[Cite as *Janecek v. Marshall*, 2011-Ohio-2994.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STEVE A. JANECEK,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2010-L-059**
- vs -	:	
MARILYN MARSHALL,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2008 PR 00020.

Judgment: Affirmed.

Joseph G. Stafford and *Anne F. Coan*, Stafford & Stafford Co., L.P.A., 55 Erieview Plaza, 5th Floor, Cleveland, OH 44114 (For Plaintiff-Appellant).

Gary S. Okin and *Laurie A. Koerner*, Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, OH 44077 (For Defendant-Appellee).

Ann S. Bergen, 24 Public Square, Willoughby, OH 44094 (Guardian ad litem).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Steve A. Janecek, appeals from the judgment entry of the Lake County Court of Common Pleas, Juvenile Division, adopting the decision of the magistrate finding appellant in contempt of court for nonpayment of temporary child support; appellant also appeals the trial court's adoption of the magistrate's decision

overruling his motion to modify the existing interim child support order. For the reasons discussed below, we affirm the judgment of the trial court.

{¶2} Although never married, the parties in this matter resided together for a period of four years and one child was born as issue of their relationship. Appellant is the sole owner of a machine shop which, during the course of the parties' relationship, afforded him a lucrative income. Appellee, Marilyn Marshall, works as a registered nurse for the Cleveland Clinic, which provided a stable and consistent income during the parties' relationship. In late 2007, however, appellee moved out of the residence and the parties ended their relationship.

{¶3} On January 7, 2008, appellant filed a complaint in the trial court for allocation of parental rights and responsibilities pertaining to the parties' minor child. Appellee subsequently filed a motion to establish child support. On August 12, 2008, the trial court issued an "Agreed Judgment Entry" in which the parties agreed appellant would pay appellee $1,185 per month in child support. The agreed entry also provided the following:

{¶4} "*** [T]he parties reserve the right to argue, at the time of final hearing in the within matter, that the amount of interim support is inappropriate and not supported by statutory guidelines, and accordingly this Court has jurisdiction to retroactively increase or decrease the amount of interim support ordered herein based upon the evidence presented at trial."

{¶5} On January 7, 2009, appellee filed a motion to show cause alleging appellant had failed to meet his child support obligations under the August 12, 2008 agreed judgment entry. Appellant subsequently moved to modify the interim order set

forth in the agreed judgment, arguing his earnings had been "substantially reduced" due to "the current recession's impact on his business."

{¶6} The matter was tried before the magistrate on September 24, 2009. In his decision, the magistrate overruled appellant's motion to decrease child support. The magistrate, however, found the evidence introduced at trial supported a modification of support from $1,185 per month to $1,614.45 per month retroactive to the date of the parties' separation in February 2008. Appellant filed timely objections to the magistrate's decision. And, on April 28, 2010, the trial court filed its judgment entry overruling appellant's objections and adopting the decision of the magistrate. This appeal followed.

{¶7} Appellant assigns six errors for this court's review. Each argument represents a challenge to the trial court's adoption of the magistrate's decision. A trial court's decision to adopt or reject a magistrate's decision is a discretionary matter. *In re Ratliff*, 11th Dist. Nos. 2001-P-0142 and 2001-P-0143, 2002-Ohio-6586, at ¶14. As such, we will only reverse the trial court's judgment for an abuse of discretion. An abuse of discretion is a term of art, connoting a judgment which fails to comport with reason or the record. See, e.g., *Gaul v. Gaul*, 11th Dist. No. 2009-A-0011, 2010-Ohio-2156, at ¶24.

{¶8} Appellant's first assignment of error alleges:

{¶9} "The trial court erred and/or abused its discretion in determining Steve's gross annual income."

{¶10} Under his first assignment of error, appellant initially asserts the gross income figures the magistrate used in calculating his child support obligations were

improper because, in arriving at the figures, the magistrate did not deduct the full amount for "ordinary and necessary expenses" from his company's gross receipts. Instead, the trial court only allowed for a 50% deduction from the company's income for the expenses alleged. Appellant contends the trial court abused its discretion in adopting the magistrate's decision to use such a formula as the entire amount of the expenses alleged should have been deducted. We do not agree.

{¶11} For child support calculation purposes, the income of a parent who is employed to full capacity is that parent's "gross income." R.C. 3119.01(C)(5)(a). "Gross income" is defined as "*** the total of all earned and unearned income from all sources during a calendar year[.]" R.C. 3119.01(C)(7). Further relevant to this case is the concept of "self-generated income," which is defined as:

{¶12} "*** [G]ross receipts received by a parent from self-employment, proprietorship of a business, joint ownership of a partnership or closely held corporation, and rents minus ordinary and necessary expenses incurred by the parent in generating the gross receipts. 'Self-generated income' includes expense reimbursements or in-kind payments received by a parent from self-employment, the operation of a business, or rents, including company cars, free housing, reimbursed meals, and other benefits, if the reimbursements are significant and reduce personal living expenses." R.C. 3119.01(C)(13).

{¶13} Thus, in determining the gross income of a self-employed parent, the trial court must deduct the ordinary and necessary expenses incurred in the generation of gross receipts. *Foster v. Foster*, 150 Ohio App.3d 298, 303, 2002-Ohio-6390. "'Ordinary and necessary expenses incurred in generating gross receipts' means actual

cash items expended by the parent or the parent's business and includes depreciation expenses of business equipment as shown on the books of a business entity." R.C. 3119.01(C)(9)(a).

{¶14} In his decision, the magistrate explained his justification for deducting only half of the claimed expenses from appellant's income:

{¶15} "The Magistrate allowed for only 50% deduction regarding business equipment purchased and claimed as an ordinary and necessary business expense in generating receipts because there was no testimony that the actual cash expenditure for the equipment occurred in the year 2006. Because business deductions were taken for personal use of assets, it is equitable to apply the same formula to other business deductions. [Appellant] failed to establish that the depreciation expenses were ordinary and necessary business expenses. ***

{¶16} "The Magistrate applied the same analysis to the years 2007 and 2008. Though the cash expenditure occurred in 2008 for the purchase of equipment in 2008, there have been no receipts generated; this was an ordinary and not necessary business expense, at best, an attempt, to generate receipts. ***"

{¶17} The magistrate is correct that various business deductions were taken for personal use items throughout the three-year period at issue without evidence the expenses generated gross receipts. Moreover, with respect to the year 2006, there was no testimony that the company expended cash for equipment. Thus, even though appellant's 2006 income tax return reflected a Section 179 depreciation of $34,350, there is nothing in the record indicating the basis of the expense generated gross receipts. The analysis is similar for 2007: the 2007 return shows a Section 179

depreciation amount of $76,425. Again, however, there is nothing in the record indicating what equipment this amount relates to or that this expense specifically generated gross receipts.

{¶18} Finally, the 2008 tax records further indicate a $113,515 Section 179 depreciation expense. At trial, appellant did testify this expense was for the purchase of new equipment. Appellant also testified, however, that although his company had previously used the equipment at some undisclosed point for an undisclosed period, the equipment was not in use at the time of the hearing. Thus, similar to 2006 and 2007, it is unclear whether it ever generated any "gross receipts" for the business.

{¶19} In determining whether depreciation is an ordinary and necessary expense incurred in generating gross receipts for a business and, thus, whether it may be deducted from gross income for child support purposes, this court has held that "it is not the duty of the trial court to ferret out those expenses that qualify as ordinary and necessary. Rather, it is the duty of the obligor to assert that certain items are exempt from inclusion as gross income pursuant to this exception." *In re Sullivan*, 167 Ohio App.3d 458, 465, 2006-Ohio-3206; see, also, *Hale v. Hale*, 11th Dist. Nos. 2005-L-101 and 2005-L-114, 2006-Ohio-5164, at ¶25. Where the obligor fails to offer evidence on which the exclusion of a depreciation expense may be based, courts have held that a trial court does not abuse its discretion in refusing to allow the deduction. *Sullivan*, supra, citing *Wittbrot v. Wittbrot*, 2d Dist. No. 2002 CA 19, 2002-Ohio-6075, at ¶44 (ruling that a trial court did not abuse its discretion in refusing to allow deduction for depreciation where there was no evidence of business expenses other than obligor's bald assertion as to the amount of the expenses).

{¶20} Given the dearth of evidence that the depreciation expenses were "ordinary and necessary expenses incurred in generating gross receipts," we hold appellant failed to meet his burden of production on this issue. Notwithstanding the lack of evidence, the trial court did not completely disallow the expenses; instead, the court deducted half the claimed amount from his gross receipts. Of course, the court was not required to deduct any depreciation. Because, however, appellee did not raise this issue in a cross-appeal, we hold the magistrate did not err in deducting half of the depreciation from appellant's gross income. Thus, the trial court did not abuse its discretion in adopting the decision in this regard.

{¶21} Further, with respect to other claimed expenses, "'[a] trial court is not required to blindly accept all of the expenses an appellant claims to have deducted in his tax returns as ordinary and necessary expenses incurred in generating gross receipts.'" *Huelskamp v. Huelskamp*, 185 Ohio App.3d 611, 2009-Ohio-6864, at ¶43, quoting *Ockunzzi v. Ockunzzi*, 8th Dist. No. 86785, 2006-Ohio-5741, at ¶53. At the hearing, appellant claimed that his truck expenses as well as his food and entertainment expenses were "ordinary and necessary expenses incurred in generating gross receipts." Although these expenses were claimed on the relevant tax returns, appellant failed to produce any independent evidence of these expenses. Nevertheless, the magistrate reasoned it would be appropriate to give appellant 50% credit for the claimed expenses against the gross income he imputed to appellant over the years 2006 through 2008. Given the lack of conclusive evidence regarding the nature of the expenses, the magistrate was not required to deduct any of these expenses from appellant's gross income. Similar to the issue of depreciation, however, appellee did

not raise this issue in a cross-appeal. We therefore hold the magistrate did not err in applying the formula it used and the trial court did not abuse its discretion in adopting the same.

{¶22} With these points in mind, we therefore hold the gross income figures the magistrate ascribed to appellant were proper and the trial court did not err in adopting the magistrate's decision in this respect.

{¶23} Next, appellant asserts the trial court erred in averaging appellant's annual gross income from 2006 through 2008 as a basis for calculating his current income for child support. Appellant contends the average overinflates his actual income because the income from his business drastically declined in 2009 due to an economic downturn. We disagree.

{¶24} R.C. 3119.05(A) requires parents to verify current and past income and personal earnings with suitable documents including tax returns and "all supporting documentation and schedules for the tax returns." In this case, appellee introduced appellant's tax information from 2006 through 2008 as well as the tax information from his S corporation. Appellee additionally introduced the corporation's balance sheet through August 19, 2009. Although appellant testified that his business had experienced a significant downturn in sales from 2008 through 2009, he introduced no documentary evidence of his decreased income as of the date of the hearing. In effect, the evidence fails to support appellant's testimony because appellant failed to specifically verify his testimony that his income significantly decreased from 2008 to 2009 with "suitable documents." In this respect, appellant failed to meet his statutory

burden of production regarding his income for obtaining a downward deviation in child support.

{¶25} That said, we acknowledge that the 2009 balance sheet indicated the company would realize less net profit than previous years; appellant, however, testified he had laid-off seven of 12 employees in 2009 thereby cutting the company's ultimate payroll expense by nearly 60%. Hence, even though the overall income of the corporation ostensibly decreased from 2008 to 2009, the evidence also indicates the corporation experienced an appreciable decrease in its overall expenses in 2009. Given the circumstances, the company's decreased gross income in 2009 does not necessarily imply appellant would suffer a significant decrease in profits as the sole owner of the business.

{¶26} The decision to average income for purposes of establishing child support is within a trial court's sound discretion. *Thompson v. Thompson*, 11th Dist. No. 2002-T-0108, 2003-Ohio-3504; see, also, *Luke v. Luke* (Feb. 20, 1998), 11th Dist. No. 97-L-044, 1998 Ohio App. LEXIS 647, *9. Moreover, courts have held that income averaging is a particularly useful method of calculating income where an obligor's gross income may be somewhat "unpredictable or inconsistent." *Scott G.F. v. Nancy W.S.*, 6th Dist. No. H-04-015, 2005-Ohio-2750, at ¶46; see, also, *In re Kohlhorst*, 3d Dist. No. 2-06-09, 2006-Ohio-6481, at ¶15. Given the documentary evidence introduced by appellee and recognizing that sales and profits of a business will invariably fluctuate from year-to-year, we hold the trial court did not abuse its discretion in averaging appellant's income over the three-year period of 2006 through 2008.

{¶27} Appellant's first assignment of error is overruled.

{¶28} We shall address appellant's second and third assignments of error together; they provide:

{¶29} "[2.] The trial court erred and/or abused its discretion by improperly calculating the child support guidelines."

{¶30} "[3.] The trial court erred and/or abused its discretion by failing to comply with *Marker v. Grimm*."

{¶31} Under these assigned errors, appellant, in conclusory fashion, contends the trial court improperly calculated his child support obligation. In his own words, appellant states:

{¶32} "It is the responsibility of the trial court to compute a child support computation worksheet which is in accordance with the statutory scheme under Ohio law; and a trial court errs and abuses its discretion where it does not properly calculate a child support computation worksheet and include the same in the record. [*Marker v. Grimm* (1992), 65 Ohio St.3d 139.] The Trial Court failed to correctly use the child support computation worksheet as required by the Supreme Court of Ohio in *Marker v. Grimm*, supra. The child support computation worksheet as computed by the Trial Court fails to comply with Ohio law." Appellant's brief, at 4.

{¶33} Appellant is correct that *Marker*, supra, requires a trial court to "actually complete" a child support computation worksheet and include it in the record. Id., paragraph one of the syllabus. Further, "[a]ny court-ordered deviation from the applicable worksheet and the basic child support schedule must be entered by the court in its journal and must include findings of fact to support such determination." Id.,

paragraph three of the syllabus. Here, contrary to appellant's assertions, the trial court did include the computation worksheet in the record (appended to the judgment entry).

{¶34} Further, App.R. 16(A)(7) requires an appealing party to provide an actual argument that relates to his or her assignment of error with supportive reasons and citations to the record. Under his second and third assignments of error, however, appellant fails to identify exactly how the court failed to correctly use the computation worksheet. Appellant simply states the trial court's use of the worksheet is contrary to law without setting forth reasons in support or citations to the worksheet itself. As appellant fails to direct this court to a specified error in the court's computation worksheet, appellant's allegations are without merit.

{¶35} Appellant's second and third assignments of error are overruled.

{¶36} Appellant's fourth assignment of error provides:

{¶37} "The trial court erred and/or abused its discretion by not deviating the amount of child support." (Sic.)

{¶38} Under this assigned error, appellant essentially argues the trial court erred in failing to downwardly deviate from the child support worksheet given the amount of parenting time he has with the child. We do not agree.

{¶39} The court imputed annual gross incomes of $146,817 to appellant and $59,881 to appellee. The combined annual income of the parties is $206,698. R.C. 3119.04(B) provides:

{¶40} "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."

{¶41} In essence, "*** when the combined gross income of the parents exceeds $150,000, the statute requires a court to treat the issue of child support on a case-by-case basis; in so doing, however, it must consider the needs and standard [of] living of the children and the parents in arriving at its determination." *Longo v. Longo*, 11th Dist. Nos. 2008-G-2874 and 2009-G-2901, 2010-Ohio-3045, at ¶11. A "*** domestic court possesses considerable discretion in setting a child support order when the parents' combined income is above $ 150,000." Id. at ¶12.

{¶42} In his decision, the magistrate stated the parties' combined income is over $150,000. In considering the statutory requirements, the court observed:

{¶43} "Because there exists a large disparity in household incomes, because [appellant's] lifestyle is the same as when the parties were together for years, and because it is in the child's best interest to have the standard of living the same as if the parties were still together, the support amount shall be $1,614.45 per month inclusive of

processing charge. Said amount considers the claims of economic hardship of Mr. Janecek, but also the financial circumstances of both households."

{¶44} Appellant contends the court's determination was unreasonable, however, because it failed to consider the items he purchases for the child, the cost of transportation he bears, and the amount of parenting time he has with the child. We disagree.

{¶45} In addressing appellant's motion to decrease child support, the magistrate effectively addressed these points:

{¶46} "[Appellant's] testimony that because of transportation costs of parenting time (approximately 2 miles driving) on alternating weekends and a few days during the week he should have a reduced support obligation goes beyond the pale considering his lifestyle, his income, his failure to pay support as ordered and most importantly the child's best interests."

{¶47} As we have determined the evidence was sufficient to support the trial court's imputation of $146,817 annual gross income to appellant and the trial court did not ignore its statutory duty to consider the child's best interests and the relative needs and lifestyles of the parties, we hold the trial court did not abuse its discretion in adopting the magistrate's conclusion regarding the monthly amount of child support to which appellant is obligated.

{¶48} Appellant's fourth assignment of error is overruled.

{¶49} Appellant's fifth assignment of error provides:

{¶50} "The trial court's judgment entry is against the manifest weight of the evidence presented at trial."

{¶51} In a civil proceeding, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C. E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280-281. As a reviewing court, we evaluate the findings of the trial court under a presumption that those findings are correct. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. This is because the trier of fact is in the best position "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." Id.

{¶52} In this case, as discussed throughout this opinion, appellant failed to produce sufficient credible evidence for the court to conclude he was entitled to a downward deviation in child support. During the hearing, appellant was vague and noncommittal regarding his current financial status. He failed to produce any documentary evidence to corroborate his claim for financial hardship. With these points in mind, in conjunction with the cumulative impact of our analysis of appellant's other assignments of error, we hold the court did not abuse its discretion in adopting the decision of the magistrate's decision overruling appellant's motion to modify child support. The judgment is therefore supported by the weight of the evidence.

{¶53} Appellant's fifth assignment of error is without merit.

{¶54} Appellant's sixth and final assignment of error provides:

{¶55} "The trial court erred and/or abused its discretion by finding Steve in contempt of court."

{¶56} We first note that the judgment entry at the heart of this appeal disposed of two separate motions: a motion to modify child support and a motion to show cause. Appellant's first five assignments of error focus upon the court's ruling on the former motion; his sixth and final assignment of error focuses upon the latter. Accordingly, although the court disposed of each motion in the same judgment entry, they are, in effect, independent orders. This bears emphasis because, as will be discussed below, the court's contempt finding is not final and therefore not appealable at this time.

{¶57} Contempt of court consists of two elements: (1) a finding of contempt and (2) the imposition of punishment. *Hague v. Hague*, 11th Dist. No. 2008-A-0069, 2009-Ohio-6509, at ¶23. A contempt order is final only after both elements have been satisfied. *Moser v. Moser,* 11th Dist. No. 2008-P-0071, 2008-Ohio-5860, at ¶4. In this case, the trial court's order provided:

{¶58} "[Appellant] is found in contempt for failure to pay child support as ordered in the agreed Judgment Entry of August 2, 2008. [Appellant] is sentenced to 30 days in the Lake County Jail which is suspended based upon compliance with the following purge order: Plaintiff shall fully comply with the ongoing child support and arrearage order of $1,614.45 plus 20% toward the arrearage for a period of one year. Plaintiff shall pay Attorney Fees in the amount of $337.50 within 30 days of the final judgment herein."

{¶59} In the present case, the trial court found appellant in contempt but he was given the opportunity to purge the contempt order. Thus, the second element of contempt has not been fulfilled. To finalize the order, the trial court must find that appellant has failed to purge himself and then actually impose the penalty or sanction.

Welch v. Welch, 11th Dist. No. 2004-L-178, 2005-Ohio-560, at ¶5. At this point, therefore, the contempt order is still conditional and not ripe for review. Id.; see, also, *Kimani v. Nganga*, 11th Dist. No. 2009-L-160, 2009-Ohio-3796, at ¶4.

{¶60} As the contempt order is not a final, appealable order, we lack jurisdiction to address appellant's sixth assignment of error.

{¶61} For the reasons discussed in this opinion, assignments of error one through five are overruled. Because appellant's sixth assignment of error challenges an order which is not final and appealable, it is not properly before this court. It is therefore the order of this court that the judgment of the Lake County Court of Common Pleas, Juvenile Division is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.