[Cite as *Thaher v. Hamed*, 2010-Ohio-5257.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jumana M. Thaher,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-970 (C.P.C. No. 07DR-09-3790)
Suleman M. Hamed,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 28, 2010

Harrison Alo and *Noure Alo*, for appellee.

W. Sean Kelleher, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

McGRATH, J.

{¶1} Defendant-appellant, Suleman M. Hamed ("appellant"), appeals from a judgment entry/decree of divorce issued by the Franklin County Court of Common Pleas, Division of Domestic Relations, on September 18, 2009.

{¶2} Appellant and plaintiff-appellee, Jumana M. Thaher ("appellee"), were married on October 9, 2000, in the country of Jordan and have three children born as issue of the marriage; namely, Seema Hamed, born July 11, 2003, Jeanine Hamed, born December 24, 2004, and Mohammed Hamed, born August 3, 2006. Appellee filed a complaint for divorce on September 24, 2007. On May 21, 2008, the trial court issued

temporary orders determining parenting time and ordering appellant to pay child support in the amount of $575.80 per month, plus processing charges, for the three children. Additionally, the temporary orders addressed medical insurance and expenses for the minor children, as well as certain marital financial assets and obligations. Neither spousal support nor attorney fees were issued in the temporary orders. The final hearing in this matter was held on July 27 and July 31, 2009. The trial court issued its judgment entry/decree of divorce ("divorce decree"), on September 18, 2009, and established the final hearing date as the termination of marriage date. This appeal followed, and appellant brings the following four assignments of error for our review:

First Assignment of Error

THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING APPELLANT TO PAY CHILD SUPPORT CALCULATED BY IMPROPERLY IMPUTING INCOME TO THE UNEMPLOYED APPELLANT.

Second Assignment of Error

THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING SPOUSAL SUPPORT BASED UPON IMPUTED INCOME AND THE POSSIBILITY OF RECEIVING A COLLEGE DEGREE AT A LATER DATE.

Third Assignment of Error

THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING DEFENDANT TO PAY A CHILD SUPPORT ARREARAGE.

Fourth Assignment of Error

THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING ATTORNEY FEES.

{¶3} In his first assignment of error, appellant contends it was error to impute income to him for child support purposes without making an explicit finding that he was voluntarily underemployed.

{¶4} A trial court has considerable discretion in the calculation of child support, and, absent an abuse of discretion, an appellate court will not disturb a child support order. *Pauly v. Pauly* (1997), 80 Ohio St.3d 386, 390. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Most instances of an abuse of discretion result in decisions that are unreasonable, as opposed to arbitrary and capricious. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161. A decision that is unreasonable is one that has no sound reasoning process to support it. Id. In addition, an abuse of discretion will not be found simply because an appellate court could maintain a different opinion were it deciding the issue. *Guernsey Bank v. Varga*, 10th Dist. No. 01AP-1129, 2002-Ohio-3336.

{¶5} A trial court must determine the parent's income in order to calculate child support. Pursuant to R.C. 3119.01(C), income for purposes of determining child support includes the gross income of the parents and any "potential income" of a parent if that parent is voluntarily unemployed or underemployed. Whether a parent is voluntarily unemployed or underemployed is a determination within the trial court's discretion and will not be disturbed absent an abuse of discretion. *Banchefsky v. Banchefsky*, 10th Dist. No. 09AP-1011, 2010-Ohio-4267, ¶8, citing *Rock v. Cabral* (1993), 67 Ohio St.3d 108. "Potential income" includes imputed income that the court determines the parent would

have earned if fully employed based upon the following criteria outlined in R.C. 3119.01(C)(11)(a):

> (i) The parent's prior employment experience;
>
> (ii) The parent's education;
>
> (iii) The parent's physical and mental disabilities, if any;
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> (iv) The availability of employment in the geographic area in which the parent resides;
>
> (v) The prevailing wage and salary levels in the geographic area in which the parent resides;
>
> (vi) The parent's special skills and training;
>
> (vii) Whether there is evidence that the parent has the ability to earn the imputed income;
>
> (viii) The age and special needs of the child for whom child support is being calculated under this section;
>
> (ix) The parent's increased earning capacity because of experience;
>
> (x) Any other relevant factor.

{¶6} The thrust of appellant's argument is that the trial court failed to make an explicit finding that he was voluntarily unemployed/underemployed, and the trial court failed to apply the statutory factors. However, a reading of the trial court's 30-page divorce decree in this matter indicates otherwise. The divorce decree states:

> Amazingly, [appellant] argues that the Court should base his child support obligation on his current salary of $8 per hour when testimony and evidence clearly establishes that he *voluntarily* terminated his employment with Syscom Advanced Materials, Inc. earning $16 per hour effective September 25, 2007. In truth, the Court believes that even the $16 per hour (or $33,280 per year) rate of pay represents a *significant* degree of underemployment on the part of [appellant] given

> his own testimony that (1) he is 12 credit hours away from his Bachelor's degree and (2) a *beginning* Chemical Engineer can typically earn $50-64,000 per annum. Still, the Court declines to actually *impute* additional income to [appellant], beyond the $16 per hour rate of pay, because [appellee] has failed to proffer sufficient testimony and evidence to enable the Court to conduct a full and fair consideration of the statutory factors as set forth in ORC §3119.01(C)(11)(a).

(Emphasis sic.; Divorce Decree at 12.)

{¶7} Though the specific words "voluntarily underemployed" were not used, the trial court clearly concluded that, based on the evidence, appellant was indeed voluntarily underemployed. *Snyder v. Snyder*, 5th Dist. No. 2008CA00219, 2009-Ohio-5292, ¶37 (no "magic language" requirement in deciding whether one is voluntarily underemployed/ unemployed); *Winkelman v. Winkelman*, 11th Dist. No. 2008-G-2834, 2008-Ohio-6557 (implicit in the trial court's decision was that the parent was voluntarily unemployed). Further, a review of the trial court's divorce decree reveals that the trial court considered the factors set forth in the statute. In fact, the passage quoted above reveals that the trial court seemingly wanted to impute a higher income to appellant but felt it was prohibited in light of the statutory factors.

{¶8} The evidence presented herein established that in Jordan appellee earned the equivalent of a high school diploma and had not worked outside the home prior to appellant leaving the country in September 2007. Appellee obtained employment on October 17, 2007 at Arab Student International Aid where she remained employed at the time of the hearing and was earning $8 per hour.

{¶9} Appellant has an "associates degree in chemical engineering/petroleum industrials" that he earned in Jordan. (Tr. 118.) Appellant also testified he is 12 credit

hours shy of completing his bachelor's degree in chemical engineering. According to appellant, because he and appellee were fighting, the police advised him to leave the house "for about a week." (Tr. 198.) To allow things to "cool down," appellant testified he left for Kuwait in September 2007 and remained there for two to three months. Prior to leaving for Kuwait, appellant was employed at Syscom Advanced Materials and was earning $16 per hour. However, because appellant remained in Kuwait for several months, appellant lost this job for failing to return to work. Appellant testified that had he returned and shown up for work, he could have kept this job. At the time of the hearing, appellant testified he was not currently employed but working on an "on-call" basis at $8 per hour. Appellant stated, "I'm laid off and they give me a call when the business goes up." (Tr. 189.)

{¶10} The trial court weighed the facts and circumstances presented herein, considered the relevant statutory criteria, and concluded appellant was voluntarily underemployed. Upon review of the record, we cannot find that the trial court abused its discretion in doing so. Accordingly, we overrule appellant's first assignment of error.

{¶11} Appellant next contends the trial court erred in awarding spousal support based on the imputed income and the possibility of appellant earning a college degree. Appellant does not argue that an award of spousal support was in error but, rather, that it was error to base the award of spousal support on imputed income. First, we note that the decision to impute income for purposes of spousal support is also within the discretion of the trial court. *Havanec v. Havanec*, 10th Dist. No. 08AP-645, 2008-Ohio-6966, ¶23, citing *Nichols v. Nichols* (Dec. 29, 1999), 9th Dist. No. 19308 (imputing income to spouse not an abuse of discretion); *Petrusch v. Petrusch* (Mar. 7, 1997), 2d Dist. No. 15960

(decision to impute income within court's discretion). Secondly, having determined that the trial court did not abuse its discretion in imputing an income of $16 per hour to appellant, the trial court appropriately imputed that same income for purposes of calculating spousal support. *Banchefsky*, supra (income imputed for purposes of calculating child support appropriate for purposes of calculating spousal support); *Simpkins v. Simpkins* (June 30, 2000), 6th Dist. No. L-99-1112; *Snyder*, supra; *Justice v. Justice*, 12th Dist. No. CA2006-11-134, 2007-Ohio-5186. Accordingly, we overrule appellant's second assignment of error.

{¶12} In his third assignment of error, appellant contends the trial court erred in ordering appellant to pay child support arrearages in the amount of $3,100. Here, appellant directs us to a portion of the hearing where the trial judge is discussing various contempt orders. According to appellant, the trial judge determined during the hearing that the issue of arrearages had not been preserved, but nonetheless in the divorce decree ordered him to pay the arrearages. The transcript reflects appellant conceded that he owed appellee $3,100 in child support arrearages, and in response to the trial judge's inquiry as to why he did not pay appellee the $3,100, appellant stated, "someday I'll pay it." (Tr. 36.) Additionally, in response to a statement from appellee's counsel that the arrearages were $3,600, appellant stated, "actually 3,100, Your Honor, we did talk about last time." (Tr. 196.) This stipulation is noted in the divorce decree as it states: "[Appellant] stipulates that he currently has an arrearage owed entirely to [appellee] in the amount of $3,100." (Divorce Decree at 10.) Accordingly, appellant's third assignment of error is overruled.

{¶13} In his fourth assignment of error, appellant contends the trial court erred in awarding attorney fees to appellee pursuant to R.C. 3105.73(A), which provides:

> In an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that action, a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate.

{¶14} An award of attorney fees under R.C. 3105.73 lies within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Huffer v. Huffer*, 10th Dist. No. 09AP-574, 2010-Ohio-1223, ¶19. In the divorce decree, appellee was awarded $4,000 in attorney fees. Appellant states the trial court failed to consider three of the four factors in R.C. 3105.73(A) and then proceeded to award an amount of fees in excess of what appellee testified that she actually paid. Unfortunately, appellant fails to direct this reviewing court to such evidence.

{¶15} As the divorce decree references, appellee testified that she initially retained attorney Eric Hoffman at the rate of $225 per hour. Appellee testified that she paid him $5,000, even though the bills reflected only $3,997.50. Not having enough money to further retain him, appellee then obtained pro bono assistance from the counsel that represented her at the hearing. In the divorce decree, the trial court cites R.C. 3105.73 and notes appellant's "dilatory conduct" and that appellant prolonged this litigation with "baseless demands." (Divorce Decree at 29.) Moreover, though not expressly stated in the paragraph awarding attorney fees, a review of the divorce decree reflects the trial court did consider the discretionary factors contained in R.C. 3105.73(A).

{¶16} The requirement under R.C. 3105.73 is that a court consider whether an award of fees to a party would be equitable. *Heyman v. Heyman*, 10th Dist. No. 05AP-475, 2006-Ohio-1345. In its discretion, the trial court did so here. Because the trial court considered the relevant factors, including the parties' incomes and conduct during the litigation, we do not find an abuse of that discretion. Accordingly, we overrule appellant's fourth assignment of error.

{¶17} For the foregoing reasons, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is hereby affirmed.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.

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