiming the tax exemptions because he is in arrears on the

¹The court did deviate from the worksheet as to the award of permanent child support. The court ordered this deviation not only because of appellant's extended parenting time, but also because he assumed the duty to purchase health insurance for the children but had not demonstrated the cost of that purchase so that it could be taken into account in the worksheet.

payment of temporary support. He asks this court to clarify the trial court's order to reflect that the arrearages for temporary support will not preclude him from claiming the dependency exemptions in the future.

{¶ 16} The court's final journal entry provided that:

"Subject to further order of court, the Defendant shall claim both minor children in 2009 as dependents on his federal and state income tax returns, provided he is substantially current in the payment of child support as ordered by the court for the year in which the children will be claimed as dependents. Commencing in 2010 and each year thereafter, the Plaintiff shall claim [A.] * * * as a dependent on her federal and state income tax returns; the Defendant shall claim [L.] * * * as a dependent on his federal and state income tax returns, provided he is substantially current in the payment of child support as ordered by the court for the year in which the children will be claimed as dependents. The Defendant will be deemed to be substantially current if, as of December 31st, the child support arrears, if any, are less than \$777 (one month of child support).

"Subject to further order of Court, commencing in 2013 when the oldest child is emancipated and every odd year thereafter, Defendant shall claim [A.] (dob 10/19/1997) as a dependent on his federal and state income tax returns, provided he is substantially current in the payment of child support as ordered by the court for the year in which the child will be claimed as a dependent. * * *"

{¶ 17} We find this order clearly states that his ability to claim the tax exemptions is affected only if appellant is not current in the payment of support *for the year in which the child will be claimed as a dependent*, that is, if, on December 31 of the year for which he wishes to claim a tax exemption,

he is in arrears for that year in the amount of \$777 or more. No clarification is needed.

{¶ 18} As appellant correctly notes, in allocating the tax exemptions, R.C. 3119.82 requires the court to consider not only the net tax savings, but also “ the relative financial circumstances and needs of the parents and children, the amount of time the children spend with each parent, the eligibility of either or both parents for the federal earned income tax credit or other state or federal tax credit, and any other relevant factor concerning the best interest of the children.” Appellant’s argument that the allocation of the tax exemption to him will result in greater net tax savings does not address all of the factors the court was required to consider, and does not demonstrate that the court abused its discretion. The fifth assignment of error is overruled.

{¶ 19} Finally, appellant contends that the magistrate’s and the court’s decisions were against the manifest weight of the evidence. He failed to show that the court’s decision was not supported by competent, credible evidence. Therefore, we overrule the sixth assignment of error and affirm the court’s decision.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
MARY J. BOYLE, J., CONCUR