

[Cite as *Lopez-Ruiz v. Botta*, 2011-Ohio-2414.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Carolina Lopez-Ruiz, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-610
 : (C.P.C. No. 06 JU-10-15927)
 Alejandro F. Botta, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on May 19, 2011

The Behal Law Group, LLC, Robert J. Behal, and Jeffrey A. Eyerman, for appellee.

Alejandro F. Botta, pro se.

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

BROWN, J.

{¶1} Alejandro F. Botta ("father"), defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, in which the court overruled father's objections to the magistrate's decision.

{¶2} Father and Carolina Lopez-Ruiz ("mother"), plaintiff-appellee, married in 1997. The parties had one child together, Alfonso, who was born on December 16, 2000.

The parties divorced in Philadelphia in 2004, and father was ordered to pay child support. Mother moved to Columbus, Ohio, in 2005. Father lives in Boston, Massachusetts.

{¶3} On December 5, 2006, after the Pennsylvania orders were registered in the state of Ohio and the parties agreed to the exercise of the trial court's jurisdiction over the matters, the parties agreed to modify father's child support obligation to \$700 per month, consistent with the statutory child support guidelines. In 2009, the parties filed numerous motions for contempt and motions to modify parental rights and responsibilities. On November 13, 2009, the parties entered into a plan for shared parental rights and responsibilities ("shared parenting plan"), which resolved all issues raised by the motions except for the amount of child support payable by father. The parties agreed to submit affidavits to a magistrate for determination of the child support issue.

{¶4} On February 10, 2010, the magistrate issued a decision, which was adopted by the trial court on March 3, 2010. In the decision, the magistrate found that the amount of child support payable by father pursuant to the statutory child support guidelines was \$833.56 per month, when health insurance for the child is in effect, and \$757.86 per month, plus \$93.66 per month for medical support, when health insurance for the child is not in effect. The parties did not dispute these amounts; rather, father argued that his obligation should be deviated downward for a variety of reasons. After analyzing the factors in R.C. 3119.23, the magistrate deviated the amounts of child support downward to \$733.56 per month, when health insurance for the child is in effect, and \$657.86 per month, plus \$93.66 per month for medical support, when health insurance is not in effect.

{¶5} Father filed objections to the magistrate's decision, which the trial court denied in a June 3, 2010 decision and entry. Father, pro se, appeals the judgment of the trial court, asserting the following assignments of error:

[I.] Trial Court Abused its Discretion by not Allowing Appellant, Dr. Botta's Cross-Examination of the Appellee, Dr. Lopez-Ruiz.

[II.] Magistrate and Trial Court Erred and Abused its Discretion by Weighing in the Child Support Calculation Statements Made by the Appellee with no Evidentiary Value.

[III.] Trial Court Erred by not Considering Cost of Living Differential between Boston and Columbus Failing to Apply O.R.C. 3119.23(L). Standard of living and circumstances of each party.

[IV.] Juvenile Court Erred and Abused its Discretion by not Weighing in Dr. Botta's Visitation Expenses for his Travel between Boston and Columbus failing to apply O.R.C. 3119.23(D) Extraordinary costs associated with parenting time.

[V.] Trial Court Erred and Abused its Discretion by not Considering Dr. Lopez-Ruiz Financial Benefits from Re-Marrying and Moving in with her new Husband failing to apply O.R.C. 3119.23(H). Benefits that either parent receives from remarriage and sharing living expenses with another person.

[VI.] Trial Court Erred by Considering Dr. Lopez-Ruiz's "in-Kind Contributions" in the Child Support Calculation Misunderstanding the Intention of O.R.C. 3119.23(J) Significant in-kind contribution from a parent.

[VII.] Trial Court Erred by Considering the School Tuition Paid by the Appellant in the Child Support Calculation[.]

[VIII.] Trial Court Erred and Abused its Discretion by not Considering the Circumstances of the Parties and the Needs of Dr. Botta for the Purpose of Child Support Calculation Failing to Apply O.R.C. 3119.23(K) The Relative Financial Resources and Need of Each parent.

[IX.] Magistrate and Trial Court Erred by Failing to Address Evidence Presented by the Appellant Rebutting The Child Support Calculation Guidelines.

[X.] Trial court did not indicate the basis for its Child Support Calculation in sufficient detail to enable a reviewing court to determine whether the award is fair, equitable, and in accordance with the law.

{¶6} We address father's seventh assignment of error first, as it is dispositive of this appeal. Father argues in his seventh assignment of error that the trial court erred when it considered the school tuition paid by mother in deviating from the basic child support schedule. R.C. 3119.22 provides that a trial court may order an amount of child support that deviates from the amount of child support that would otherwise result from the use of the basic child support schedule and the applicable worksheet if, after considering the factors and criteria set forth in R.C. 3119.23, the court determines that the amount calculated would be unjust or inappropriate and would not be in the best interest of the child. R.C. 3119.23, in turn, provides that the court may consider any of the following factors in determining whether to grant a deviation under R.C. 3119.23: (A) special and unusual needs of the children; (B) extraordinary obligations for minor children or obligations for handicapped children who are not step-children and who are not offspring from the marriage or relationship that is the basis of the immediate child support obligation; (C) other court-ordered payments; (D) extended parenting time or extraordinary costs associated with parenting time; (E) the obligor obtaining additional employment after a child support order is issued in order to support a second family; (F) the financial resources and the earning ability of the child; (G) disparity in income between parties or households; (H) benefits that either parent receives from remarriage or

sharing living expenses with another person; (I) the amount of federal, state, and local taxes actually paid or estimated to be paid by a parent or both of the parents; (J) significant in-kind contributions from a parent, including, but not limited to, direct payment for lessons, sport equipment, schooling, or clothing; (K) the relative financial resources, other assets and resources, and needs of each parent; (L) the standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued; (M) the physical and emotional condition and needs of the child; (N) the need and capacity of the child for an education; (O) the responsibility of each parent for the support of others; and (P) any other relevant factor.

{¶7} The amount of child support to be paid calculated according to the worksheet and guidelines is presumed to be the correct amount of child support. R.C. 3119.03. The decision to deviate from the actual annual obligation is discretionary and will not be reversed absent an abuse of discretion. See *In re Custody of Harris*, 168 Ohio App.3d 1, 2006-Ohio-3649, ¶60-61. The term "abuse of discretion" connotes that the court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying this standard of review, an appellate court may not merely substitute its judgment for that of the trial court. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131. Further, we should not independently review the weight of the evidence but should be guided by the presumption that the trial court's findings are correct. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74.

{¶8} In his seventh assignment of error, father contests the magistrate's and trial court's findings with regard to R.C. 3119.23(J). Father contends that paragraph seven of the shared parenting plan prohibited the consideration of private school tuition costs in

deviating from the basic child support guideline amount. Paragraph seven provides, in pertinent part:

The child will continue to attend Wellington School so long as Mother wishes to pay the tuition/costs of same and the parties will communicate on significant school related issues and decisions. Mother is solely responsible for the costs for Wellington School and such costs shall not be part of any child support guideline calculation.

{¶9} In addressing deviation factor (J), the magistrate found that "mother's payment of tuition (\$16,350 per year) plus all school fees, uniforms and materials, plus 100% of Alfonso's extracurricular expenses are the most significant expenses for the child that are not included in the attached child support computation worksheet." In addressing father's objections, the trial court found, with regard to deviation factor (J):

Although [mother] pays the tuition (\$16,350 per year) and fees and the uniform and material expenses for Alfonso to attend the Wellington School, pursuant to the agreed shared parenting plan, the costs of the Wellington School shall not be part of a guideline child support calculation. The Magistrate complied with this provision as the costs were not included in the guideline calculation (or worksheet). The plan does not prohibit the consideration of the expenses when determining whether a deviation from the guideline worksheet is warranted.

{¶10} Father asserts that, when the parties agreed that the costs associated with the child's attending a private school were not going to be a part of "any" child support calculation, the court should not have included them as a factor for deviation. "Any," argues father, includes "any" child support calculation performed by the trial court. We agree. Paragraph seven of the shared parenting plan provides that the private school tuition "costs shall not be part of any child support guideline calculation[,]" which, in our view, has a very broad meaning. Mother argues that the critical word in this provision is

"guideline," and that the provision prohibits the consideration of tuition costs only when determining the "guideline" amount. Presumably, what mother contends is that the "guideline" amount is the amount arrived at by calculating the child support obligation using the basic child support schedule in R.C. 3119.021 and child support computation worksheet in R.C. 3119.022. However, specifically included in the child support computation worksheet in R.C. 3119.022 is a line for "deviation adjustment." Line 27 on the child support computation worksheet is for the input of any "deviation adjustment," and Line 27(b) requires "[s]pecific facts including amount of time children spend with each parent, ability of each parent to maintain adequate housing for children, and each parent's expenses for children must be stated to justify deviation." Thus, the deviation adjustment, as well as a recital of findings based upon the deviation factors in R.C. 3119.23, is a part of the "child support guideline calculation," as that phrase is used in paragraph seven of the parties' shared parenting plan. Although, in the present case, the child support computation worksheet attached to the magistrate's decision did not include any entry for the "deviation adjustment" on Line 27, the failure to include the deviation calculation on the child support computation worksheet does not amount to an abuse of discretion, as long as the trial judge includes in the journal a determination that the amount would be unjust and not in the best interest of the child and findings of fact in support of that determination. See *Rotte v. Rotte*, 12th Dist. No. CA2004-10-249, 2005-Ohio-6269, ¶26. Furthermore, the first part of the sentence at issue here provides that "[m]other is solely responsible for the costs for Wellington School." To consider mother's tuition and costs for deviation purposes would violate this provision. Therefore, neither the magistrate nor the trial court should have considered the private school tuition/costs mother pays for the

child in determining whether deviation was appropriate, and to do so constituted prejudicial error. For these reasons, father's seventh assignment of error is sustained.

{¶11} Because the trial court improperly considered the substantial private school tuition/costs mother pays for the child in determining whether deviation was warranted, and we are unable to determine what weight the trial court afforded this improper consideration, the matter must be remanded to the trial court for reconsideration of the deviation factors without regard to the private school tuition/costs mother pays for the child. To render any opinion on the remaining assignments of error at this juncture would be premature. Therefore, we find father's remaining assignments of error moot, and we decline to address them in this appeal.

{¶12} Accordingly, father's seventh assignment of error is sustained, and his first, second, third, fourth, fifth, sixth, eighth, ninth, and tenth assignments of error are moot. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch is reversed, and this matter is remanded to that court for proceedings consistent with this decision. The trial court may accept additional evidence upon remand, hold further hearings, or determine the issue of deviation on the existing record, at its sole discretion.

Judgment reversed and cause remanded.

FRENCH and DORRIAN, JJ., concur.
