[Cite as *Bentley v. Rojas*, 2010-Ohio-6243.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

LE'CHARLES BENTLEY Appellant v. GABRIELA ROJAS Appellee	C.A. No. 10CA009776 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE Nos. 04JB07599 05JB09118 05JG09005 09JS026584 09JG028072

DECISION AND JOURNAL ENTRY

Dated: December 20, 2010

BELFANCE, Judge.

{¶1} Appellant, Le'Charles Bentley, appeals from the decision of the Lorain County Court of Common Pleas, Juvenile Division. For the reasons set forth below, we reverse in part, and affirm in part.

BACKGROUND

{¶2} Le'Charles Bentley ("Father") and Gabriela Rojas ("Mother") had a long-term relationship, but were never married. The couple has three children: L.B., born September 9, 2003; A.B., born March 30, 2005; and V.B., born August 21, 2008. Father was a professional athlete, but retired in 2008 due to a permanent injury. For some time, Father supported the children notwithstanding the absence of a formal order of support. In 2006, the parties entered into a shared parenting plan and an order for child support concerning A.B. and V.B.

{¶3} On December 10, 2009, Mother and Father appeared at a hearing seeking, inter alia, termination of the shared parenting plan for L.B. and A.B., creation of an order of visitation for all three children, and modification of the current child support order to cover all three children.

{¶4} The trial court terminated the shared parenting plan and designated Mother as the residential parent and legal custodian. Father was granted companionship based on the court's standard order of companionship. With respect to child support, the trial court found that Father worked seasonally at a sports training academy, which he owns, and lives off his investments and investment income. The trial court found Father's annual income for child support purposes to be $145,035.96. Subsequently, the trial court issued an order requiring Father to pay approximately $44,000 per year in child support.

{¶5} Father has appealed the trial court's decision, arguing that the trial court erred in computing his income for child support purposes and erred in only granting him companionship per the court's standard order.

ASSIGNMENTS OF ERROR

> "First Assignment of Error: The trial court abused its discretion when it imputed income without an explicit finding of voluntary unemployment or voluntary under employment."
>
> "Second Assignment of Error: The trial court abused its discretion by basing [Father's] child support obligation on nonrecurring income."

Imputation of Income

{¶6} In his first assignment of error, Father contends that the trial court incorrectly imputed income to him without making the requisite finding that he was voluntarily under- or unemployed. At paragraph 11 of its judgment entry, the trial court discussed Father's income and financial resources, stating: "Father's current income is imputed at $145,035.96." Despite

the language the court used, we do not believe that the trial court technically "imputed" income to Father. We acknowledge that if the trial court intended to impute income to Father, its action would constitute reversible error because the trial court failed to state that it found Father to be voluntarily under- or unemployed. See *Ramskogler v. Falkner*, 9th Dist. No. 22886, 2006-Ohio-1556, at ¶13. However, as explained below, it does not appear that the trial court was actually imputing income to Father in light of the evidence adduced at trial.

{¶7} The testimony at trial revealed that Father no longer receives income from his career as a professional athlete; however, he has retained a substantial amount of cash from the years he was so employed. In total, Father has approximately 5 million dollars in investments; approximately half is invested in retirement accounts that Father does not have access to, without penalty, until retirement age. The other half of Father's money is in various investment accounts that Father may currently access. Father's financial advisor testified at trial that the retirement investments are "qualified money" and that the non-retirement funds are "non-qualified money." There was no testimony as to the amount of interest or dividends, if any, generated as to the qualified money. A portion of the non-qualified money is in a checking account from which Father draws funds for his living expenses and other purchases. Father and his financial advisor also testified that $300,000 of Father's non-qualified money was invested in an annuity that Father purchased in June 2009. The annuity will mature after a period of six years; however, after the first year of holding the investment, Father is permitted to withdraw up to ten percent, or $30,000, per year without penalty fees. In addition, Father's non-qualified investments generated $49,035.96 in interest income in 2009, the year of the hearing. The financial advisor stated that the interest income is reinvested in the non-qualified investments and not distributed directly to Father. Father testified that he had recently invested approximately $200,000 to

establish a sports training academy specifically targeted at training offensive linemen. Father's financial advisor approved of the investment because it represented a unique business enterprise. Thus far, the business has operated at a loss and Father has not realized any income from that venture. No evidence was presented at the hearing that Father has made unwise or high-risk investments. To the contrary, the evidence demonstrated that Father has sought to maximize his return on his investments and relied upon the advice of his financial advisor.

{¶8} With respect to expenses, Father stated that he does not have a mortgage on any of the homes that he owns and does not have automobile loans. He is responsible for the operating expenses of his training academy, car insurance, utilities and various other living expenses. Father pays his expenses from the checking account that represents money retained from his career as an athlete.

{¶9} In order to impute income for support purposes, the trial court is required to explicitly find that the party to whom it is imputing income is voluntarily under- or unemployed. *Ramskogler* at ¶13. The trial court then considers the potential income to be imputed to the party based on several statutory factors, including, prior employment experience, education, employment opportunities and salary levels in the party's geographic area, etc. *Wilburn v. Wilburn*, 169 Ohio App.3d 415, 2006-Ohio-5820, at ¶38; R.C. 3119.01(C)(11)(a).

{¶10} In the case at bar, the trial court did not find that Father was voluntarily under- or unemployed and did not engage in a discussion of the factors outlined in R.C. 3119.01(C)(11)(a). Indeed, practically no evidence was offered concerning the aforementioned statutory factors. For example, there was no testimony concerning whether Father had received employment opportunities and if so, what salary he could have earned had he accepted employment. Likewise, there was no general evidence concerning Father's potential earning capacity as might

have been adduced through introduction of a vocational assessment or a vocational expert. Instead, in light of the evidence presented, the trial court considered Father's investments, income from those investments, and expenses as outlined above to determine Father's income for child support purposes. Although the trial court stated that it "imputed" income to Father, it is apparent from the court's discussion of Father's financial situation and the evidence presented by the parties, that the trial court was not engaging in an inquiry as to whether Father was voluntarily under- or unemployed so as to impute potential income. Rather, the trial court was attempting to arrive at an income figure for Father by considering the income derived from his investments. However, we acknowledge that the trial court's choice of language was confusing and that its inclusion of the $145,035.96 as employment income in the child support calculation worksheet also added to that confusion.

{¶11} Accordingly, because the trial court did not impute income based upon an inquiry under R.C. 3119.01(C)(11)(a), the trial court was not required to find that Father was voluntarily under- or unemployed. Father's first assignment of error is overruled to the extent he argues that the trial court erred in failing to expressly determine that Father was voluntarily under- or unemployed.

Inclusion of $5,500 and $30,000 as income

{¶12} Father also argues in his first and second assignments of error that the trial court erred by including $5,500 per month and $30,000 per year in the calculation of his income. We agree.

{¶13} The Supreme Court has determined that the abuse of discretion standard of review generally applies in reviewing matters concerning child support. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. "Income" for child support purposes is defined by statute and the trial court must

calculate a parent's income with reference to the statute. R.C. 3119.01(C)(5), (7). In the case at bar, because we must determine whether the trial court correctly applied the statute in calculating Father's income, we review the trial court's determination de novo. *Buttolph v. Buttolph*, 9th Dist. No. 09CA0003, 2009-Ohio-6909, at ¶16, citing *Porter v. Porter*, 9th Dist. No. 21040, 2002-Ohio-6038, at ¶5 (whether the trial court correctly applied a statute is a question of law that is reviewed de novo).

The $5,500 per month figure

{¶14} R.C. 3119.01(C)(7) defines "gross income" in pertinent part as:

> "except as excluded in division (C)(7) of this section, the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable, and includes income from salaries, wages, overtime pay, and bonuses to the extent described in division (D) of section 3119.05 of the Revised Code; commissions; royalties; tips; rents; dividends; severance pay; pensions; interest; trust income; annuities; social security benefits, including retirement, disability, and survivor benefits that are not means-tested; workers' compensation benefits; unemployment insurance benefits; disability insurance benefits; * * * and all other sources of income."

With respect to the $5,500 per month amount, the trial court stated, "Per his investments, Father receives $49,035.96 through his investments plus payment of his mortgage in the form of liens on two of his homes, insurance and utilities, totaling $5,500.00 per month." This statement suggests that in addition to his interest income, Father also receives additional income that allows Father to pay additional expenses totaling $5,500 per month. We initially observe that the uncontroverted evidence offered at trial demonstrated that Father did not have a mortgage on any of his homes. Thus, the trial court's statement "plus payment of his mortgage in the form of liens on two of his homes[,]" is incorrect. In addition, the evidence established that based upon the advice of his financial advisor, Father maintained a checking account to hold funds earned while he was a professional athlete. Father withdrew funds from this account to pay all of his

living expenses, such as insurance, utilities, and loans. Accordingly, the trial court erred in determining that $5,500 per month, or $66,000 per year, represented income to Father for purposes of his child support obligation.

The $30,000 figure

{¶15} In addition, the trial court erred in its determination that $30,000 also constituted income as defined in R.C. 3119.01(C)(7). The financial advisor testified that Father recently used some of his non-qualified investment capital to purchase a $300,000 annuity. Pursuant to its terms, the annuity would mature in 2015 and Father was guaranteed a return of at least 3%. Father was given the option to withdraw up to 10% or $30,000 a year from the annuity without penalty fees. Although Father could withdraw funds from the annuity, no testimony was presented as to the amount of interest the annuity had actually generated at the time of the trial. While it is true that any interest earned by the annuity could be considered as income to Father, the principle of the annuity is not categorized as income; just as the nearly $50,000 of interest earned by Father's non-qualified investments is income, but the approximately 2.5 million dollars of principal in the non-qualified investment account is not categorized as income. See R.C. 3119.01(C)(7) (defining gross income to include dividends and interest); *Smart v. Smart*, 3rd Dist. No. 17-07-10, 2008-Ohio-1996, at ¶¶29-30 (potential interest accrued on a personal injury settlement, not the amount of the settlement itself, is income); *Howell v. Howell*, 167 Ohio App.3d 431, 2006-Ohio-3038, at ¶55 (potential interest income from three sizable inheritances should be taken into account in determining father's income for support purposes). Moreover, the money to purchase the annuity was originally part of the 2.5 million dollars of non-qualified investment that generated the $49,035.96 in interest that was already categorized as income by the trial court. Therefore, the trial court erred in finding that Father's income included "an

additional $30,000 per year in investments[.]" Father's first and second assignments of error are well taken as the trial court erred in allocating $5,500 per month and $30,000 per year to Father as income for child support purposes.

> "Third Assignment of Error: The trial court abused its discretion by failing to consider the wishes of the parents as expressed through temporary orders as a relevant factor in determining a schedule of parenting time for the minor children."

{¶16} Lastly, Father asserts that the trial court erred in awarding him companionship pursuant to the standard order of companionship rather than the companionship schedule that was provided in the parties' temporary order for companionship during the pendency of the matter. In so doing, Father contends that the trial court failed to adequately weigh the statutory factors to develop a companionship schedule that would be in the best interest of the children.

{¶17} Father has challenged the trial court's exercise of its discretion in considering and weighing the factors relevant to its determination of companionship. Father does not argue that the trial court committed an error of law or that its factual findings were against the manifest weight of the evidence, rather, Father asserts that the trial court should have given consideration and weight to the temporary orders of the court. The trial court has discretion to consider and weigh the evidence regarding the applicable best interest factors. See *Irish v. Irish*, 9th Dist. Nos. 09CA009577, 09CA009578, 2010-Ohio-403, at ¶12 (stating that the trial court has discretion when considering evidence in relation to statutory factors). Therefore, its decision should not be reversed unless the exercise of its discretion was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶18} Mother and Father each sought to have full custody of their three children. Both testified at the hearing that the shared parenting plan should be terminated in light of Mother and Father's inability to effectively communicate with one another.

{¶19} A trial court may terminate a shared parenting plan "upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children." R.C. 3109.04(E)(2)(c). After the trial court terminates the prior shared parenting plan, the court shall "issue a modified decree for the allocation of parental rights and responsibilities for the care of the children * * * as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made." R.C. 3109.04(E)(2)(d). When allocating parental rights and responsibilities, the court must take into account the best interest of the children. R.C. 3109.04(B)(1). "To determine what is in the best interest of the child[ren] for the purpose of determining how to reallocate parental rights, the trial court must consider the factors set forth in R.C. 3109.04(F)(1)." *Hammond v. Harm*, 9th Dist. No. 23993, 2008-Ohio-2310, at ¶11. R.C. 3109.04(F)(1) lists ten separate factors, which include in pertinent part:

> "(a) The wishes of the child's parents regarding the child's care;
>
> "(b) If the court has interviewed the child in chambers pursuant to division (B) of this section * * *, the wishes and concerns of the child, as expressed to the court;
>
> "(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;
>
> "(d) The child's adjustment to the child's home, school, and community;
>
> "* * *
>
> "(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;
>
> "(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;
>
> "* * *

> "(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;
>
> "(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

Although the trial court must consider the evidence concerning each factor outlined in the statute, "the court need not explicitly reiterate its findings with regard to those factors absent a Civ.R. 52 request for findings of fact and conclusions of law." (Quotation and citation omitted.) *Hodson v. Hodson*, 9th Dist. No. 23567, 2007-Ohio-4419, at ¶10.

{¶20} Neither party asserts that the trial court erred in terminating the shared parenting plan. At trial, the parties presented minimal evidence concerning their wishes for allocation of parental rights and responsibilities. Father testified that he should have sole, legal custody of the children because he is more apt to provide a relationship built around communication between both parties and one that is built on respect and love for both parents. He also stated that he would like to spend more time with his children than was provided in the parties' prior shared parenting plan. Mother testified that it was important for the children to spend time with Father.

{¶21} Father claims that in the absence of adequate evidence presented at trial with regard to the parents' wishes, the trial court was required to consider the terms of the temporary orders devised by Mother and Father two weeks before the trial. Father has not provided legal authority to support this proposition. There is no provision in R.C. 3109.04(F)(1) that directs a court to look to prior orders when considering the allocation of parental rights and responsibilities. Nor does the statute state that the parents' wishes for allocation of rights must be gleaned from prior agreements or temporary orders for companionship.

{¶22} In its judgment entry, the trial court stated that it had considered each of the statutory best interest factors, and it discussed its factual findings as they related to the best

interest factors. For example, the trial court discussed the interaction of the children with Mother, Father, and Mother's family, the appropriateness of each parents' home for the children, the inability of the parents to cooperate with respect to shared parenting, and that Father has a residence out-of-state. See R.C. 3109.04(F)(1)(c), (f), (i), (j). Based on the above, we determine that the trial court's exercise of its discretion in considering the wishes of the parents and the best interest factors in light of the evidence produced at trial was not arbitrary, unreasonable or unconscionable, especially given the limited amount of evidence presented as to the parent's wishes for companionship. Father's third assignment of error is overruled.

CONCLUSION

{¶23} Father's first assignment of error is sustained in part, and the second assignment of error is sustained. Father's third assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas, Juvenile Division, is reversed in part, affirmed in part, and the matter is remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
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 Lorain, 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 equally to both parties.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶24} I respectfully dissent. The majority's determination that the trial court incorrectly computed Bentley's income for the purposes of child support is premised on its prior determination that the trial court did not actually intend to impute income to Bentley. I would hold that the trial court did impute income to Bentley and erred by failing to make a finding that he was voluntarily under- or unemployed.

{¶25} The trial court specifically stated that Bentley's "current income is imputed at $145,035.96." The trial court made this finding only after a discussion of Bentley's potential earning capacity, as would be required by R.C. 3119.01(C)(11). While the trial court did not make the requisite finding that Bentley is voluntarily under- or unemployed, the trial court noted that Bentley is a former NFL player and discussed sources from which Bentley could derive income. The trial court noted that Bentley receives $49,035.96 through his investments but also "has the ability to receive an additional $30,000 per year in investments[.]" The trial court noted that Bentley was serving an "an internship for broadcasting with the potential for employment to do commentary" with WKNR and was "currently negotiating the terms of a contract[.]" The trial court also discussed the cost to attend Bentley's football academy for offensive lineman,

which was $1,350 for a six-week session and $1,980 for a twelve-week session. In light of the trial court's discussion of Bentley's prior employment experience, special skills, the availability of employment, as well Bentley's earning capacity due to his investments, I would conclude that the trial court imputed income to Bentley and merely failed to make the requisite finding of voluntary under- or unemployment. This reading of the trial court's judgment entry is reasonable given the parties' financial circumstances as well as the need for an equitable result. Thus, I would sustain Bentley's first assignment of error.

APPEARANCES:

FREDERICK W. STRATMANN, Attorney at Law, for Appellant.

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