

[Cite as *In re B.S.*, 2009-Ohio-4660.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: B. S.
 M. S.

C. A. No. 24605

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. DN 06-10-994
 DN 06-10-995

DECISION AND JOURNAL ENTRY

Dated: September 9, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} Brian Sine was terminated by his employer the morning of a hearing to determine his child support obligation. Although the termination notice Mr. Sine received indicated that he was fired because he did not meet the company’s revenue goals, the juvenile court found the explanation incredible and concluded that he was voluntarily unemployed. Mr. Sine has appealed, assigning as error that the court’s finding was against the manifest weight of the evidence. Because Debora Sine did not present some competent, credible evidence to meet her burden of proof that Mr. Sine was voluntarily unemployed, this Court reverses.

FACTS

{¶2} In April 2007, the juvenile court awarded Mrs. Sine custody of the Sines’ two children, but did not rule on child support. In March 2008, Mrs. Sine moved to establish child support. The court scheduled the motion to be heard before a magistrate on June 9, 2008.

{¶3} The morning of the hearing, Mr. Sine was terminated from his position as branch manager of an equipment rental company. He received a notice explaining that it was for unsatisfactory performance. The notice indicated that, in April 2008, the company had warned Mr. Sine that his branch's rental revenue goals were \$105,000 per month with 20% earnings before income and taxes. The branch's revenue for April, however, was only \$87,883 with 7.8% earnings before income and taxes. In May 2008, its revenue was \$100,792 with 17.3% earnings before income and taxes.

{¶4} Mr. Sine testified that he had worked for the company for more than four years and had never been disciplined before being written up in April and May 2008. He said that revenue for the whole company was down, but that the revenue for his location was actually higher than the previous year. He acknowledged that it, nevertheless, failed to meet the company's expectations. He said that, after he learned the numbers for April, he did everything he could to increase business, but it was difficult because of the economy. He explained that "there's no building going on" and that he "can't force people to go dig holes" The parties did not present any other evidence regarding the reason for Mr. Sine's termination.

{¶5} On June 17, 2008, the magistrate issued her decision. She found there was "significant reason to doubt the credibility of the termination notice," noting that it "coincidentally went into effect the morning of th[e] hearing, following a long period in which no support had been ordered." She also noted Mr. Sine's testimony that revenue was higher than the previous year and his "general disregard for court orders." She, therefore, concluded that Mr. Sine's unemployment was willful. Based on her determination that he was voluntarily unemployed, she imputed the amount he had earned in 2007 to him for child support purposes.

{¶6} Mr. Sine objected to the magistrate’s finding that he is voluntarily unemployed. On January 8, 2009, the juvenile court overruled his objections. It determined the magistrate’s finding was supported by the evidence. It also determined that the explanation the company gave for Mr. Sine’s termination was not credible. In particular, it noted that he was not written up by his employer until after Mrs. Sine moved for child support. It also noted that it was illogical for his employer to terminate him when his branch’s revenue was up. The court, therefore, adopted the magistrate’s child support calculation. Mr. Sine has appealed, assigning as error that the juvenile court’s finding that he is voluntarily unemployed is against the manifest weight of the evidence.

VOLUNTARILY UNEMPLOYED

{¶7} In *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶26, the Ohio Supreme Court held that the test for whether a judgment is against the weight of the evidence in civil cases is different from the test applicable in criminal cases. According to the Supreme Court in *Wilson*, the standard applicable in civil cases “was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279.” *Id.* at ¶24. The “explanation” in *C.E. Morris* was that “[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.” *Id.* (quoting *C.E. Morris Co.*, 54 Ohio St. 2d at 279). But see *Huntington Nat’l Bank v. Chappell*, 9th Dist. No. 06CA008979, 2007-Ohio-4344, at ¶17-75 (Dickinson, J., concurring).

{¶8} Section 3119.01(C)(5)(b) of the Ohio Revised Code provides that the income of “a parent who is unemployed or underemployed” includes “the sum of the gross income of the parent and any potential income of the parent.” “Potential income” includes imputed income that the parent would have earned if he had been fully employed. R.C. 3119.01(C)(11)(a).

Construing Section 3119.01(C), this Court has held that, before a court may impute income to a party for child support purposes, “it must explicitly find that the party was either voluntarily unemployed or voluntarily underemployed.” *Ramskogler v. Falkner*, 9th Dist. No. 22886, 2006-Ohio-1556, at ¶13.

{¶9} “Whether a parent is ‘voluntarily [un]employed’ . . . and the amount of ‘potential income’ to be imputed to a child support obligor, are matters to be determined by the trial court based upon the facts and circumstances of each case.” *Rock v. Cabral*, 67 Ohio St. 3d 108, syllabus (1993)(quoting former R.C. 3113.215(A)(5) (analogous to current R.C. 3119.01(c)(11)). The burden of proof is on the parent who is claiming that his or her former spouse is voluntarily unemployed. *Groves v. Groves*, 12th Dist. No. CA2008-06-059, 2009-Ohio-931, at ¶9 (collecting cases).

{¶10} The juvenile court noted that it was undisputed that Mr. Sine was terminated on the morning of the support hearing. It found, however, that the evidence presented regarding the reason for his termination was not credible. Specifically, because the branch Mr. Sine managed increased its revenue from the previous year, the court did not believe that he was terminated because of an unsatisfactory job performance. Instead, it inferred that he was voluntarily unemployed from the fact that he had worked for the equipment rental company for four years and did not receive a write-up until just after Mrs. Sine moved for child support.

{¶11} The termination notice was the only evidence presented at the hearing regarding why Mr. Sine was unemployed. The court did not believe it, meaning there was no credible evidence as to why Mr. Sine lost his job. Mrs. Sine has argued that the court correctly inferred that his unemployment was voluntary from the fact that he was not disciplined until she moved for child support. She has also noted that Mr. Sine testified that, since 2005, he has received

\$31,000 and a house worth \$125,000 as an inheritance. She has further noted that he said he is receiving income from renting the house.

{¶12} Although the court did not believe the company's reason for terminating Mr. Sine, that does not mean the termination was voluntary. It was unreasonable for the court to infer that, because Mr. Sine did not have any problems at work until Mrs. Sine moved for child support, he sought to be unemployed. This Court also concludes that the fact Mr. Sine received a modest inheritance does not support an inference that he is voluntarily unemployed.

{¶13} Mrs. Sine has argued that the facts of this case resemble *Bahr v. Bahr*, 9th Dist. No. 04CA0088-M, 2005-Ohio-4253. In that case, however, Mr. Bahr admitted telling his ex-wife that he was "going to teach her a lesson by taking a leave of absence from [his] job." *Id.* at ¶11. In this case, Mrs. Sine failed to present any competent and credible evidence that Mr. Sine is voluntarily unemployed. Upon learning that he had been terminated, she could have sought a continuance so that she could attempt to gather such evidence. Mr. Sine's assignment of error is sustained.

CONCLUSION

{¶14} The juvenile court's finding that Mr. Sine is voluntarily unemployed is against the manifest weight of the evidence. The judgment of the Summit County Common Pleas Court Juvenile Division is reversed and this matter is remanded for a new child support hearing.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶15} Respectfully, I concur in judgment only on the basis that Mrs. Sine did not meet her burden of proof.

MOORE, P. J.
DISSENTS, SAYING:

{¶16} I respectfully dissent from the majority's decision to reverse the trial court. The majority correctly sets forth our standard of review by citing the Supreme Court's decision in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, wherein the Court stated: "Judgments 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." However, the majority ignores the evidence that was before the court and the permissible inferences the court was able to draw from that evidence.

{¶17} The record reflects that the trial court had the following facts before it:

Mother sought child support after a lengthy period of time when she did not receive support from Father.

Father had been working steadily at the same company in a responsible position for 4 years.

Father arrived at the hearing on support with a notice that he has been terminated.

The termination notice happened to be dated the same date as the hearing.

The reasons Father provided to the court for his termination were 1) under-performance, and 2) progressive discipline established by prior write-ups by the company.

{¶18} The trial court had the opportunity to observe the witness during his examination.

It was the court's responsibility to make the appropriate credibility determinations. Obviously, the court did not find Father to be a credible witness. The court made note of these facts, which appear to be undisputed:

Even though Father was allegedly released from his employment for under-performing, his performance was greater than it had been in the previous year.

Even though Father was allegedly released for under-performance, he out performed other stores in the company for the same time period.

The write-ups from the company began shortly after Mother filed her motion seeking child support from Father.

The employer gave Father an initial warning in April, and a final warning in May.

The termination notice was given before the production figures for the following month (June) were available.

{¶19} The trial court had the ability to consider facts, from Mother and/or Father in making its determination that there was "some" competent credible evidence. *Marek v. Marek*, 158 Ohio App.3d 750, 2004-Ohio-5556, at ¶16 (discussing evidence the trial court considered in determining that the appellant was voluntarily unemployed and specifying that the evidence included testimony from both parties). In considering whether Father was voluntarily unemployed, the court correctly considered the fact that Father was not in compliance with the Domestic Relations Court's order to sell the marital residence. Also, the receipt by Father of an inheritance, while not determinative, was certainly relevant in assisting the trial court in its

determination of whether husband had other sources of revenue that could sustain him, if he chose not to work. The facts set forth above were all properly considered by the trial court and constituted “some competent, credible evidence” supporting the finding that Father was voluntarily unemployed pursuant to R.C. 3119.01. Accordingly, I would affirm.

APPEARANCES:

TED CHUPARKOFF, attorney at law, for appellant.

PAUL E. ZINDLE, attorney at law, for appellee..