[Cite as *Strimbu v. Strimbu*, 2011-Ohio-3629.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

JEANIE E. STRIMBU,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0104**
- vs -	:	
NICK STRIMBU, III,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 2003 DR 234.

Judgment: Affirmed.

Michael A. Partlow, Morganstern, MacAdams & DeVito, Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113 (For Plaintiff-Appellee).

William R. Biviano, Biviano Law Firm, 700 Huntington Bank Tower, 108 Main Avenue, S.W., Warren, OH 44481 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Nick Strimbu, III, appeals the Judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, denying his Motion for Modification of Child Support. The issue before us concerns the post-decree modification of a child support order where the combined incomes of the parties exceed $150,000. For the following reasons, we affirm the decision of the court below.

{¶2} Nick Strimbu and plaintiff-appellee, Jeanie E. Strimbu, were married in July 1994, in Lake Tahoe, Nevada. Four children were born as issue of the marriage:

Nathan Strimbu, d.o.b. February 1, 1995; Allison Strimbu, d.o.b. July 31, 1996; Alana Strimbu, d.o.b. January 29, 1998; and Brian Strimbu, d.o.b. September 14, 1999.

{¶3} On May 7, 2003, Jeanie filed a Complaint for Divorce. On May 15, 2003, Nick filed an Answer with Counterclaim.

{¶4} On December 23, 2003, the domestic relations court entered a Judgment Entry, memorializing the terms of a settlement agreement reached by the parties. In relevant part, the agreement provided that both parties were designated residential parents and legal custodians of the children pursuant to a Shared Parenting Plan, with Jeanie designated the "residential parent for school purposes." According to the Plan, Nick was responsible for paying $3,450 per month for child support.

{¶5} On June 16, 2009, Jeanie filed a Motion for Increase in Child Support.

{¶6} On August 17, 2009, Nick filed a Motion for Modification of Child Support, seeking to decrease his obligation "due to a substantial change in financial circumstances."

{¶7} On November 13, 2009, a hearing on the parties' Motions was held. Nick testified that his projected income for 2009 was $175,226. Jeanie testified that her 2008 income was $10,401, but provided no estimate of her 2009 income.

{¶8} On August 18, 2010, the domestic relations court issued a Judgment Entry, denying both parties' Motions. The court's Judgment stated: "No evidence was presented by either party, for the Court to consider, as to the needs of the children and the standard of living of the children that would warrant a modification of the current child support order. Without the necessary evidence as to the needs and standard of living of the children and parents prior to and after notice for modification, the Court cannot determine if the circumstances have changed enough to warrant a modification

of the current support order. Further, the Court cannot proceed to determine if a modification is proper without first fulfilling the analysis mandate of O.R.C. 3119.04(B)."

{¶9} On September 22, 2010, Nick filed his Notice of Appeal. On appeal, Nick raises the following assignment of error:

{¶10} "[1.] The trial court abused its discretion in failing to modify child support based solely upon the lack of evidence as to the children's needs and standard of living."

{¶11} "It is well established that a trial court's decision regarding child support obligations falls within the discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion." *Pauly v. Pauly*, 80 Ohio.St 3d 386, 390, 1997-Ohio-105, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144.

{¶12} In the present case, where the combined incomes of the parties exceed $150,000, the Revised Code provides 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." R.C. 3119.04(B).

{¶13} "In determining the amount reasonable and necessary for child support, R.C. 3109.05 requires the court to consider all relevant factors, including the financial resources of the child, the financial resources and needs of the custodial parent, the standard of living the child would have enjoyed had the marriage continued, and the educational needs of the child and the educational opportunities that would have been

available to him had the circumstances requiring the court order for his support not arisen." *Birath v. Birath* (1988), 53 Ohio App.3d 31, 37; accord *Lazenby v. Bunkers*, 6th Dist. No. WD-09-046, 2010-Ohio-3075, at ¶39 (citations omitted).

{¶14} Ohio's appellate courts, including this one, have often held that the failure 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," as required by R.C. 3119.04(B), constitutes an abuse of discretion. *Moore v. Moore*, 182 Ohio App.3d 708, 2009-Ohio-2434, at ¶19; *Siebert v. Tavarez*, 8th Dist. No. 88310, 2007-Ohio-2643, at ¶39; *Gregory v. Kottman-Gregory*, 12th Dist. Nos. CA2004-11-039 and CA2004-11-041, 2005-Ohio-6558, at ¶44; *Longo v. Longo*, 11th Dist. No. 2004-G-2556, 2005-Ohio-2069, at ¶91.

{¶15} Nick argues the domestic relations court abused its discretion by failing to avail itself of the rebuttable presumption, provided for in R.C. 3119.03, that "the amount of child support that would be payable under a child support order, as calculated pursuant to the basic child support schedule and applicable worksheet through the line establishing the actual annual obligation, is rebuttably presumed to be the correct amount of child support due." Similarly, Nick claims the court could have extrapolated the proper amount of child support due from the child support worksheets submitted to the court. Nick relies on the case of *Lyons v. Bachelder*, 5th Dist. No. 2004-CA-0018, 2005-Ohio-4887, where the court of appeals upheld a trial court's decision to modify a child support order despite its failure to consider the needs and standard of living.

{¶16} In *Lyons*, the parties combined gross income was $181,520. The trial court determined the amount of the modified obligation by completing the basic child support schedule and worksheet for a combined gross income of $150,000. While the trial court did not comply with R.C. 3119.04(B), the court of appeals noted that the

transcript contained "little, if any, evidence as to the specific needs and standard of living of the children," and the appellant did not cite to any relevant portions of the record addressing this issue. 2005-Ohio-4887, at ¶31.

{¶17} The *Lyons* decision does not require reversal in this case. The *Lyons* decision is consistent with the principle that child support determinations are within a trial court's discretion and that such decisions are reviewed under a deferential standard. In a similar case, *Maguire v. Maguire*, 9th Dist. No. 23581, 2007-Ohio-4531, the court of appeals upheld the denial of a motion to modify under the same deferential standard. In *Maguire*, the court of appeals held that "the party moving for the child support modification *** had the burden of proof to establish how the relevant factors would support a modification of his child support obligation," and that "[t]he trial court has no obligation to investigate and develop evidence that the parties have failed to present." Id. at ¶14 (citation omitted).

{¶18} In the present case, the domestic relations court did not abuse its discretion in denying Nick's Motion to Modify on the grounds that the parties failed to introduce evidence of the children's needs and standard of living. Assuming, arguendo, that the court could have presumed the amount contained in the worksheets was appropriate or extrapolated some other amount, the court was not required to do so.[1]

1. The dissent's focus on whether a change in circumstances has occurred as a matter of law, i.e., whether there has been a ten-percent change in a party's support obligation, is misplaced. The existence (or lack) of a change in circumstances does not obviate the applicability of R.C. 3119.04(B) to support obligations where the parties' combined income is in excess of $150,000. *Bettinger v. Bettinger*, 9th Dist. No. 22621, 2005-Ohio-5389, at ¶9 ("[i]n situations in which the parents earn a combined income of more than $150,000, R.C. 3119.04(B) governs the modification of support obligations"). As the court of appeals recognized in *Reik v. Bowden*, 172 Ohio App.3d 12, 2007-Ohio-2533, "courts have repeatedly said that the statute does not require any explanation of a support decision unless the court awards less than the amount awarded for combined incomes of $150,000." Id. at ¶21. Thus, a change in circumstances, without more, does not entitle a party to a modification of the support obligation as a matter of law.

{¶19} In her appellate brief, Jeanie concurs with Nick that the domestic relations court abused its discretion, albeit for a different reason. Rather, Jeanie contends that there was "significant evidence regarding the children's standard of living" in the record.

{¶20} The evidence regarding the children's needs and standard of living is summarized as follows. Jeanie testified that the youngest child, Brian, attends St. Mary's School in Chardon while the three older children attend Chardon public schools. All the children initially attended parochial school. The eldest child graduated from St. Mary's but the two middle children were withdrawn because Jeanie could not afford the tuition. Jeanie testified that she owes St. Mary's School about $10,000 for past tuition. She currently pays the school $300 a month for Brian's tuition and $500 a month for the balance owed.

{¶21} Jeanie testified that Brian suffers from severe attention deficit hyperactivity disorder and, for this reason, believes it is important that Brian continue in parochial school. She also testified that he requires help with his schoolwork, grooming, and hygiene, which restricts her ability to find work outside the home. Jeanie claims her ability to earn is also hindered by Nick's irregular exercise of his visitation rights.

{¶22} Nick testified regarding a boat he purchased for $60,000. Nick expressed his disagreement with the medication that Brian takes for his condition and gave a higher estimation of his functional abilities than Jeanie provided. Nick also explained the way he handles visitation with the children.

{¶23} The majority of the hearing was spent on the issue of Nick's income.

{¶24} The limited testimony regarding the children's and parties' needs and standard of living was not sufficient to enable the domestic relations court to conduct a proper analysis of this issue as contemplated by R.C. 3119.04(B). The only definite

change in the children's standard of living is that two of them must now attend public school. There was minimal evidence that would allow the court to contextualize this change with regard to the children's or the parties' overall standard of living. There was no evidence or indication of any of the children's other needs. As noted above, while the court might, in the exercise of its discretion, have addressed the substance of the parties' Motions based on the inadequate record before it, it was within the court's discretion to decline to do so.

{¶25} The sole assignment of error is without merit.

{¶26} For the foregoing reasons, the Judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, denying Nick's Motion for Modification of Child Support, is affirmed. Costs to be taxed against the parties equally.

JOHN W. WISE, J., Fifth Appellate District, sitting by assignment, concurs,

TIMOTHY P. CANNON, P.J., dissents with a Dissenting Opinion.

TIMOTHY P. CANNON, P.J., dissenting.

{¶27} I respectfully dissent from the opinion of the majority. This is an unusual case in that both appellant and appellee are requesting a remand to the trial court for reconsideration of the trial court's ruling. I believe we should grant them their wish.

{¶28} R.C. 3119.04(B) requires an assessment of the "best interest of the child" to be made in establishing a support order where the combined income of the parties exceeds $150,000. The critical time for this to be done is when the support order is

initially established. The question that needs to be addressed specifically in this case is whether or not a party who has had a support obligation computed pursuant to R.C. 3119.04(B) is entitled to a *modification* of that award if there has been a *change of circumstances* as a matter of law. In this situation, the support award should be modified.

{¶29} Ohio courts have held that even when a child-support calculation is made pursuant to R.C. 3119.04(B), the trial court when considering a *modification* must decide whether a change of circumstances has occurred. See *Siebert v. Tavarez*, 8th Dist. No. 88310, 2007-Ohio-2643; *Reik v. Bowden*, 172 Ohio App.3d 12, 2007-Ohio-2533. In the *Reik* case, the First District Court of Appeals applied the ten percent test for whether a change of circumstances occurred as set forth in R.C. 3119.79. Id. at ¶17. It stated:

{¶30} "In this case, the trial court found that the joint income of the two parties was $660,000. Pursuant to R.C. 3119.04(B), it found that the basic combined child-support obligation was $28,534. Considering that Bowden's share was 89.4 percent, the trial court found that the actual annual obligation at line 23a was $25,508. *Since there was more than a 10 percent difference between that figure and the amount of the original $128,875 order, there was a change of circumstances as a matter of law*." (Emphasis added.) *Reik*, supra, at ¶18.

{¶31} In this case, the income decrease of the payor-father and the income increase of the payee-mother represent a significant difference from the income status at the time of the original award. According to *Reik*, in calculating what a new award should be, the amount of support should be calculated at the maximum combined income level of $150,000 to determine if there has been a change of circumstances. If

this amount is more than a ten percent variance in the support obligation from the original award, there has been a change of circumstances as a matter of law. Id. at ¶24.

{¶32} Even if this formula is not the most appropriate to use, the income of the parties in this case has varied close to 20 percent from the time of the original award. Appellant should be entitled to a modification because there has been a change of economic circumstances as a matter of law.

{¶33} The lack of information in regard to the best interest of the children might stymie a trial court in establishment of the initial support obligation. If the best interest of the children has been affected in some way *since* the original order, the burden of proof should be on the party seeking to establish this fact. If they do, it should be taken into consideration by the trial court in making any modification. However, if this information is absent when considering a *modification*, but an economic change of circumstances has occurred *as a matter of law*, a modification of the award must be made. I would remand the case to the trial court to consider modification of the award based on the evidence in the record before the court.