[Cite as *Youschak v. Youschak*, 2020-Ohio-1106.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

TAMMY SUE YOUSCHAK,

Plaintiff-Appellee,

v.

BRIAN C. YOUSCHAK,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0002

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2014 DR 00095

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Carl King, 115 West Lincoln Way, Lisbon, Ohio 44532, No Brief filed, for Plaintiff-Appellee and

Atty. Mark Lavelle, 940 Windham Court, Suite 7, Boardman, Ohio 44512, for Defendant-Appellant.

Dated: February 26, 2020

Robb, J.

{¶1} Appellant-father Brian C. Youschak appeals the decision of the Columbiana County Common Pleas Court adopting a magistrate's decision which granted his request for a decrease in child support. The father takes issue with the income imputed to him, arguing he was not voluntarily underemployed and the court unreasonably expressed skepticism about how he paid his monthly expenses. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} The parties were divorced in November 2014, after entering a separation agreement. The shared parenting plan for their child (born in 2005) essentially provided parenting time to the father under the standard local schedule but added an extra mid-week visit every other week. The father agreed to monthly child support of $1,145.72 (plus processing fees). The attached child support worksheet set his income at $166,000 and the mother's income at $16,536.

{¶3} In September 2017, the mother filed a motion to terminate shared parenting and modify parental rights. On April 2, 2018, the father filed a motion to reduce child support due to decreased income. When the father's child support arrearage exceeded $8,000 in July 2018, the mother asked to hold him in contempt. At the August 2018 hearing, the parties agreed to a parenting plan involving efforts to reunify the child with the father who would exercise parenting time on Fridays for 24 hours. By stipulation, the mother's income was imputed at minimum wage. The trial proceeded on the father's motion to reduce child support and the matter of contempt.

{¶4} The father testified he worked for a limited liability company owned by his dad, which provided brokerage and dispatch services to match cargo with trucks. He submitted his last three personal income tax returns, which showed the following amounts for adjusted gross income: $99,615 (in 2015); $14,795 (in 2016); and $724 (in 2017). (Def.Ex. A-C). He could not explain the $3,000 adjustments to gross income for capital loss on his returns. (Tr. 63). He testified he was not an officer of the company, but the company's tax returns showed payments to him as the sole officer in the following

amounts: $102,615 (in 2015); $17,795 (in 2016); and $3,000 (in 2017). (Pl.Ex. 4-6). He said he was paid commissions at random intervals and the business lost its two main customers in 2016, estimating they accounted for 90% of their income. (Tr. 18, 29, 36). He said the company was doing better in 2018 but did not provide income figures for the company or himself. (Tr. 43-44).

{¶5} In his financial affidavit and at trial, the father estimated his monthly expenses at $3,172 (not including child support). When asked how he supported himself and paid these monthly expenses with the income he was claiming, he said he used his personal savings and estimated his balance was down to $1,500. (Tr. 18-19, 42-43). He also disclosed that he took disbursements from the company which were not reported as income because they were being treated as loan repayments. (Tr. 18-19, 33). He prepared a document depicting loans he made to the company since mid-2016 totaling $57,250. (Tr. 53); (Def.Ex. D). He believed he recaptured between 60% to 70% of this loan so far. (Tr. 57). The Huntington Bank checks used by the father as evidence of his loans to the company listed only his dad as the account holder, but he insisted it was a joint account established in 2014 during the divorce when he was concerned his former spouse would take the money. (Tr. 56). He said he also had a savings account at that bank in both names, where the money would have been located before he transferred it to the checking account. (Tr. 64-66).

{¶6} The owner of the company (the father's dad) testified that his company owned no assets. (Tr. 75). He said his son loaned money to the company in the past two years, but he could not estimate the amount. (Tr. 72-73). This witness denied that the company had paid back any of these loans, stating this would occur "when it starts getting profitable again." (Tr. 74, 81-82). He also revealed that he personally contributed $25,000 to his company in 2017 and "a little bit" in 2016. (Tr. 74, 84, 86). He takes small amounts of money from the company when he needs it. (Tr. 71, 83). When asked about the Huntington accounts, this witness said: the deposits were a "stipend"; the money belonged to his son; "we" put most of the money from the Huntington account into the company; and he lacked knowledge of the transactions. (Tr. 79-81).

{¶7} On August 30, 2018, the magistrate's decision was released decreasing the father's monthly child support obligation from $1,145.72 to $909.51 plus processing fees

(when health insurance is provided), effective April 2, 2018. The magistrate found the father was voluntarily underemployed and was "skeptical" of the father's claim to have little to no income for the past two years when he was able to pay monthly expenses exceeding $3,000 (plus child support until partial payments began in 2018). The magistrate imputed to the father an annual income of $102,000 (down from $166,000 in the November 2014 separation agreement). The magistrate also found the father in contempt due to the arrearage but held sentencing in abeyance pending further review. The trial court adopted the magistrate's decision and entered judgment accordingly on August 30, 2018.

{¶8} The father thereafter filed timely objections arguing it was erroneous and contrary to the manifest weight of the evidence to find he was voluntarily underemployed. He said he was trying to save his dad's business and argued the court should allow him 90 days to make the business profitable or find alternative employment (before imputing income). The father contested the magistrate's statement about how his monthly expenses were paid and asked for a hearing so he could produce bank statements. He also objected to the contempt finding. The mother's response said the father did not thoroughly explain his drastic income decrease and the situation was within the father's control and resulted from his voluntary acts.

{¶9} On December 18, 2018, the trial court overruled the objections. The court repeated various factual findings made by the magistrate and then applied the statutory factors for imputing income. The court concluded that the claimed income reduction from $166,000 to $3,000 while working for the same company was a clear reflection of being underemployed based upon the statutory factors. In addressing his request for more time, the court found the father already had ample opportunity to determine if the business could be saved. The court also found no issue with the finding on the father's monthly expenses versus his claimed income or the finding of contempt and set a review hearing for sentencing on contempt.

{¶10} The father filed a timely notice of appeal. His brief set forth three assignments of error with the third assignment contesting the contempt finding. On August 14, 2019, this court issued a judgment dismissing the portion of the appeal contesting the contempt as it was not a final and appealable order since the case was set

for further review and no sanction had been imposed. In accordance with that judgment, the appeal continues as to the decision finding the father voluntarily underemployed and imputing income to him.

ASSIGNMENTS OF ERROR

{¶11} The father's first and second assignments of error provide:

"THE TRIAL COURT ABUSED ITS DISCRETION IN UPHOLDING THE MAGISTRATE'S DECISION THAT THE DEFENDANT-APPELLANT IS 'VOLUNTARILY UNDERMPLOYED'."

"DECISION THAT THE DEFENDANT-APPELLANT PAID $3000 WORTH OF MONTHLY EXPENSES FROM HIS OWN SAVINGS WAS ERRONEOUS AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶12} Where a party files a motion to modify the amount of child support, the court shall recalculate the amount of support under the applicable schedule and worksheet and find a substantial change of circumstances for modification if the recalculated amount varies from the original amount by more than ten per cent, unless the court deviates from this amount by finding it would be unjust or inappropriate and not in the child's best interest. R.C. 3119.79(A), (C). *See also* R.C. 3119.22; R.C. 3119.23. But first, in order to recalculate the amount of support, the court must ascertain the income of the parents. The income of a parent who is employed to full capacity is the gross income of that parent. R.C. 3119.01(C)(9)(a). The income of a parent who is underemployed (or unemployed) is the sum of that parent's gross income and any potential income. R.C. 3119.01(C)(9)(b).

{¶13} "Potential income" includes the imputed income the court determines the parent would have earned if fully employed as determined from the following criteria: (i) prior employment experience; (ii) education; (iii) physical and mental disabilities; (iv) employment availability in the geographic area; (v) prevailing wage and salary levels in the geographic area; (vi) special skills and training; (vii) ability to earn the imputed income; (viii) the child's age and special needs; (ix) increased earning capacity due to experience; (x) decreased earning capacity due to a felony conviction; and (xi) any other relevant factor. R.C. 3119.01(C)(11). Although voluntary in this context means intentional, the parent's "subjective motivations" for underemployment do not govern. *Rock v. Cabral*, 67

Ohio St.3d 108, 111-112, 616 N.E.2d 218 (1993) (the parent's lack of intent to affect child support is irrelevant).

{¶14} The trial court granted the father's motion for a child support reduction after finding his income decreased from $166,000 to $102,000. This new income figure was derived from income he received from the company in 2015, before he started considering the money he was paid to be loan repayments instead of income. In reviewing the statutory factors in R.C. 3119.01(C)(11)(a), the trial court found: the father had several years of employment experience in the field of trucking brokerage and dispatching; he was still employed at the same company as before the divorce; he worked on commission; he did not claim to suffer any physical or mental disabilities; the child was 13 years old with no special needs; and there was available employment in the geographic area as suggested by the father's testimony about the large number of companies competing with his employer for the same business. The court found he was voluntarily underemployed in 2016 and 2017 and/or that he received more income than he claimed. The father contests both findings.

{¶15} Decisions on child support are within the trial court's discretion and are not disturbed absent an abuse of discretion. *Pauly v. Pauly*, 80 Ohio St.3d 386, 390, 686 N.E.2d 1108 (1997). Likewise, the question of whether a parent is voluntarily underemployed and the amount of potential income to impute are questions of fact for the trial court, which will not be reversed unless there is a showing of an abuse of discretion. *Rock*, 67 Ohio St.3d at 112. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). The trier of fact has the best opportunity to view the demeanor, attitude, and credibility of each witness, which items do not translate well on the written page. *Davis v. Flickinger*, 77 Ohio St.3d 415, 418-419, 674 N.E.2d 1159 (1997), citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80-81, 461 N.E.2d 1273 (1984).

{¶16} By arguing he is not voluntarily unemployed, the father is essentially saying a person who volunteers nearly free services to his relative's company can avoid paying any meaningful amount of child support. The father said he had no ownership interest in the company. At the time of the 2014 divorce, he agreed he made $166,000. The

company reported that it paid him $102,000 in 2015. Yet, the company reportedly paid him only $3,000 in 2017. When this followed a year of being paid only $17,795 (in 2016), the trial court could reasonably find the father was voluntarily underemployed. An obligor does not have the right to seek a greatly reduced and minimal child support order because they wish to linger at a failing company making minimal commissions. The evidence showed the father was nearly working for free for his father's company and claiming the disbursements he took from the company were loan repayments rather than income.

{¶17} This was enough to meet any burden on the mother to show the father's voluntary underemployment. *Pepin-McCaffrey v. McCaffrey*, 7th Dist. Mahoning No. 12 MA 4, 2013-Ohio-2952, ¶ 29 (once the parent claiming voluntary underemployment meets the initial burden of showing the other party is voluntarily underemployed, the burden shifts to the underemployed parent to show that he or she is working at his or her potential). It must also be remembered that this was the father's motion to reduce child support. *See id.* at ¶ 30 (imputing income at the obligor's pre-retirement rate). *See also Maguire v. Maguire*, 9th Dist. Summit No. 23581, 2007-Ohio-4531, ¶ 14 ("As the party moving for the child support modification, Husband had the burden of proof to establish how the relevant factors would support a modification of his child support obligation.").

{¶18} The father generally protests the amount of imputed income. He does not suggest what amount the court should have imputed. He suggests without specifically arguing the court should have imputed the amount he made in 2017 (the company paid him $3,000 and he claimed a capital loss for an adjusted gross income of $724 for the year). This would clearly be an unreasonably low figure and the figure is a clear indication that the father was not "employed to full capacity" considering the totality of the circumstances. *See* R.C. 3119.01(C)(9)(a). Notably, by using the amount the company paid the father in 2015, the court substantially decreased his income compared to the figure the father utilized in the 2014 separation agreement. Believing he could not still make $166,000 but being faced with the unrealistic recently-claimed annual income of $3,000 (with a claimed loss for an adjusted gross of $724), the court could impute income under the circumstances of this case.

{¶19} The father states the court improperly assumed that there was available employment and/or that he could make $102,000 working for another transportation

broker. However, he testified there were "a lot of companies and a lot of competition" in this business. (Tr. 44). Considering the competition affected the father's employer, the court could presume the same geographical area was being discussed. The father did not look for another job as he wanted to focus on his dad's company, but his answer suggested he could be similarly situated if he provided services for and made commissions from more than one company. (Tr. 45, 48). It is also noted that the father did not attest how many hours a week he spent working and attempting to find new clients for his current employer to ensure he was working full-time at this employer. Using the annual income for the year before the father allegedly started receiving "loan repayments" (instead of income) was not unreasonable under the circumstances of this case.

{¶20} Furthermore, it was for the trial court to judge the father's credibility when he claimed he loaned the company a large amount of money and when he claimed any additional disbursements (above the small income reported by the company as compensation) in the last two years were loan repayments. The evidence of these loans were checks bearing only his dad's name as the account holder. His dad, who was the owner of the company, testified that he loaned his own company $25,000 in 2017 (and an unspecified amount in 2016). A credible explanation for the necessity of additional loans from the father was not provided. The owner of the company testified the company owned no assets (besides a telephone) and there were no employees except himself and the father. The business address was the same as the father's home address, and the father's financial affidavit showed he had no rent or mortgage payments. In addition, the owner testified that the father had not received any repayment for the loan yet, whereas the father testified that he received disbursements from the company as loan repayments. (Tr. 81). He also claimed these funds never made it to his account because he spent them immediately upon disbursement. Finally, he said the owner of the company disbursed income to him when he earned commissions, but the owner testified the father disbursed money to himself by taking what he could "scrounge out of there." (Tr. 77).

{¶21} Considering the totality of the facts and circumstances, it was not unreasonable for the court to express skepticism of the father's claims about his income, loans, receipt of loan repayments, ability to meet high monthly expenses on such low income, and the savings account balance at various relevant times. *See Barclay v.*

Barclay, 2d Dist. Montgomery No. 24883, 2012-Ohio-1974, ¶ 6, 18-19 (when asked how he could sustain his lifestyle with the claimed substantial reduction in income, the obligor said he borrowed from family and also suggested his company was paying him back for personal loans he made to the company). *See also Habib v. Shikur*, 10th Dist. Franklin No. 17AP-735, 2018-Ohio-2955, ¶ 19-24 (where the appellate court refused to substitute its judgment for the magistrate and trial court who both expressed skepticism of the father's credibility as to his gross income and expenses in arguing for a modification of child support).

{¶22} In sum, it does not appear the trial court abused its discretion in finding the father voluntarily unemployed (where his dad's company paid him an annual income of only $3,000 in 2017) and imputing income to him at the same amount this employer paid him in 2015. The father's assignments of error are overruled, and the trial court's judgment is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.