[Cite as *Kent v. Kent*, 2010-Ohio-6457.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

ALBERT J. KENT Appellee v. MARTHA A. KENT Appellant	C.A. No. 25231 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2009-02-0512

DECISION AND JOURNAL ENTRY

Dated: December 29, 2010

CARR, Judge.

{¶1} Appellant, Martha Kent ("Wife"), appeals the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court reverses.

I.

{¶2} Appellee, Albert Kent ("Husband"), filed a complaint for divorce from Wife on February 18, 2009. Wife answered and filed a counterclaim for divorce on March 16, 2009. Husband answered the counterclaim. The matter proceeded to trial on January 7, 2010. On January 21, 2010, the domestic relations court issued a final entry decree of divorce. Wife filed a timely appeal, raising four assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT LACKED JURISDICTION TO ALLOCATE THE TAX DEPENDENCY EXEMPTIONS OF EMANCIPATED CHILDREN."

{¶3} Wife argues that the domestic relations court erred when it ordered that Husband shall claim two of the parties' emancipated children as exemptions for tax purposes. This Court agrees.

{¶4} Husband and Wife had six children, three of whom were emancipated at the time of the trial. The domestic relations court issued a child support order in regard to the couple's three minor children. In addition, it ordered that "Husband shall claim two of the four older children and one of the younger children as exemptions."

{¶5} R.C. 3119.82 states, in relevant part:

> "Whenever a court issues, or whenever it modifies, reviews, or otherwise reconsiders a court child support order, it shall designate which parent may claim the children who are the subject of the court child support order as dependents for federal income tax purposes as set forth in section 151 of the 'Internal Revenue Code of 1986,' 100 Stat. 2085, 26 U.S.C. 1, as amended."

{¶6} This Court recognizes the well-settled law that a trial court lacks jurisdiction to either address in the first instance or modify parental rights and responsibilities in regard to children who are emancipated. *Berthelot v. Berthelot*, 9th Dist. No. 23561, 2007-Ohio-3884, at ¶8, citing *Miller v. Miller* (1951), 154 Ohio St. 530, paragraph two of the syllabus (holding "In a divorce action, where a child of the parties attains his majority, authority of the court over such child comes to an end, and the court is without power to provide for the support of or aid to such child or to continue a provision for his support."); *Rohrbacher v. Rohrbacher* (1992), 83 Ohio App.3d 569, 575; *Maphet v. Heiselman* (1984), 13 Ohio App.3d 278, 279. Accordingly, when the domestic relations court lacks jurisdiction to issue or modify a child support order due to a child's emancipation, it further lacks the authority to designate which parent may claim the emancipated child for income tax purposes.

{¶7} Husband argues that R.C. 3119.82, being silent as to the trial court's authority to designate a parent's right to claim exemptions for emancipated children, does not prohibit the court from doing so. This Court is not persuaded by this argument. First, as a general rule, the domestic relations court has no authority to issue orders in regard to emancipated children. Second, the canon of construction expressio unius est exclusion alterius, i.e., the express inclusion of one thing implies the exclusion of the other, compels this Court to conclude that the legislature did not intend to expand the domestic relations court's jurisdiction over emancipated children simply by omitting any reference to them in the statute.

{¶8} This Court concludes that the domestic relations court lacked jurisdiction to vest in Husband the right to claim his emancipated children as exemptions for income tax purposes. Wife's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT'S FINDING THAT WIFE WAS UNDEREMPLOYED AND THE IMPUTATION OF INCOME TO WIFE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶9} Wife argues that the domestic relations court's finding that she was underemployed and its concomitant imputation of income to her was against the manifest weight of the evidence. This Court agrees.

{¶10} "When applying a civil manifest-weight-of-the-evidence standard, a court of appeals should affirm a trial court when the trial court's decision is supported by some competent, credible evidence." *Everitt v. Everitt*, 9th Dist. No. 24860, 2010-Ohio-875, at ¶6, quoting *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918, at ¶3; *Rosen v. Chesler*, 9th Dist. No. 08CA009419, 2009-Ohio-3163, at ¶8.

{¶11} The trial court found Wife to be underemployed and imputed an annual income to her in the amount of $20,800.00. The trial court based its finding of Wife's underemployment on Husband's evidence that a massotherapist can earn an introductory wage of $10.00 per hour and that "employment as a massotherapist is available in the immediate area." The imputed income amount corresponds to a wage of $10.00 an hour times forty hours a week times fifty-two weeks a year.

{¶12} R.C. 3119.01(C)(5) defines "income" as either of the following:

> "(a) For a parent who is employed to full capacity, the gross income of the parent;
>
> "(b) For a parent who is unemployed or underemployed, the sum of the gross income of the parent and any potential income of the parent."

The burden of proof rests with the parent who is claiming that the other parent is voluntarily unemployed or underemployed. *Knouff v. Walsh-Stewart*, 9th Dist. No. 09CA0075, 2010-Ohio-4063, at ¶27.

{¶13} The evidence established that Wife did not work at all during the marriage from June 1986 until the fall of 2005 when she obtained a part-time job. She testified that she recently attended classes to become a massotherapist. She testified that she completed a massotherapy program in October 2009, took the licensing exam on December 1, 2009, and was awaiting her results which would be available in February 2010. Wife testified that one must have a license in order to work as a massotherapist. She testified that she would have to retake the exam in June 2010, if she did not pass the December 2009 exam. Wife testified that, at the time of the trial, she was not licensed and, therefore, not permitted by the State of Ohio to engage in the business of massotherapy. She further testified that she did not currently have any job prospects in that field. Moreover, she testified that she understood that job prospects in the field of massotherapy

were limited due to the state of the economy and the fact that massages often constitute luxury services that many people are foregoing under the current economic conditions.

{¶14} Husband argues that Wife's argument is moot because she subsequently obtained her massotherapist's license. That fact is not in evidence as part of the trial court record. Accordingly, this Court may not consider it. See, generally, App.R. 9; *Bastian v. McGannon*, 9th Dist. No. 07CA009213, 2008-Ohio-1449, at ¶20. More significantly, the record does contain Husband's stipulation that Wife's current income is $9,000.00.

{¶15} The domestic relations court's finding that Wife was underemployed was against the manifest weight of the evidence. There was no competent, credible evidence to support a finding that Wife could be earning $10.00 per hour as a massotherapist because the evidence established that Wife was not licensed and, therefore, incapable of obtaining work as a massotherapist. The trial court erred, therefore, in imputing income to Wife on that basis. Wife's second assignment of error is sustained.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ABUSED ITS DISCRETION IN THE LIMITED AWARD OF SPOUSAL SUPPORT."

{¶16} Wife argues that the domestic relations court erred in its award of spousal support. This Court agrees.

{¶17} While a trial court has wide latitude in awarding spousal support, "[i]n determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, *** the court shall consider" all of the fourteen factors enunciated in R.C. 3105.18(C)(1). Those factors include:

> "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

"(b) The relative earning abilities of the parties;

"(c) The ages and the physical, mental, and emotional conditions of the parties;

"(d) The retirement benefits of the parties;

"(e) The duration of the marriage;

"(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

"(g) The standard of living of the parties established during the marriage;

"(h) The relative extent of education of the parties;

"(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

"(j) The contribution of each party to the education, training, or earning ability of the other party[;]

"(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

"(l) The tax consequences, for each party, of an award of spousal support;

"(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

"(n) Any other factor that the court expressly finds to be relevant and equitable." R.C. 3105.18(C)(1).

{¶18} In this case, the domestic relations court determined an award of spousal support based, in part, on its erroneous imputation of income to Wife. Accordingly, the trial court erred in its award of spousal support. To the extent that Wife argues that the trial court erred in its determination of the duration of spousal support, that argument is not ripe and this Court declines to address it. Wife's third assignment of error is sustained.

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED IN ITS CALCULATION OF CHILD SUPPORT."

{¶19} Wife argues that the domestic relations court erred in its calculation of child support. This Court agrees.

{¶20} In determining an order of child support, the trial court must utilize a child support computation worksheet. *Marker v. Grimm* (1992), 65 Ohio St.3d 139, paragraph one of the syllabus. The amount of child support is based in large part upon the gross income amounts of the parents. See *Varner v. Varner*, 170 Ohio App.3d 448, 2007-Ohio-675, at ¶7; R.C. 3119.022. Because this Court has previously determined that the domestic relations court erred in its imputation of income to Wife, it further necessarily erred in its determination of child support in consideration of Wife's erroneous income. Wife's fourth assignment of error is sustained.

III.

{¶21} Wife's assignments of error are sustained. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, P. J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

KENNETH L. GIBSON, Attorney at Law, for Appellant.

ROBERT E. EPSTEIN, Attorney at Law, for Appellee.