[Cite as *Hothem v. Hothem*, 2010-Ohio-2400.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
MELISA A. HOTHEM	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 09-CA-20
TERRON HOTHEM	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Civil appeal from the Coshocton County Court of Common Pleas, Case No. 04-DV-430

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 26, 2010

APPEARANCES:

For Plaintiff-Appellee

VAN BLANCHARD II
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Coshocton, OH 43812

For Defendant-Appellant

MATTHEW J. KUNSMAN
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Gwin, P.J.

{¶1} Defendant-appellant Terron Hothem appeals a judgment of the Court of Common Pleas of Coshocton County, Ohio, overruling his motion for a downward deviation in his child support obligation, modifying child support, and modifying the order of visitation appellant has with his two minor children. Plaintiff-appellee is Melisa Hothem, the residential parent. Appellant assigns two errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE THE STATEMENTS CONTAINED IN PLAINTIFF'S EXHIBIT #6 AND THE TESTIMONY OF KAREN HOLMES, BELMONT COUNTY OHIO CHILDREN SERVICES BOARD, AS IT RELATED TO THE STATEMENTS IN PLAINTIFF'S EXHIBIT #6, ON THE BASIS THAT THE EXHIBIT FALLS WITHIN THE BUSINESS RECORDS EXCEPTION TO HEARSAY [OHIO RULE OF EVIDENCE 803(6)].

{¶3} "II. THE TRIAL COURT ERRED IN ADOPTING THE CHILD SUPPORT COMPUTATIONS FILED BY APPELLEE AND THE MEMORANDUM IN SUPPORT OF SAID COMPUTATIONS FOR THE PURPOSES OF COMPUTING APPELLANT'S CHILD SUPPORT OBLIGATION."

{¶4} The parties were divorced in 2004. On September 4, 2007, the Child Support Enforcement Agency of Coshocton County requested a court hearing to determine whether the child support amount it computed was the appropriate amount of support. Appellant filed several motions for modifications of the court's prior order. The motions pertinent to this appeal are the motion for a downward deviation in his child support obligation, and additional parenting time.

{¶5} The trial court conducted evidentiary hearings on March 17, and May 4, 2009. Both parties submitted child-support worksheet computations. At the May 4th hearing, appellee presented the testimony of Karen Holmes, an investigator for the Belmont County Children's Services Board. Holmes testified about interviews she conducted with the two minor children, and submitted her notes containing the children's statements, as well as other documents. Appellant objected to Holmes' testimony and the admission of her notes.

{¶6} On July 28, 2009, the trial court entered a seven page judgment entry disposing of all pending motions. The trial court found appellant's motion to deviate from the support guideline amount was not well-taken, denied appellant's motion for additional parenting time, and sustained appellee's motion to reduce his parenting time.

I.

{¶7} In its first assignment of error, appellant argues the trial court erred by admitting Holmes' testimony and notes. The trial court found Holmes' notes fell within the business-records exception to hearsay contained in Evid. R. 803 (6). Appellant argues the trial court was incorrect, and should not have admitted evidence of out-of-court statements.

{¶8} Appellee presented Holmes' testimony and the documents in defense of appellant's show-cause motion for restricting appellant's court-ordered visitation, and in response to his motion to award additional parenting time. Appellant does not assign error to the trial court's conclusion that appellee was not in contempt of the court's prior order, nor to its decision to reduce, not extend, appellant's parenting time.

{¶9} The trial court's decision states its findings are based upon appellee's testimony, the statements made by the children in the in-camera interview it conducted with each child separately, and the testimony of Dr. Gary Wolfgang. The trial court does not refer to Holmes' testimony or any of her documents.

{¶10} We find even if the trial court was incorrect in the evidentiary ruling, it was harmless error. The trial court is entitled to the presumption of regularity, that is, the trial court is presumed to know and follow the law unless the record demonstrates otherwise. *State v. Eley* (1996), 77 Ohio St. 3d 174, 672 N.E. 2d, 640. In a bench trial, we must presume a trial court relies only on relevant, material, and competent evidence in arriving at its judgment. *State v. Lloyd,* Warren App. Nos. CA2007-04-052 and CA2007-04-053, 2008-Ohio-3383 at paragraph 59, citing *State v. Lane* (1995), 108 Ohio App. 3d 477, 671 N.E. 2d 272.

{¶11} Here, because the trial court does not state it relied upon Holmes' testimony or documents, and because appellant does not assign as error the conclusion the trial court drew from the evidence, we find no prejudice.

{¶12} The first assignment of error is overruled.

II.

{¶1} In his second assignment of error, appellant argues the trial court erred in adopting appellee's proposed child-support computations, because it utilized an incorrect amount of income for appellant. Further, appellant argues the trial court abused its discretion not granting an appropriate deviation for travel expenses and for shared-living expenses of appellee.

{¶2} Our standard of reviewing decisions of a domestic relations court is

generally the abuse of discretion standard, see *Booth v. Booth* (1989), 44 Ohio St. 3d 142. The Supreme Court made the abuse of discretion standard applicable to alimony orders in *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E.2d 1140; to property divisions in *Martin v. Martin* (1985), 18 Ohio St. 3d 292; to custody proceedings in *Miller v. Miller* (1988), 37 Ohio St. 3d 71; and to decisions calculating child support, see *Dunbar v. Dunbar,* 68 Ohio St 3d 369, 533-534, 1994-Ohio-509, 627 N.E.2d 532. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable, *Blakemore,* supra, at 219. When applying the abuse of discretion standard, this court may not substitute our judgment for that of the trial court, *Pons v. Ohio State Med. Board,* (1993), 66 Ohio St.3d 619, 621 614 N.E.2d 748.

{¶13} R.C. § 3119.23 states:

{¶14} **"Factors considered for deviation**

{¶15} 'The court may consider any of the following factors in determining whether to grant a deviation pursuant to section 3119.22 of the Revised Code:

{¶16} "(A) Special and unusual needs of the children;

{¶17} "(B) Extraordinary obligations for minor children or obligations for handicapped children who are not stepchildren and who are not offspring from the marriage or relationship that is the basis of the immediate child support determination;

{¶18} "(C) Other court-ordered payments;

{¶19} "(D) Extended parenting time or extraordinary costs associated with parenting time, provided that this division does not authorize and shall not be construed as authorizing any deviation from the schedule and the applicable

worksheet, through the line establishing the actual annual obligation, or any escrowing, impoundment, or withholding of child support because of a denial of or interference with a right of parenting time granted by court order;

{¶20} "(E) The obligor obtaining additional employment after a child support order is issued in order to support a second family;

{¶21} "(F) The financial resources and the earning ability of the child;

{¶22} "(G) Disparity in income between parties or households;

{¶23} "(H) Benefits that either parent receives from remarriage or sharing living expenses with another person;

{¶24} "(I) The amount of federal, state, and local taxes actually paid or estimated to be paid by a parent or both of the parents;

{¶25} "(J) Significant in-kind contributions from a parent, including, but not limited to, direct payment for lessons, sports equipment, schooling, or clothing;

{¶26} "(K) The relative financial resources, other assets and resources, and needs of each parent;

{¶27} "(L) The standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued or had the parents been married;

{¶28} "(M) The physical and emotional condition and needs of the child;

{¶29} "(N) The need and capacity of the child for an education and the educational opportunities that would have been available to the child had the circumstances requiring a court order for support not arisen;

{¶30} "(O) The responsibility of each parent for the support of others;

{¶31} “(P) Any other relevant factor.

{¶32} ***

{¶33} “If the court grants a deviation based on division (P) of this section, it shall specifically state in the order the facts that are the basis for the deviation.”

{¶34} Appellant urges the trial court should have offset his business income by his ordinary and necessary business expenses. Appellant argues in addition to his employment with the Department of Transportation, he also operates a farm. He receives oil and gas revenues from the farm property, but has farm expenses and losses. The trial court included the gas and oil revenue but did not deduct the farm expenses and losses. Appellant argues his farm operating expenses actually exceed the oil and gas revenue.

{¶35} Appellee responds at the time of the hearings, appellant had not filed federal income tax returns for 2007 or 2008, because he did not want any refund intercepted and applied to his child support arrearage. The most recent financial information the trial court had before it appellant’s 2006 federal income tax return.

{¶36} Appellant reported his gas and oil revenue on his 2006 federal income tax, but did not list any expenses associated with the activity. Appellant reported his farming activity, including both the income and the expenses. Appellee argues that the oil and gas income should not be offset against the farming expenses, because appellant treated the two separately and did not combine them on his income tax return.

{¶37} We find the trial court did not abuse its discretion in treating the farm separately from the oil and gas income.

{¶38} Appellant also argues the record indicates appellant's union negotiated a new contract effective July 1, 2009, but the court used his income at the time of the May 4, 2009 hearing. Appellant argues under the new union contract his income was lowered, he would lose his overtime payments, and his health insurance premium and out-of-pocket expenses were raised.

{¶39} Appellant testified he stood to lose 80 hours of pay, and his personal leave accrual was frozen. Appellant conceded after the freeze, he would receive a payment equivalent to 32 hours of personal leave or one-half of the personal leave hours lost during the freeze, whichever was less.

{¶40} Given the state of the evidence before the trial court, we find the court did not err in utilizing the current information, averaging appellant's most recent three year overtime earnings, rather than projecting what appellant's income might be in the future.

{¶41} Appellant moved the court to deviate from the worksheet amount because of the expenses associated with his travel time to exercise visitation. The parties meet halfway to exchange the children, but appellant argues appellee does not incur travel expenses because her employer provides a car allowance. Appellant argues she is likely to receive some reimbursement for travel expenses to transport the children for visitation in addition to her travel for business. The record does not demonstrate this. Appellee testified she receives a lump sum plus work-related mileage which varies with cost of gas.

{¶42} The trial court acknowledged there is a significant difference in the income of the parties, but also found appellee has expended significantly more of her income for life enriching activities for the children, and to reduce appellant's child support

obligation may negatively impact her ability to provide the activities. The court specifically found it was in the best interest of the children to participate in the activities. The trial court concluded that awarding the full amount of child support established by the basic child-support schedule would not be unjust or inappropriate nor adverse to the best interest of the children.

{¶43} Finally, appellant argues the trial court should have included that appellee shares living expenses with her mother. The court found to the contrary, appellee provides a home for her mother and other routine living expenses. Appellee testified her mother does not live with her, but often stays at appellee's house. For example, she stayed all winter because of heat expenses. She does not contribute to the household, or buy any food. It does not appear that appellee benefits monetarily.

{¶44} We conclude the trial court did not abuse its discretion in the manner in which it computed the child-support guidelines.

{¶45} The second assignment of error is overruled.

{¶46} For the foregoing reasons, the judgment of the Court of Common Pleas of Coshocton County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

WSG:clw 0505

[Cite as *Hothem v. Hothem*, 2010-Ohio-2400.]

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

MELISA A. HOTHEM	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TERRON HOTHEM	:	
Defendant-Appellant	:	CASE NO. 09-CA-20

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Coshocton County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE