[Cite as *Lazenby v. Bunkers*, 2010-Ohio-3075.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Annette J. Lazenby	Court of Appeals No. WD-09-046
Appellee	Trial Court No. 01 DR 074
v.	
Jeffrey A. Bunkers	**DECISION AND JUDGMENT**
Appellant	Decided: June 30, 2010

* * * * *

Keithley B. Sparrow, for appellee.

Jeffrey D. Levy, for appellant.

* * * * *

COSME, J.

{¶ 1} Appellant, Dr. Jeffrey A. Bunkers, appeals from the judgment in the Wood County Common Pleas Court, Domestic Relations Division, that declined to modify his child support obligation. We affirm.

I. BACKGROUND

{¶ 2} On November 18, 2005, appellant Dr. Jeffrey A. Bunkers and appellee Annette J. Bunkers, now known as Annette J. Lazenby, were granted a divorce. Appellant was ordered to pay $12,760.50 per month in child support for two children.

{¶ 3} The magistrate's decision of October 6, 2004, and the attached child support computation worksheet, make clear that the magistrate extrapolated a child support amount based on an income of $894,910 for appellant and an imputed income of $50,000 for appellee. The magistrate considered the factors set forth in R.C. 3119.23 and specifically mentioned: (1) the disparity in income; (2) the relative financial resources of the parties; (3) the standard of living the parties would have enjoyed had the marriage continued; and (4) the need for counseling for the children. The magistrate considered child support pursuant to R.C. 3119.04(B) at the amount listed under the basic child support schedule for a combined income greater than $150,000. The magistrate declined to utilize the 14.65 percent model and chose, instead, to extrapolate the applicable percentage of child support at the $150,000 level. The magistrate found credible appellee's claims that her monthly expenses totaled over $20,000, excluding the cost for private schooling of the children (approximately $10,000 annually). The magistrate computed the extrapolated amount to be $129,126, to which he added $24,000 based upon the children's enrollment in private school.

{¶ 4} On September 1, 2005, the trial court adopted the magistrate's decision. Appellant appealed, and on February 9, 2009, this court affirmed, holding that the trial

court did not abuse its discretion when it used the extrapolation method to calculate the proper amount of child support. See *Bunkers v. Bunkers*, WD-06-030, 2007-Ohio-561, ¶ 23.

{¶ 5} On January 9, 2008, appellant filed a motion to modify child support arguing that circumstances had changed. Appellant asserts that the remarriage of appellee to Steve Lazenby, "a man of substantial means" justified a modification of child support. Appellant alleged that appellee has derived a benefit from the marriage to Steve Lazenby and the child support payments are being used to sustain the standard of living that the Lazenbys enjoy.

{¶ 6} At hearing on December 11, 2008, appellant presented three different child support worksheets compiled by the Wood County Child Support Enforcement Agency ("WCCSEA") that reflected his claim that the child support payments should be no more than $1,830 per month. Each child support worksheet assumed that appellant's annual income was $834,701 and appellee's annual income was zero, minimum wage or $50,000 - the last of which had been imputed to appellee by the trial court during the divorce.

{¶ 7} Appellant argued that appellee's remarriage to Steve Lazenby has relieved appellee of the burden of maintaining the parties' marital home at a cost of $3,362 per month. Appellee and her two children now live in Lazenby's home. Appellant also argued that appellee's monthly expenses are far less than the court-ordered child support. Appellant contends that appellee's actual monthly expense is $924 per month, per child.

As such, he suggests that the remainder is being diverted to sustain the standard of living that the Lazenbys enjoy. Appellant insists that Steve Lazenby, who earns $130,000 a year and has only $1,661.17 in discretionary income after expenses, cannot provide appellee with the standard of living that she currently enjoys.

II. REMARRIAGE DOES NOT JUSTIFY A MODIFICATION OF CHILD SUPPORT

{¶ 8} In his first assignment of error, appellant contends:

{¶ 9} "I. The trial court abused its discretion by failing to modify child support despite a substantial change in circumstances."

{¶ 10} In his appellate brief, appellant asserts that a substantial change of circumstances occurred based on: (A) appellee's remarriage to "a man of substantial means"; (B) WCCSEA's calculation of the child support obligation; and (C) the current child support order exceeding the actual amount of support needed by the two children, allowing appellee to enjoy a standard of living greater than the court intended.

{¶ 11} We disagree.

{¶ 12} A trial court possesses broad discretion in its determination regarding a modification of child support obligations. *Pauly v. Pauly* (1997), 80 Ohio St.3d 386, 390, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. Accordingly, an appellate court will not disturb such determinations absent an abuse of discretion. *Pauly*, 80 Ohio St.3d at 390, citing *Booth*, 44 Ohio St.3d at 144. An abuse of discretion suggests more than an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. It implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. Id.

When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

A. Appellee's Remarriage

{¶ 13} Appellant argues that appellee's remarriage to "a man of substantial means" is sufficient to find that a change of circumstances has occurred under R.C. 3119.79(C), which provides that the "amount of child support required to be paid under the child support order should be changed due to a substantial change of circumstances that was not contemplated at the time of the issuance of the original child support order * * *."

{¶ 14} Ohio courts have held that the remarriage of the nonresidential parent may justify a modification of child support, as the benefits received by the obligor from the remarriage are a factor in determining whether to deviate from the child support schedules. *Esber v. Esber* (1989), 63 Ohio App.3d 394 (criticized on other grounds by *Holm v. Smilowitz* (1992), 83 Ohio App.3d 757 and *Jordan v. Jordan* (Nov. 15, 1990), 4th Dist. No. CA 1427); *Snyder v. Snyder* (1985), 27 Ohio App.3d 1; *Martin v. Martin* (1980), 69 Ohio App.2d 78; *Rhoades v. Rhoades* (1974), 40 Ohio App.2d 559; and *Blaisdell v. Blaisdell* (1929), 7 Ohio Law Abs. 685.

{¶ 15} However, Ohio courts have not held that the remarriage of the residential parent must justify a modification of child support. The trial court may consider the benefits the residential parent receives through remarriage in determining whether a change of circumstances has occurred.

{¶ 16} Here, the trial court concluded that the remarriage of the residential parent was not a substantial change in circumstances, in large part because the disparity of income between the parties still existed. The trial court did consider other factors set forth in R.C. 3119.23 in determining that there was no change in circumstances justifying modification, including:

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

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

{¶ 19} "* * *

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

{¶ 21} "* * *

{¶ 22} "(P) Any other relevant factor."

{¶ 23} Appellant undoubtedly receives some financial benefit from cohabiting with Steve Lazenby. Appellee no longer needs to pay the $3,362 monthly mortgage on the home that she and the children were living in. However, any savings that might have been realized is being consumed, in part, by the continuing increase in private school tuition. Appellee testified that the cost of private school tuition has increased from $10,000 per year to $18,000 per year.

{¶ 24} R.C. 3119.05(E) explicitly precludes consideration of a new spouse's income when computing income in the worksheet. R.C. 3119.05(E) states, "When the

court or agency calculates the gross income of a parent, it shall not include any income earned by the spouse of that parent." In *Tarr v. Walter*, 7th Dist. No. 01 JE 7, 2002-Ohio-3188, ¶ 32, the court observed that to the extent that the legislature did intend for courts to probe into the actual income of a new spouse, "the process would be to consider disparity in household income, not to attempt to equalize household incomes. The existence of a deviation factor does not mean that a full credit is automatically due. The underlying rationale and premise behind the worksheet and schedule should be remembered; that is, child support is aimed at keeping the child in the position he would occupy had the marriage continued."

{¶ 25} In *Quinn v. Paras*, 8th Dist. No. 82529, 2003-Ohio-4952, ¶ 45, the court held that benefits a former wife obtained through remarriage did not warrant a modification of former husband's child support obligations. See R.C. 3119.05(E), R.C. 3119.23. In *Quinn*, the trial court opted to deny a deviation emphasizing that the disparity in income still existed, and application of the factors set forth in R.C. 3119.23 did not warrant a deviation. *Quinn* at ¶ 45.

{¶ 26} Here, appellant has already appealed the judgment of the trial court granting the award of child support and the use of the extrapolation method to calculate the proper amount of child support. *Bunkers v. Bunkers*, WD-06-030, 2007-Ohio-561, ¶ 23. In that appeal, we held that the trial court did not abuse its discretion; the amount of support awarded by the trial court was in the best interest of the children. Id. See R.C. 3119.04(B). There is no evidence that the amount of support is no longer appropriate.

{¶ 27} Application of the R.C. 3119.23 deviation factors do not warrant a deviation in this case based on appellee's remarriage. There is no "bright-line test" for determining the amount of a support deviation. *Julian v. Julian*, 9th Dist. No. 21616, 2004-Ohio-1430, ¶ 12. We conclude that, based on the facts of this case, the trial court did not act unreasonably, arbitrarily, and unconscionably when it again refused to deviate from the child support worksheet. There is no evidence that the original order from the judgment entry of divorce is still not proper. See *Reik v. Bowden*, 1st Dist. No. C-060531, 2007-Ohio-2533, ¶ 5.

B. WCCSEA's Calculation of the Child Support Obligation

{¶ 28} Appellant argues a substantial change in circumstances also existed based on three different child support worksheets compiled by the WCCSEA showing that the child support payments should be no more than $1,830 per month. Each child support worksheet assumed that appellant's annual income was $834,701 and appellee's annual income was zero, minimum wage or $50,000 - the last which had been imputed by the trial court. The child support worksheet attached to the judgment entry of divorce shows that the income of appellant was $894,910.

{¶ 29} Appellant presents no statutory authority for the premise that the trial court must accept the calculations of the WCCSEA as satisfying the "substantial change of circumstances" requirement set forth in R.C. 3119.79(C). In his appeal, however, appellant relies upon R.C. 3119.79(A) as requiring the trial court to recalculate the amount of support based on the lower income.

{¶ 30} R.C. 3119.79(A) states:

{¶ 31} "(A) If an obligor or obligee under a child support order requests that the court modify the amount of support required to be paid pursuant to the child support order, the court shall recalculate the amount of support that would be required to be paid under the child support order in accordance with the schedule and the applicable worksheet through the line establishing the actual annual obligation. If that amount as recalculated is more than ten per cent greater than or more than ten per cent less than the amount of child support required to be paid pursuant to the existing child support order, the deviation from the recalculated amount that would be required to be paid under the schedule and the applicable worksheet shall be considered by the court as a change of circumstance substantial enough to require a modification of the child support amount."

{¶ 32} But the trial court is not required to accept as true any evidence of appellant's income. Whether appellant's income has increased or decreased is a question of fact for the court. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112. Further, we must presume that the findings of the trial court are correct because the trial judge is best able to observe the witnesses and use those observations in weighing the credibility of the testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81.

{¶ 33} The trial court did not adopt any of the proffered worksheets as its own. Although the trial court did not recalculate the amount of support pursuant to R.C. 3119.79(A), its failure to do so was not error - appellant's income had not changed substantially. As such, the ten percent requirement was not met. In other words, the

financial change of circumstances that would call for application of R.C. 3119.79(A) does not apply here. For appellant to present "new" information as a change in circumstances is disingenuous. Additionally, in *Reik v. Bowden*, 1st Dist. No. C-060531, 2007-Ohio-2533, ¶ 21, the court held that R.C. 3119.04 does not require an explanation of a support decision unless it is far less than the amount awarded for combined incomes of $150,000. See, e.g., *Pruitt v. Pruitt*, 8th Dist. No. 8435, 2005-Ohio-4424, ¶ 44.

{¶ 34} The trial court reasonably found that there were no significant changes in circumstances to justify a modification from the original order - the alleged decrease in income was not accepted as true by the trial court. The trial court relied upon the original income figures adopted by the magistrate and the trial court in the judgment entry of divorce. The trial court was not unreasonable in finding that the needs of the children were the same as when the original order was filed.

C. Amount of Child Support

{¶ 35} Finally, appellant argues that a substantial change of circumstances exists because the current child support order exceeds the actual amount of support needed by the two children, which has allowed appellee to enjoy a standard of living greater than the court intended.

{¶ 36} Appellant contends that appellee's credit card use is proof that his child support payments are being used to support the lifestyle that the Lazenbys enjoy. Appellant asserts that the bulk of appellee's credit card expenses were incurred solely for appellee's benefit and for the benefit of the Lazenby's three other children. Appellant

contends that a review of appellee's expenses over an 18 month period demonstrates that appellee and the Lazenbys are realizing a $9,617.13 benefit against an average monthly expense of $3,143.37. Appellant insists that it is not possible for this $3,143.37 monthly expense to be attributed solely to the two children. Appellant suggests that the $3,143.37 monthly expense be divided by 2/5, leaving a total expense of $1,757.35 to be applied to his two children.

{¶ 37} Appellee testified that the expenses for the two children include food, shelter, clothing, tuition, automobile gas and repair, unreimbursed medical, vacations and other expenses. Further, Steve Lazenby testified that he does not pay for clothing, sports, lessons, dues, swimming lessons, medical insurance, or other expenses for the two children. He has two children of his own and pays both child support and spousal support.

{¶ 38} As we observed earlier, appellant has already appealed the judgment of the trial court granting a divorce, the award of child support and the deviation from the extrapolated amount. In that appeal, we held that the trial court did not abuse its discretion; the amount of support awarded by the trial court was in the best interest of the children. *Bunkers v. Bunkers*, WD-06-030, 2007-Ohio-561, ¶ 23.

{¶ 39} Where, as here, the income of the parents is greater than $150,000, the appropriate standard for the amount of child support is "'that amount necessary to maintain for the children the standard of living they would have enjoyed had the marriage continued.'" *Berthelot v. Berthelot*, 154 Ohio App.3d 101, 2003-Ohio-4519, ¶ 24, quoting

Birath v. Birath (1988), 53 Ohio App.3d 31, 37. See *Maguire v. Maguire*, 9th Dist. No. 23581, 2007-Ohio-4531, ¶ 12.

{¶ 40} Accordingly, appellant's first assignment of error is not well-taken.

III. RECALCULATION OF CHILD SUPPORT

{¶ 41} In his second assignment of error, appellant contends:

{¶ 42} "II. The trial court committed reversible error by failing to consider the required child support calculation worksheets in evidence when recalculating appellant's child support obligation."

{¶ 43} Appellant complains that the trial court committed reversible error when it failed to recalculate the amount of support upon appellant's motion to modify; the actual worksheet used must be made a part of the record; and a denial must be based on specific facts.

{¶ 44} We disagree.

{¶ 45} R.C. 3119.79(A) addresses the recalculation of the amount of a child support obligation upon the request of a party. Before a trial court may modify an existing child support order, the court must first find that a change of circumstances has occurred after a recalculation of support based on the completion of a new child support worksheet. R.C. 3119.79(A); *Julian v. Julian*, 9th Dist. No. 21616, 2004-Ohio-1430, ¶ 5. The threshold test for modifying an existing child support order pursuant to R.C. 3119.79(A) is the statutory ten percent test. *Teiberis v. Teiberis*, 9th Dist. No. 04CA008482, 2005-Ohio-999, ¶ 16; *Farmer v. Farmer*, 9th Dist. No. 03CA0115-M,

2004-Ohio-4449, ¶ 20; and *Swank v. Swank*, 9th Dist. No. 21207, 2003-Ohio-720, ¶ 12. In *Farmer*, the court held that consideration of deviational factors where the trial court failed to find that the statutory ten percent test had been satisfied "would, in effect, render the statutory ten percent test a nullity." *Farmer* at ¶ 20.

{¶ 46} Appellant argues that the child support worksheets show that the support payments should not be more than $1,830 per month - 85.65% less than the $12,760.50 currently required as child support. As such, appellant argues that the ten percent test under R.C. 3119.79(A) has been met.

{¶ 47} Although the trial court admitted into evidence the child support computation worksheets prepared by WCCSEA, it did not adopt them as its own. See *McCoy v. McCoy* (1995), 105 Ohio App.3d 651. The trial court did not specifically find that there was a more than ten percent change in the child support required to be paid pursuant to the existing child support order. The trial court disagreed with appellant's assertion that the small decrease in his income warranted a finding that R.C. 3119.79(A) applied.

{¶ 48} Because the trial court concluded that there was no significant reduction in income, it did not change the income amount that had been assigned to appellant in the child support computation worksheet attached to the judgment entry of divorce. As such, the court left undisturbed its original determination of appellant's income. Therefore, we find that the trial court did not abuse its discretion by not recalculating the amount of the child support obligation.

{¶ 49} In *Marker v. Grimm* (1992), 65 Ohio St.3d 139, paragraphs one and two of the syllabus, the Supreme Court of Ohio held that a trial court must actually complete a child support worksheet and make it part of the record, stating, "this requirement is mandatory and must be literally and technically followed." See *Depalmo v. Depalmo* (1997) 78 Ohio St.3d 535, 538; *Dilacqua v. Dilacqua* (Sept. 3, 1997), 9th Dist. No. 18244; and *Carter v Carter*, 9th Dist. No. 21156, 2003-Ohio-240, ¶ 25.

{¶ 50} In *Marker*, the trial court failed to complete a worksheet, and the transcript of the support hearing was "devoid of any information concerning many of the items necessary to complete a worksheet." Id. at 142. In deviating, the court also did not make specific findings that the mandated amount of child support under the guidelines would be unjust and would not be in the best interests of the child. Id. at 143.

{¶ 51} But in *Yark v. Yark* (Jan.12, 2001), 6th Dist. No. F-00-010, this court observed, "Some appellate courts have subsequently ruled that a trial court does not have to include the worksheet in the record if the evidence produced at the hearing on the motion to modify showed that there is no change in circumstances. These appellate courts reason that the completion of the worksheet in that situation would be a 'vain act.'" Id., see, e.g., *Morrow v. Morrow* (Sept. 4, 1998), 11th Dist. No. 97-L-237; and *Orefice v. Orefice* (Dec. 19, 1996), 8th Dist. No. 70602. "However, even courts adopting this view have acknowledged that a trial court denying a motion to modify on the basis that there is no substantial change in circumstances must either include a completed worksheet in the record or must make adequate findings of fact and calculations in its decision to permit

an appellate court on review to ascertain why completing the worksheet would be a 'vain act.'" Id., quoting *Church v. Gadd* (June 30, 1999), 11th Dist. No. 96-G-2014.

{¶ 52} Even if a trial court erred in failing to complete a worksheet, reversal and remand are not always dictated when a court does not comply. See, e.g., *McCoy v. McCoy* (1995), 105 Ohio App.3d 651, 655-656; *Seni v. Seni* (Jan. 23, 1998), 2d Dist. No. 16600; *Guidera v. Guidera* (June 30, 1993), 3d Dist. No. 1-93-16. Civ.R. 61 states that "no error or defect in any ruling or order * * * is ground for * * * vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." See R.C. 2309.59. Relying on Civ.R. 61, the appellate court in *Carr v. Blake* (Feb. 18, 2000), 1st Dist. No. C-990174, stated, "This court will not, therefore, reverse the order setting support in this case unless the failure to complete and journalize the worksheet affected a substantial right of appellant."

{¶ 53} Here, the trial court did not complete a worksheet prior to rendering its decision because it did not accept appellant's argument that his income had decreased by such a degree that the ten percent test would be met. Nor could the court consider Steve Lazenby's income when considering the disparity in the parties' incomes. R.C. 3119.05(E) explicitly precludes consideration of a new spouse's income when computing income in the worksheet. Finally, there were only four deviation factors being

considered, R.C. 3119.23(G), (H), (K), and (P). See *Tarr v. Walter*, 7th Dist. No. 01 JE 7, 2002-Ohio-3188.

{¶ 54} It is clear that the trial court did consider: (1) the disparity in income between appellant and appellee; (2) the benefit appellee was receiving as a result of her remarriage; (3) the relative financial resources, other assets and resources, and needs of each parent; and (4) other relevant factors. The trial court rejected appellant's argument that his income had decreased or that Steve Lazenby's income should also be considered, and relied upon the child support worksheet attached to the judgment entry of divorce.

{¶ 55} However, the trial court determined that appellant's assertion that his income had decreased was not credible and that appellant had not met the burden of proof to show a substantial change in circumstances from the date of the child support order now in effect to the date the motion for modification was filed. The trial court concluded that the ten percent threshold in R.C. 3119.79(A) was not triggered because appellant's income had not changed.

{¶ 56} Accordingly, appellant's second assignment of error is not well-taken.

VIII. CONCLUSION

{¶ 57} The trial court properly concluded in this case, pursuant to R.C. 3119.79(C), and application of the factors set forth in R.C. 3119.23, that remarriage of the residential parent did not constitute a substantial change in circumstances justifying a modification of child support. The trial court properly rejected appellant's proffer of the child support calculations from WCCSEA suggesting that the ten percent threshold test

set forth in R.C. 3119.79(A) had been met because it determined that appellant's income had not decreased. Although the statute requires that the trial court recalculate the amount of support, we find the trial court's failure to do so was harmless. The record showed that there was no change of circumstances. Further, appellant's allegation that the current child support order exceeds the actual amount of support needed by the two children is not supported by the record, and is in fact, contradicted by our finding that the trial court did not abuse its discretion in using the extrapolation method to calculate the proper amount of child support. We further held that the upward deviation from the extrapolated amount was not an abuse of discretion. As such, appellant's allegations do not support a finding that a substantial change of circumstances has occurred.

{¶ 58} Because the trial court reasonably found that the evidence did not support a finding that appellant's income had changed, the trial court did not commit reversible error when it declined to recalculate the amount of support upon appellant's motion to modify pursuant to R.C. 3119.79(A).

{¶ 59} Accordingly, the judgment of the Wood County Common Pleas Court, Domestic Relations Division is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE