IN THE SUPREME COURT OF OHIO

A. S.,	:	
Appellee,	:	On Appeal from the Lucas County Court of Appeals, Sixth Appellate
-vs-	:	District
J. W.,	:	Court of Appeals Case No. CL-17-1099
Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, J. W.

Jeffrey P. Nunnari (0059691) (COUNSEL OF RECORD)
3349 Executive Parkway
Suite D
Toledo, Ohio 43606
Telephone: (419) 578-9246
Facsimile: (419) 843-7544
E-mail: jp59691@yahoo.com
www.jeffreynunnarilaw.com

COUNSEL FOR APPELLANT, J. W.

Ron L. Rimelspach (0006063) (COUNSEL OF RECORD)
5800 Monroe Street
Building C, Suite 202
Sylvania, Ohio 43560
Telephone: (419) 885-2153
Facsimile: (419) 885-1777
E-mail: rlr202erie@bex.net

COUNSEL FOR APPELLEE, A. S.

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EXPLANATION AS TO WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case presents the court with two issues of first impression: 1) Does R.C. 3119.05(D)(1) and (2) erroneously refer to "commissions," as the lower court held, or does it mean what the General Assembly wrote, and 2) does a trial court fulfill its statutory duty to determine child support in high income cases by simply extrapolating a figure from the child support guidelines, a method of which the Sixth Ohio Appellate District (and others) approves, in spite of the General Assembly's enactment of R.C. 3119.04(B), which was intended to eliminate this practice?

There can be no doubt that a sizeable segment of the population earns all or a portion of its income through commissions which, by their very nature, can fluctuate drastically from time to time. The General Assembly has spoken as to how commissions are to be treated when determining gross income for child support purposes. R.C. 3119.05(D). The court below found that the General Assembly erroneously included the term "commissions" in R.C. 3119.05(D)(1) and (2), thereby encouraging trial courts within – and perhaps without – the Sixth District and potentially other appellate courts to ignore the plain language of the statute as it written when it comes to the treatment of commissions for child support purposes. So, the answer to the first question presented by this case is one derived from the application of the rules of statutory construction or interpretation, which this Court undertakes *de novo.*

The second issue before the Court is also one of statutory interpretation. It is an issue that pervades the domestic relations bar when dealing with high (and, presumably, from time to time, low) income cases. "Since the inception of child support guidelines, computing child support in high income cases has been problematic." *Domestic Relations Journal of Ohio,* May/June 2004, Vol. 16, Issue 3, "Determining Child Support Where the Parties' Combined

Income is over $150,000: Or Where the Maximum is Really the Minimum," Diane M. Palos, Magistrate, Cuyahoga County Division of Domestic Relations.

Computing child support in cases where the combined income of the parties is between $6,600 and $150,000 is a relatively simple task, as Ohio's basic child support schedule sets out amounts that are presumed to be correct for parents having combined gross incomes within that range. R.C. 3119.021. In such cases, the amount of support calculated under the schedule for two children varies between 28% and 14.65% of annual income, reflecting the simple fact that parents of markedly different incomes do not spend the same percentage of gross income to support their children. The schedule ends at a combined gross income of $150,000, for which the basic annual child support obligation for two children is rebuttably presumed to be $21,971 per year. R.C. 3119.021 requires courts and child support enforcement agencies to use the child support schedule when calculating the amount of child support to be paid, unless the combined gross annual income of the parents is less than $6,600 or more than $150,000.

Determining an appropriate amount for child support in high income cases is more problematic. In 2001, the General Assembly changed the method by which courts were instructed to calculate the basic child support obligation for parents having a combined gross income in excess of $150,000 per year. Until that time, the court or agency was required to compute a basic combined child support obligation that was "no less than the same percentage of the parents' combined annual income that would have been computed under the basic child support schedule . . . for a combined gross income of one hundred fifty thousand dollars." R.C. 3113.215(B)(2)(b) (2000). This method is commonly referred to as "extrapolation." Downward deviations from this amount could only be made when the court or agency determined that the amount would be unjust or inappropriate and entered findings of fact for its determination. *Id.*

By directing courts to make an initial determination of support by extrapolating from the basic child support schedule, R.C. 3113.215(B)(2)(b) (2000) presumed parents having combined incomes exceeding one million dollars actually spent the same percentage of income to support their children as parents having incomes of $150,000. This approach led to unreasonable results and caused the General Assembly to amend the statute. Effective March 21, 2001 the General Assembly enacted R.C. 3119.04(B) which repealed the requirement that courts calculate an extrapolated figure from the guidelines. R.C. 3119.04(B) requires instead that courts begin with a figure based on the support payable by parents having a combined gross annual income of $150,000, and directs courts to make case-by-case determinations based on the actual needs and standards of living of the children and the parents. Notwithstanding the enactment of R.C. 3119.04(B), trial courts have continued the practice of calculating child support in high income cases by simply extrapolating an amount from the basic child support schedule, and almost every appellate court to consider the propriety of this practice has voiced its approval. *See, e.g., Cyr v. Cyr,* 2005-Ohio-504 (8th Dist.); *In re JMG,* 2013-Ohio-2693 (8th Dist.); but *Cf. Siebert v. Tavarez,* 2007-Ohio-2643 (8th Dist.) (trial court does not fulfill its statutory duty to determine child support on a case-by-case basis when it merely extrapolates a figure from the guidelines); *Kendall v. Kendall,* 2005-Ohio-1777 (6th Dist.); *Bunkers v. Bunkers,* 2007-Ohio-561 (6th Dist.), discretionary appeal not allowed, 114 Ohio St. 3d 1480, 2007-Ohio-3699; *Lanham v. Mierzwiak,* 197 Ohio App. 3d 426, 2011-Ohio-6190 (6th Dist.); *DiBlase v. DiBlase,* 2013-Ohio-2879 (7th Dist.).

As the *Tavarez* Court observed, it is difficult to see how a trial court fulfills its statutory mandate under R.C. 3119.04(B) to consider the issue of child support employing a case-by-case analysis in high income cases where the court simply extrapolates from the child support

guidelines. In a hypothetical case in general, and in this case, specifically, rote extrapolation from the guidelines can yield an unreasonable and overly-burdensome child support order, one which adversely and severely impacts the obligor's standard of living and concomitant ability to provide for a child or children while in the obligor's care. Despite the legislature's efforts to address this problem, it prevails. Ohio's lower appellate courts have developed their own body of jurisprudence on what they see as the proper application of R.C. 3119.04(B), but that body of law seems not-very-much-different than prior jurisprudence on the subject promulgated pursuant to former R.C. 3113.215(B)(2)(b) (2000). In fact, the continuing practice of extrapolation eschews R.C. 3119.04(B)'s mandate to determine child support in high income cases employing a case-by-case analysis. This Court has been silent on this practice. It is time for it to speak.

STATEMENT OF THE CASE AND FACTS

A. S. and J. W. never married; in fact, they never intended to. They never even lived together. They had a child, R. W., who was conceived through the process of *in-vitro* fertilization. A. S. had informed J. W. that she intended to conceive a child in such a fashion, with or without J. W.'s participation. So, with J. W.'s participation, R. W. entered the world.

Things didn't work out so well for A. S. and J. W. for, before R. W. was even born, J. W. began another relationship. A. S. and J. W. lived in separate cities, and after R. W. was born, informally operated under a "co-parenting agreement." Sometime thereafter, A. S. filed a complaint in the Lucas County Juvenile Court to establish parental rights and responsibilities. During the course of the litigation, the parties entered into an interim shared parenting agreement which was approved by the court. The shared parenting agreement allocated the parties' parenting time with R. W. on a roughly 42%/58% split, with J. W. receiving 42% of the

time. The court later adopted an amended shared parenting plan which did not alter the parties' parenting times.

The matter proceeded to trial on economic issues, including the issue of child support. Both A. S. and J. W. are successful individuals. Both earn sizeable incomes. At the time of trial, A. S. demonstrated an annual income history for several years ranging from just over $122,000 to $131,000; over the same period, J. W. had annual incomes ranging from $160,500 to $515,400. A. S. earned a salary; J. W. earned a salary, plus commissions. J. W.'s base salary increased slightly over the years at issue. The trial court made its determination of the parties' gross incomes for child support purposes and set J. W.'s child support obligation by simple extrapolation from the child support guidelines. J. W. objected to the magistrate's calculations, but they were affirmed by the trial court. In the context of his objections, he took issue with the way his commissions were treated for purposes of determining his gross income.

J. W. advanced his arguments on appeal to the Sixth District Court of Appeals. The Court of Appeals affirmed the judgment of the trial court for the reasons stated in its *Decision and Judgment* entered March 16, 2018, a copy of which can be found at the Appendix. While the Court of Appeals found no error in the trial court's treatment of J. W.'s commissions for child support purposes, it did find error in the General Assembly's enactment of R.C. 3119.05, eff. 3-22-2001; 2007 HB119 06-30-07, amended by 129th General Assembly, File No. 131, SB 337, § 1, eff. 9-28-2012, stating,

> Having examined R.C. 3119.05(D), it appears that the legislature mistakenly included commissions within subsections (1) and (2) of the statute. The statute is clear in its aim to assist trial courts in fairly calculating an obligor's overtime and bonus for purposes of determining gross income, and including commissions in the equation does not appear to advance that aim.

Decision and Judgment, p. 7, n.1. In addition, the Court of Appeals adhered to its previous holdings in *Kendall, Bunkers,* and *Mierzwiak, supra,* and found no error in the trial court's use of the extrapolation method in calculating J. W.'s child support obligation.

J. W. now seeks to invoke the discretionary jurisdiction of this court in this case of public and great general interest, and urges the Court to adopt his Propositions of Law as herein set forth.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Commissions are calculated for purposes of determining "gross income" in the same manner that overtime and bonuses are calculated for purposes of determining "gross income" pursuant to R.C. 3119.05(D).

R.C. 3119.05 reads in relevant part as follows:

> (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:
>
> (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;
>
> (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.

Traditionally, courts look back to the three years immediately preceding the time for which the support order is being calculated. *See, e.g., Rymers v. Rymers,* 2012-Ohio-1675 ("Because the final judgment was entered in April of 2011, the trial court was required to compare the average, annual bonus earnings received by husband from 2008, 2009, and 2010 with husband's 2010 bonus and include the lesser of the two figures in calculating husband's gross income for purposes of child support," *Id.* at ¶ 30). Had the trial court employed this methodology, J. W.'s support obligation would have been more reasonable and manageable because it would have "factored-out" his all-time high commission received in 2016 (the year

in which the support order was established) and kept his average annual income more in line with what he earned historically. The trial court's disregard of the proper application of this methodology resulted in the support order about which J. W. complains.

The Court of Appeals found support for its finding that the General Assembly erroneously included commissions in R.C. 3119.05(D) in R.C. 3119.01(C)(7), "which limits the amount of bonuses and overtime that may be treated as gross income, but does not so limit commissions." *Decision and Judgment,* p. 7. However, R.C. 3119.01 is a definitional section of the Revised Code, which is general in nature. R.C. 3119.05(D) specifically addresses how trial courts are to treat bonuses, overtime and commissions in order to determine gross income for child support purposes. It is a special provision. So, if there is indeed a conflict between the general provisions of R.C. 3119.01 with R.C. 3119.05(D)'s special provision for the treatment of certain items of income, then one must resort to the basic rules of statutory construction to see which interpretation of the statute prevails.

R.C. 1.51 instructs that:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

R.C. 3119.01 and the version of R.C. 3119.05 in effect when this case was tried[1] were amended effective 9-28-2012 by S.B. 337. Accordingly, effect must be given to R.C. 3119.05(D)'s treatment of commissions in order to determine gross income for child support purposes, as it, being a special provision, prevails over the general, definitional R.C. 3119.01.

[1] R.C. 3119.01 was amended again effective 12-31-2017 by H.B. 49.

The General Assembly has specifically stated that overtime, bonuses and commissions are to be treated in accordance with R.C. 3119.05(D). "[T]he intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact?" *State v. Hairston*, 101 Ohio St. 3d 308, 2004-Ohio-969, at ¶ 12, quoting *Slingluff v. Weaver* (1992), 66 Ohio St. 621, paragraph two of the syllabus. There can be no question that R.C. 3119.05(D) is free from ambiguity and doubt and that it expresses the sense of the law-making body. It was therefore error for the Court of Appeals to hold otherwise.

<u>Proposition of Law No. II:</u> In cases where the combined income of the parties exceeds $150,000, a trial court does not fulfill its statutory duty to determine child support on a case-by-case analysis when it merely extrapolates a percentage of income to determine child support. R.C. 3119.04(B), construed.

R.C. 3119.04(B) reads as follows:

> If the combined gross income of both parents is greater than one hundred fifty thousand dollars per year, the court, with respect to a court child support order, or the child support enforcement agency, with respect to an administrative child support order, shall determine the amount of the obligor's child support obligation on a case-by-case basis and shall consider the needs and the standard of living of the children who are the subject of the child support order and of the parents. The court or agency shall compute a basic combined child support obligation that is no less than the obligation that would have been computed under the basic child support schedule and applicable worksheet for a combined gross income of one hundred fifty thousand dollars, unless the court or agency determines that it would be unjust or inappropriate and would not be in the best interest of the child, obligor, or obligee to order that amount. If the court or agency makes such a determination, it shall enter in the journal the figure, determination, and findings.

Notwithstanding the enactment of R.C. 3119.04(B), trial courts have continued to employ the extrapolation method when determining child support in high income cases. This practice has

largely been affirmed on appeal. *See, e.g., Cyr v. Cyr,* 2005-Ohio-504 (8th Dist.); *In re JMG,* 2013-Ohio-2693 (8th Dist.); *Kendall v. Kendall,* 2005-Ohio-1777 (6th Dist.); *Bunkers v. Bunkers,* 2007-Ohio-561 (6th Dist.), discretionary appeal not allowed, 114 Ohio St. 3d 1480, 2007-Ohio-3699; *Lanham v. Mierzwiak,* 197 Ohio App. 3d 426, 2011-Ohio-6190 (6th Dist.); *DiBlase v. DiBlase,* 2013-Ohio-2879 (7th Dist.). However, the Eighth District Court of Appeals has been critical of this practice in several cases. *See, e.g., Siebert v. Tavarez,* 2007-Ohio-2643; *Phelps v. Saffian,* 2016-Ohio-5514. As the Eighth District stated,

> **{¶34}** [ ] We have significant doubts whether the court fulfills its statutory duty to determine child support on a case-by-case analysis as required by R.C. 3119.04(B) when it by rote extrapolates a percentage of income to determine child support.
>
> **{¶35}** We concede that the extrapolation method could have limited utility in guiding the court's discretion when the combined income of the parents only marginally exceeds the $150,000 base requirement. However, as the combined income of the parents rises sharply, mere extrapolation can lead to large, and possibly unrealistic, child support amounts. For example, the basic child support schedule set forth in R.C. 3119.021, provides a support amount of $15,218 per year for families with combined incomes of $150,000 and one child. Extrapolating this roughly 10 percent figure to an income of $2.6 million would result in a yearly child support obligation of $260,000 or approximately $21,666 per month. Aside from extraordinary cases or cases dealing with catastrophic expenses, such a child support figure may be viewed as excessive.
>
> **{¶36}** [ ] When making a child support determination under R.C. 3119.04(B), the court must not only look to the standard of living of the child, but to that of the parents as well. In some cases, this determination will require the court to ensure that the obligor parent is not so overburdened by child support payments that it affects that parent's ability to survive. In other cases, it may require that the court acknowledge the standard of living of the custodial parent, particularly in light of the intangible contributions the custodial parent makes. These contributions may adversely affect the custodial parent's standard of living, and the court should ensure that these intangible contributions are financially offset by the obligor parent. In doing so, the court must be careful to differentiate the need to ensure the custodial parent's standard of living from spousal support. Child support is not spousal support, and we stress that we are not suggesting that the court consider the standard of living that Siebert would have enjoyed had the parties actually been married. . . .

Siebart, supra.

Current jurisprudence holds that extrapolation from the guidelines is permitted in high income cases so long as the trial court "considers" the standard of living of the children and the parents. So long as the trial court does so (or says that it has), the resulting child support computation is entirely within the court's discretion. It need not justify the amount by reference to any specific factor or factors. *See, Cyr: In re JMG; Kendall; Bunkers, Lanham; DiBlase, supra; Longo v. Longo,* 2010-Ohio-3045. This in spite of the fact that in many cases – including this one – a wealth of evidence was adduced relative to the needs and standards of living of the children and of the parties. What is the point in receiving such evidence if the court is to make no use of it? In other words, what are the outer bounds of a trial court's discretion in a high income case? It is unlikely that the General Assembly enacted a child support statute specifically for high-income parents only for it to be essentially ignored. Surely the statute's instruction to "determine the amount of the obligor's child support obligation on *a case-by-case basis* and [to] consider the *needs and the standard of living of the children* who are the subject of the child support order *and of the parents*" (emphasis added) requires at least something of a meaningful analysis by the trial court when fashioning the order so that it is amenable to meaningful appellate review, at the very least.

While it might be tempting to "shrug-off" J. W.'s appeal on the basis that child support orders are entirely within a court's discretion, this appeal presents this Court with an opportunity to interpret R.C. 3119.04(B) so as to provide lower courts with guidance with which to circumscribe their discretion. Lower courts have interpreted the statute in such a fashion so as to render the reasons and purposes of its enactment meaningless. It is being applied in much the same fashion as former R.C. 3113.215(B)(2)(b) (2000). Current jurisprudence renders it entirely to a court's discretion to establish a child support order in high

income cases. But the exercise of discretion without bounds is really not an exercise in discretion at all, and an unreasonable decision is one that has no sound reasoning process to support it. *Wolfe v. Wolfe*, 2005-Ohio-2331. Moreover, no court retains the discretion to adopt an incorrect legal rule or to apply an appropriate rule in an inappropriate manner. *Safest Neighborhood Assn. v. Athens Bd. of Zoning Appeals*, 2013-Ohio-5610. Merely extrapolating a child support amount from the guidelines, in the face of ample evidence by which to analyze the needs and standards of living of parents and children, is the very definition of an abuse of discretion, because it is arbitrary (pick a number), unreasonable (not based on reason) and unconscionable when, as in this case, it adversely impacts the obligor's ability to maintain his own standard of living, thereby impacting the child and the child's best interests while in the care of the obligor-parent. *See, Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217. Rather, the better rule is, "In no case can the court proceed to determine the proper amount of child support in [above-guideline] cases without fulfilling the analysis mandated by R.C. 3119.04(B)." *Siebart, supra* at ¶ 45. Fulfillment of the mandate should require trial courts to identify the particular factors that support any given child support order by taking into consideration all factors affecting the best interests of the parties and the child or children who are the subject of the support order.

CONCLUSION

Wherefore, Appellant J. W. requests this Court to accept jurisdiction in this case of public and great general interest so that the important issues it presents will be reviewed on the merits.

Respectfully submitted,

Jeffrey P. Nunnari, Counsel of Record

/s/ Jeffrey P. Nunnari
Jeffrey P. Nunnari
Counsel for Appellant, J. W.

Certificate of Service

This is to certify that a copy of the foregoing was duly served upon Ron L. Rimelspach, Esq., by e-mail to rlr202erie@bex.net on this 30th day of April, 2018.

/s/ Jeffrey P. Nunnari
Jeffrey P. Nunnari
Counsel for Appellant, J. W.