IN THE SUPREME COURT OF OHIO

A. S.,	:	Case No. 18-0602
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.	:	

MERIT BRIEF 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.

Julianne Renee Krell Pickard (0086020) (COUNSEL OF RECORD)
5800 Monroe Street
Building D, Suite 3
Sylvania, Ohio 43560
Telephone: (419) 517-0086
Facsimile: (888) 840-4556
E-mail: jrkp@liebenthal-levine.com

COUNSEL FOR APPELLEE, A. S.

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Statutes[1]

[1] All references to the Revised Code are to those sections that were in effect, or that were applicable to, this action at the time it unfolded.

STATEMENT OF FACTS

The facts of this matter are relatively straightforward and are substantially set forth in the *Magistrate's Decision* (Sep. 13, 2016) (Appx. 17) and *Judgment Entry*, Lucas County Juvenile Court (Mar. 24, 2017) (Appx. 15):

Appellee ("Mother") filed a complaint to establish parental rights and responsibilities between her and Appellant ("Father") as concerns their minor child, R. W, on September 2, 2016. R. W. was born as a result of an *in vitro* fertilization process to which Mother intended to submit herself with or without Father's cooperation. R. W. was born on February 25, 2015. The relationship between Mother and Father ended before R. W. was born.

Prior to Mother's complaint, the parties had been operating under a co-parenting agreement. (Juv. Ct. Ex. "S.") During the course of the litigation, the parties entered into a shared parenting agreement which was approved by the court on July 21, 2016. (Juv. Ct. Joint Ex. I.)

The matter proceeded to trial on August 11, 2016 on economic issues, including the issue of child support. The court established two child support orders: One for the period of time covering the last quarter of 2015; see, *Magistrate's Decision Supplemental Support and Health Care Orders* (Sep. 13, 2016) (for 2015) (Appx. 20), and another commencing January 1, 2016 moving forward. *Magistrate's Decision Supplemental Support and Health Care Orders* (Sep. 13, 2016) (Appx. 29). Because Father's income is based largely on commissions and therefore fluctuates annually, the court averaged his income over three years; however, the court used Father's 2016 income and commission to establish the second support order commencing January 1, 2016 (Appx. 29) because Father received a large commission payment in 2016 which boosted his income for that year higher than any other year. "It is fair, equitable,

and in this child's best interest that father's support obligation shall start effective the date of filing of mother's Complaint on 09-02-15, and then that original amount shall be modified effective 01-01-16 due to father's significant increase in gross annual income in 2016." *Magistrate's Decision* (Sep. 13, 2016) (Appx. 17), *Additional Findings*, (last finding.) As a result, Father's annual child support obligation, including a percentage allocated to arrearages, is approximately $57,364.00. This, despite Father's testimony that the 2016 commission payment is an anomaly and that he doesn't expect to receive as much income annually moving forward as he did for 2016. *Magistrate's Decision, Supplemental Report and Health Care Orders* (Sep. 13, 2016) (Appx. 29; Trial Tr. pp. 118 – 124.)

Father filed objections to the magistrate's decisions challenging the propriety of the child support calculations, but his objections were overruled and final judgment was entered on March 24, 2017. *Judgment Entry*, Lucas County Juvenile Court (Mar. 24, 2017) (Appx. 15).

Father advanced his arguments on appeal to the Court of Appeals for Lucas County. The Court of Appeals affirmed the judgment of the trial court for the reasons stated in its *Decision and Judgment* entered March 16, 2018 (Appx. 3). While the Court of Appeals found no error in the trial court's treatment of Father'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 of the Lucas County Court of Appeals (Mar. 16, 2018) (Appx. 3) p. 7, n.1.

Father filed his *Notice of Appeal* to the Supreme Court of Ohio on April 30, 2018 (Appx. 1). On July 18, 2018, the Supreme Court granted jurisdiction to hear one of two Propositions of Law advanced by Father and allowed an appeal on the following Proposition of Law:

ARGUMENT

Proposition of Law: 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).

Summary of Argument

R.C. 3119.05(D) instructs how trial courts are to determine "gross income" for child support purposes when one or both parties' income(s) routinely fluctuate as a result of the receipt of overtime, commissions, and bonuses. Case law provides some guidance as to how the statute is to be applied. However, it appears that trial courts – and appellate courts – across Ohio conflate the concepts that drive R.C. 3119.05(D) and R.C. 3119.05(H) when determining what is "gross income" for child support purposes. This appeal is partly a result of that conflation. It is also the result of the finding by the Court of Appeals for Lucas County that the General Assembly erroneously included the term "commissions" in R.C. 3119.05(D).

Standard of Review

A trial court in a domestic relations case has the discretion to do what is equitable upon the facts and circumstances of each case, including on issues of child support. *Booth v. Booth* (1989), 44 Ohio St. 3d 142, 144. The determination of gross income for purposes of calculating child support is a factual one and is subject to review on appeal to see if it is supported by

competent, credible evidence in the record. *Thomas v. Thomas*, 2004-Ohio-1034, ¶ 13. The trial court, as the trier of fact, is in the best position to weigh the evidence and determine the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St. 2d 230, paragraph one of the syllabus. A trial court's decision with respect to child support is reviewed on appeal under an abuse of discretion standard. *Booth, supra; Miller v. Miller*, 2013-Ohio-5071, ¶ 37. "As a general rule, misapplication of the law to the facts is an abuse of discretion." *Thirty Four Corp. v. Sixty Seven Corp.* (1993), 91 Ohio App. 3d 818, 823.

Argument

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 when considering commissions, overtime and bonuses. *See, e.g., Lafever v. Lafever*, 2015-Ohio-823 ¶¶ 14 – 18; *Rymers v. Rymers*, 2012-Ohio-1675 at ¶ 30. Had the trial court employed this methodology, Father'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 Father complains.

The trial court improperly included Father's 2016 all-time high commission, which he testified was four years in the making and is not likely to recur in such a high amount, with his commissions for 2014 and 2015 when calculating his 2016 gross income for child support purposes. (*Magistrate's Decision, Supplemental Report and Health Care Orders* (Sep. 13, 2016) (for 2016) (Appx. 29); Juv. Ct. Joint. Ex. III; Trial Tr. pp. 118 – 124; *Judgment Entry*, Lucas County Juvenile Court (Mar. 24, 2017) (Appx. 15).) This is a clear misapplication of R.C. 3119.05(D). The trial court should have used Father's 2016 base salary of $94,000 and averaged his commissions for 2013, 2014 and 2015. Because the trial court misapplied the law to the undisputed facts regarding the parties' incomes when determining Father's gross income for child support purposes, its child support calculation constitutes an abuse of discretion. *Thirty Four Corp. v. Sixty Seven Corp.; supra.* The correct calculation for Father's 2016 gross income is contained in Juv. Ct. Joint. Ex. II appended to the *Magistrate's Decision, Supplemental Report and Health Care Orders*, (Sep. 13, 2016) (for 2015), albeit that the correct amount of Father's base salary should be $94,000, not $90,000. Once that simple change is made and using the average of Father's commissions as indicated on Juv. Ct. Joint Ex. II, the resulting figure would be Father's actual child support obligation commencing January 1, 2016 (not taking into account arrearages).

The Court of Appeals found support for its finding that the General Assembly erroneously included commissions in R.C. 3119.05(D) by reference to 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* of the Lucas County Court of Appeals (Mar. 16, 2018) (Appx. 3,) 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(C)(7) 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[2] 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. *See, State v. Volpe* (1988), 38 Ohio St. 3d 191, 193 – 194; *Chiles v. M.C. Capital Corp.* (1994), 95 Ohio App. 3d 485, 495 – 496.

Further support that R.C. 3119.05(D) properly includes "commissions" is found in R.C. 3119.05(A), which requires courts and agencies to verify the parents' "current and past incomes and *personal earnings*" (emphasis added) before the statute goes on to explain how those sources of income are to be treated for purposes of calculating child support. In turn, R.C. 3119.01(C)(10) defines "personal earnings" as "compensation paid or payable for personal services, however, denominated, and includes wages, salary, *commissions*, bonuses, *draws*

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

against commissions, profit sharing, vacation pay, or any other form of compensation." (Emphasis added.)

The Court of Appeals also found support for its holding by resort to R.C. 3119.05(H), which provides, "When the court or agency calculates gross income, the court or agency, *when appropriate*, may average income over a reasonable period of years." (Emphasis added.) Father submits that it is inappropriate to utilize the income averaging provision in R.C. 3119.05(H) when there is sufficient information in the record to establish a three-year history of annual income from commissions and when a specific statutory provision, namely, R.C. 3119.05(D), speaks specifically as to how such commission income is to be calculated in determining gross income for child support purposes. Father submits that it is only appropriate to resort to R.C. 3119.05(H) in those cases where the record is insufficiently developed to show three complete calendar years of income from commissions. *See, e.g., Gdula v. Gdula,* 2001-Ohio-3329, ¶¶ 12 – 17 (construing former analogous provisions R.C. 3113.215(B)(5)(d) and (h)); *Lafever, supra* (court could not apply R.C. 3119.05(D) to wife's commission income because record was insufficiently developed; income averaging under R.C. 3119.05(H) was therefore proper).

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. 3d 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.

Finally, and probably most telling, the structure of the child support worksheet itself – which is statutory – comports with Father's position. R.C. 3119.02 requires that "the court or agency *shall* calculate the amount of the obligor's child support obligation in accordance with the basic child support schedule, *the applicable worksheet,* and the other provisions of sections 3119.02 to 3119.24 of the Revised Code." (Emphasis added.) "In statutory construction . . . the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage." *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St. 2d 102, paragraph one of the syllabus. Indeed, this Court has held that use of the child support worksheet is mandatory. *Marker v. Grimm* (1992), 65 Ohio St. 3d 139, paragraph one of the syllabus. Moreover, the terms of the worksheet are also mandatory.[3] *Id.*, paragraph two of the syllabus. So, while a trial court has considerable discretion when fashioning a child support order, such discretion is not unfettered. *Sapinsley v. Sapinsley,* 171 Ohio App. 3d 74, 2007-Ohio-1320, ¶ 8.

Turning to the worksheet, line 1a calls for the inclusion of "[a]nnual gross income from employment or, *when determined appropriate* by the court or agency, *average annual gross income from employment* ***over a reasonable period of years."*** (Emphasis added.)This language is virtually identical to the text of R.C. 3119.05(H). Line 1a further instructs to exclude overtime, bonuses, self-employment income, and commissions. Line 1b, in turn, calls for taking

[3] Mother may argue that because this is a "high income" case the guidelines do not apply; however, this argument is vitiated by the fact that the trial court prepared child support worksheets and then merely extrapolated therefrom when calculating Father's child support obligation.

into consideration – *separately from line 1a income* – a party's overtime, bonuses and commissions for the three years previous to the current year and taking the lesser of the last calendar year's commission or the three-year average of those commissions when determining income for child support purposes. This is the mandate of R.C. 3119.05(D).

Given the foregoing, R.C. 3119.05(H) provides no safe harbor for the trial court's child support calculation. The trial court, having chosen to prepare worksheets and use them to fashion its support orders by rote extrapolation therefrom, misapplied the law to the facts below and therefore, given the mandatory nature of the worksheet, abused its discretion. *Grimm; Sapinsley*, both *supra.* Moreover, it is clear that the trial court attempted to comply with the mandate of R.C. 3119.05(D), but again, it misapplied the statute, *Lafever; Rymers, supra,* therefore abusing its discretion. The notion that R.C. 3119.05(H) was somehow appropriately applied below crept into the record for the first time in Mother's response brief in the Court of Appeals. (Ct. App. R. 17, p. 9). So, not only did the Court of Appeals find that the term "commissions" is erroneously included in R.C. 3119.05(D), it also took the bait presented by Appellee and mistakenly hung its hat on the peg represented by R.C. 3119.05(H), all to Father's detriment.

CONCLUSION

The decision below represents, in part, the dangers of legislating via judicial *fiat.* Being legally ill-founded, it serves no purpose but to sew confusion among the trial and appellate courts of this State, as well as its 88 Child Support Enforcement agencies. The General Assembly has enacted a statutory scheme that instructs how child support orders are to be calculated. It has specifically spoken as to how commission income is to be treated for that

purpose. The Lucas County Court of Appeals not only eschewed the plain language employed by the General Assembly in that statutory scheme in order to justify the result reached by the trial court, but its rewriting of R.C. 3119.05(D) also potentially serves as "authority" to justify other courts and agencies to also misapply the scheme. It is an aberration, and it needs to be corrected.

Wherefore, Father asks that this Court reverse the judgment of the Lucas County Court of Appeals and remand this matter for further proceedings.

Respectfully submitted,

Jeffrey P. Nunnari, Counsel of Record

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

Dated September 17, 2018.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was duly served upon Julianne Renee Krell Pickard, Esq., by e-mail to jrkp@liebenthal-levine.com on this 17th day of September, 2018.

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