

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

KRISTI LAFEVER, :
 :
 Plaintiff-Appellee, : CASE NO. CA2014-02-017
 :
 - vs - : OPINION
 : 3/9/2015
 :
 STACY LAFEVER, :
 :
 Defendant-Appellant. :

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 2012 DRA 00721

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HENDRICKSON, J.

{¶ 1} Defendant-appellant, Stacy LaFever (Husband), appeals a divorce decree of the Clermont County Court of Common Pleas, Domestic Relations Division. For the reasons stated below, we reverse the decision of the trial court and remand the matter for further proceedings.

{¶ 2} Husband and plaintiff-appellee, Kristi LaFever (Wife), were married in 1998.

The parties have two minor children born during the marriage. The family previously lived in California, where Husband was employed as an audio-visual technician, and Wife worked in a salaried position for a company that sells and distributes medical devices. The family moved to Ohio in 2011 as a result of Wife taking on a sales position within her company "because there was a lot of potential for growth." Wife's new role involved selling medical devices for diabetics to both doctors and consumers in a territory encompassing much of southern Ohio and northern Kentucky.

{¶ 3} As Husband and Wife expected, the move allowed Wife to generate substantial commissions and significantly increase her earnings in 2011 and 2012, as compared to prior years in which she held a straight salary position within the company. By contrast, Husband had difficulty maintaining employment after moving from California. Although he held several positions in the audio-visual field after 2011, Husband also experienced at least two extended periods of unemployment.

{¶ 4} On May 17, 2012, Wife filed for divorce. Shortly thereafter, Husband filed a counterclaim, also seeking termination of the marriage. During the pendency of the divorce proceedings, the trial court issued an agreed entry regarding temporary orders that required Wife to pay \$600 per month in child support until the divorce was final.

{¶ 5} A trial was held in September 2013 to resolve the parties' disagreements with respect to, among other things, child support, spousal support, and the division of marital debt. On October 24, 2013, the trial court issued a judgment which equally divided the marital debt, and ordered Wife to pay Husband \$700 per month in child support, and \$300 per month in spousal support for three years. On January 16, 2014, the trial court issued the decree of divorce and decree of shared parenting, both of which were consistent with the October 2013 judgment.

{¶ 6} Husband now appeals, raising three assignments of error regarding the trial

court's calculations of child support and spousal support.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED IN CALCULATING [WIFE'S] INCOME FOR THE PURPOSES OF CHILD AND SPOUSAL SUPPORT.

{¶ 9} In his first assignment of error, Husband argues that the trial court failed to properly calculate Wife's income in accordance with R.C. 3119.022. He also contends the trial court's attribution of \$77,132 in commission income to Wife was against the manifest weight of the evidence.

{¶ 10} At the outset, we note Wife has not filed a brief opposing this appeal. App.R. 18(C) states in pertinent part,

If an appellee fails to file the appellee's brief * * * in determining the appeal, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action.

See Whittington v. Whittington, 12th Dist. Warren No. CA2011-06-065, 2012-Ohio-1682, ¶ 8.

In the present case, although we disagree with Husband's interpretation of R.C. 3119.022, we find that Husband's brief reasonably appears to sustain his allegation that the trial court's calculation of Wife's income from commissions was against the manifest weight of the evidence.

Method of Calculating Income from Commissions

{¶ 11} R.C. 3119.24(A)(1) requires a trial court to calculate child support for a shared parenting order "in accordance with the schedule and with the worksheet set forth in [R.C.] 3119.022." Husband contends that pursuant to the child support worksheet, the trial court was required to attribute to Wife either the average of Wife's last three years of commissions (2010-2012), or the most recent full year of commissions (2012), whichever is less.

{¶ 12} Trial courts have considerable discretion in formulating child support awards.

Booth v. Booth, 44 Ohio St.3d 142, 144 (1989). Therefore, a trial court's decision regarding child support will not be reversed absent an abuse of discretion. *Ornelas v. Ornelas*, 12th Dist. Warren No. CA2011-08-094, 2012-Ohio-4106, ¶ 22. An abuse of discretion connotes more than an error of law or judgment; it implies the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 13} However, the trial court's discretion is not unfettered. *Sapinsley v. Sapinsley*, 171 Ohio App.3d 74, 2007-Ohio-1320, ¶ 8 (1st Dist.). The child support worksheet is "mandatory in nature and must be followed literally and technically in all material respects because the overriding concern is the best interest of the child for whom the support is being awarded." *Macke v. Macke*, 12th Dist. Clermont No. CA2003-08-070, 2004-Ohio-2074, ¶ 8.

{¶ 14} Line 1 of the child support worksheet governs the calculation of a parent's income from employment.¹ It reads as follows:

a. Annual gross income from employment or, when determined appropriate by the court or agency, average annual gross income from employment over a reasonable period of years. (exclude overtime, bonuses, self-employment income, or commissions)

Father	Mother
\$.....	\$.....

b. Amount of overtime, bonuses, and commissions (year 1 representing the most recent year)

Father	Mother
Yr. 3 \$..... (Three years ago)	Yr. 3 \$..... (Three years ago)
Yr. 2 \$..... (Two years ago)	Yr. 2 \$..... (Two years ago)
Yr. 1 \$.....	Yr. 1 \$.....

1. The child support worksheet in R.C. 3119.022 requires the court to calculate income in the same manner for both parents. Because the only income at issue on this appeal is Wife's, we limit our focus to the trial court's calculations in determining Wife's annual gross income.

(Last calendar year)	(Last calendar year)
Average \$.....	Average \$.....

(Include in Col. I and/or Col. II the average of the three years or the year 1 amount, whichever is less, if there exists a reasonable expectation that the total earnings from overtime and/or bonuses during the current calendar year will meet or exceed the amount that is the lower of the average of the three years or the year 1 amount. If, however, there exists a reasonable expectation that the total earnings from overtime/bonuses during the current calendar year will be less than the lower of the average of the 3 years or the year 1 amount, include only the amount reasonably expected to be earned this year.)

\$.....	\$.....
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{¶ 15} Thus, Line 1(a) of the child support worksheet instructs the court to identify the parent's annual gross income from employment. Income from overtime, bonuses, and commissions are expressly excluded, as is self-employment income.

{¶ 16} Line 1(b) of the worksheet instructs the court how to determine the appropriate amount of overtime, bonuses, and commissions to be included in the parent's annual gross income. The court must initially identify the amount of income the parent earned from overtime, bonuses, and commissions for each of the past three complete calendar years (i.e., Year 1 being the last calendar year, Year 2 being two years ago, and Year 3 being three years ago).² Then, the court must calculate the average of these years, and add the average amount to the income identified in Line 1(a).

{¶ 17} However, if the trial court reasonably expects that the parent's total earnings from overtime, bonuses, and commissions during the current calendar year will meet or exceed the lesser amount of the three year average or the Year 1 amount ("the lesser amount"), then the court is to attribute the lesser amount to the parent for the purposes of

2. Although the instructions for Line 1(b) of the worksheet only specifically mention "overtime and/or bonuses," we find it is implied that commissions should be included, as well. The term "commissions" is included with the terms "overtime" and "bonuses" at the beginning of Line 1(b).

calculating child support. On the other hand, if the trial court reasonably expects that the parent's total earnings from these sources will be lower than the lesser amount, then the court is to attribute to the parent only the amount reasonably expected to be earned in the current year.

{¶ 18} As can be seen, the method outlined in Line 1(b) for calculating income from overtime, bonuses, and commissions requires a three-year period for comparison before the trial court may form a reasonable expectation that the parent's total earnings from these sources will meet, exceed, or be less than the lesser amount. If the court lacks sufficient evidence to calculate a three-year average, then the calculation in Line 1(b) of the child support worksheet is inapplicable.

{¶ 19} Thus, with respect to Husband's contention, it is true that under certain circumstances Line 1(b) of the worksheet authorizes the trial court to attribute to the parent the lesser of either (1) the average of the last three years of the parent's income from commissions, or (2) the income from commissions for the last complete calendar year. However, in order to do so, the trial court must have sufficient evidence of three complete calendar years of income from commissions. Where the court does not have sufficient evidence for three complete calendar years, Line 1(b) is inapplicable.

{¶ 20} In the present case, the trial court determined that Wife's commissions would decline from the amounts she earned in 2011 and 2012. Yet, because Wife did not begin working in a sales position until sometime in 2011, and because Wife did not provide evidence of income from commissions prior to the start of the 2012 fiscal year, the trial court only had evidence of Wife's income from commissions for part of 2011. Further, the record shows the trial court only had evidence of Wife's income from commissions for part of 2012,

as well.³ Therefore, the trial court did not have sufficient evidence for three complete calendar years in which Wife received income from commissions, and the calculation outlined in Line 1(b) of the child support worksheet was not applicable.

{¶ 21} In order to address situations in which the evidence has established a pattern of income from commissions, but where the amount of those commissions is not predictable from year to year, Ohio courts have consistently turned to R.C. 3119.05(H). See *Poling v. Poling*, 10th Dist. Franklin No. 13AP-189, 2013-Ohio-5141, ¶ 13. R.C. 3119.05(H) authorizes the trial court, where appropriate, to "average [the parent's] income over a reasonable period of years" for the purposes of calculating the parent's child support obligation. See, e.g., *Krone v. Krone*, 9th Dist. Summit No. 25450, 2011-Ohio-3196, ¶ 33 (approving income averaging where the parent's commissions from real estate transactions fluctuated with the market).

{¶ 22} For instance, this court recently approved such "income averaging" where a parent changed employers, and compensation for his new job was based primarily on commissions. *York v. York*, 12th Dist. Clermont No. CA2011-03-016, 2011-Ohio-5872. In *York*, the evidence presented at the 2010 trial showed that the appellant worked as a construction worker in 2007, and as a commission-based car salesman beginning in 2008, with by far his best year of earnings in 2009. *Id.* at ¶ 9. The trial court averaged appellee's income for 2007 and 2008 for the purposes of determining his child support obligation. *Id.* at ¶ 10. Because there was some evidence in the record to support the trial court's finding that Father's 2009 income was an aberration, this court found that "the trial court's decision not to use Father's 2009 income and to [average his 2007 and 2008 income] is rational and based on a sound reasoning process, and therefore is not an abuse of discretion." *Id.* at ¶ 11.

3. Wife's sales report for fiscal 2012, which ran from May 1, 2011 to April 30, 2012, did not contain information on Wife's income from commissions between February and April 2012.

{¶ 23} For these reasons, we disagree with Husband's contention that under the facts of this case, the trial court was required to attribute to Wife either the average of Wife's last three years of commissions, or the most recent full year of commissions, whichever is less.

Calculations Must be Based on Competent, Credible Evidence

{¶ 24} Husband also argues the trial court's calculation of Wife's income from commissions was against the manifest weight of the evidence. He contends that the trial court underestimated Wife's income in 2012 by approximately \$69,000 because it wrongly deducted the moving expenses paid by Wife's employer for the expenses Husband and Wife incurred to move their family from California to Ohio in 2011. He further contends that the trial court incorrectly estimated Wife's 2013 income.⁴

{¶ 25} Challenges to factual determinations upon which a child support award is based are reviewed using the "some competent credible evidence" standard. *Heywood v. Heywood*, 12th Dist. Clermont No. CA2010-02-013, 2010-Ohio-3565, ¶ 12. Under this standard, a judgment that is not supported by competent credible evidence will be reversed by a reviewing court as against the manifest weight of the evidence. *Dario v. Colliver*, 12th Dist. Butler No. CA2010-03-047, 2010-Ohio-5310, ¶ 18.

{¶ 26} We are sympathetic towards the trial court in this case, as it was difficult sorting through the evidence to ascertain which evidence was relevant, and whether or not the evidence was presented in the proper context. Because Wife's company is on a fiscal year running from May 1 to April 30, it was unclear at several points in Wife's testimony whether certain events occurred during a calendar year or the company's fiscal year. In addition, as

4. For the purposes of calculating child support, R.C. 3119.01(C)(7)(e) excludes "nonrecurring or unsustainable income or cash flow items" from a parent's gross income. The trial court excluded the moving expenses by deducting them from Wife's 2012 income. Husband argues the trial court should have deducted them from Wife's 2011 income instead. Yet, although there is a dispute as to the year in which the moving expenses should have been excluded, there is no dispute that the moving expenses were nonrecurring income that should not be included in Wife's gross income for the year they were paid.

noted above, the evidence submitted to the trial court by the parties did not provide the trial court with complete information regarding Wife's income from commissions in any year.

{¶ 27} The trial court's calculations for the child support award attributed an adjusted gross income of \$59,565 to Husband, and an adjusted gross income of \$130,789.40 to Wife. Wife's income included \$77,132 in commissions. In its October 2013 judgment, the trial court indicated that Wife did not begin working as a territory salesperson until 2012. Therefore, the court averaged the commissions it determined Wife to have earned in 2012, and the commissions it estimated she would earn in 2013.

{¶ 28} To calculate Wife's 2012 commissions, the court subtracted Wife's \$60,000 base salary from her reported W-2 earnings of \$209,047. The court also subtracted approximately \$69,000 in moving expenses incurred by Husband and Wife, but paid by Wife's employer. The court's final figure for 2012 was therefore \$80,205 in commissions. Next, the court extrapolated from what it believed to be all of the commissions Wife had earned in 2013 prior to the trial to estimate that Wife would earn a total of \$74,059 in commissions in 2013. The average of the court's figures for Wife's commissions in 2012 and 2013 was \$77,132.

{¶ 29} After a thorough review of the record, we find the trial court's calculation of Wife's income from commissions was not based on competent, credible evidence. To begin with, the record shows that Wife began her position as a territory salesperson in 2011, not 2012. Wife testified as such, and her testimony is supported by documentary evidence; Wife's sales reports date back to May 2011, and her W-2 earnings summaries show a drastic increase in her earnings between 2010 and 2011 (\$128,965.95 in 2010, to \$244,008.74 in 2011).

{¶ 30} In addition, the record indicates that Wife's employer paid the moving expenses in 2011. It is true that early in her testimony, Wife stated that her employer paid the moving

expenses in 2012. However, later in her testimony, Wife explained that the moving expenses were actually paid in 2011. The following exchange occurred at trial:

[ATTORNEY]: * * * Well, first of all, identify [Exhibit E], if you can.

[WIFE]: That's my W-2. This is the actual year we moved. I'm sorry, this is where the [moving expenses] will come into play.

[ATTORNEY]: And what was the year of this W-2?

[WIFE]: 2011.

[ATTORNEY]: And what does it show with your Medicare wages?

[WIFE]: [\$]244,000, which includes moving expenses and things like that * * *.

* * *

[ATTORNEY]: Let's look at Exhibit F if we could. Do you recognize that document?

* * *

[WIFE]: That's our moving expenses. * * * I believe the total is \$68,842.76 * * *.

[ATTORNEY]: So, those were all one-time payments to you in 2011 - -

[WIFE]: Yes.

{¶ 31} Thus, Wife's testimony, together with her W-2 from 2011 and her employer's documentation of the 2011 moving expenses, support Husband's position that the trial court should not have excluded the moving expenses by deducting them from Wife's 2012 income. That is, whereas the trial court attributed \$80,205 in commissions to Wife for 2012, it appears the figure should be closer to \$149,000. For this reason, we find that the trial court's calculation of Wife's 2012 income from commissions was against the manifest weight of the evidence.

{¶ 32} With respect to the trial court's estimate of Wife's 2013 income from commissions, we are not aware of any authority under which a trial court may include estimates of future income when it utilizes income averaging pursuant to R.C. 3119.05(H). R.C. 3119.05(A) provides that "parents' current and past income and personal earnings shall be verified by electronic means or with suitable documents, including, but not limited to, paystubs, employer statements, * * * tax returns, and all supporting documentation * * *." Ohio courts require that parents exactly adhere to this verification requirement for current and past income for the purposes of calculating child support. *Ornelas*, 2012-Ohio-4106 at ¶ 23, citing *Ostmann v. Ostmann*, 168 Ohio App.3d 59, 2006-Ohio-3617, ¶ 53 (9th Dist.). Thus, when R.C. 3119.05(H) permits the trial court to "average income over a reasonable period of years," it is implicit that the income to be averaged is actual, not anticipated, income.

{¶ 33} Moreover, Husband rightly points out that the trial court's estimate is based, in part, on figures the trial court mistakenly believed to be actual commissions for the months of September and October 2013. Because the trial took place in September 2013, it was, of course, not possible that the trial court possessed information regarding Wife's September and October 2013 sales commissions. Rather, the commissions identified by the trial court for those months appear to be Wife's commissions for September and October 2012, which were documented in her sales report for the 2013 fiscal year.

{¶ 34} For these reasons, we find the trial court's estimate of Wife's 2013 income from commissions was also against the manifest weight of the evidence.

{¶ 35} In light of the foregoing, Husband's first assignment of error is sustained.

{¶ 36} Assignment of Error No. 2:

{¶ 37} THE TRIAL COURT ERRED IN FINDING THAT IT WAS NOT IN THE CHILDREN'S BEST INTEREST TO INCREASE EITHER PARTY'S CHILD SUPPORT ABOVE THE \$150,000 LEVEL.

{¶ 38} In his second assignment of error, Husband challenges the trial court's decision not to increase Husband's and Wife's basic combined child support obligation above the level set in the child support obligation schedule for a combined income of \$150,000.

{¶ 39} Line 17 of the child support worksheet instructs the trial court to identify the "basic combined child support obligation" of the parents by referring to the schedule in R.C. 3119.021. However, because the maximum combined income listed in the schedule is \$150,000 per year, R.C. 3119.04(B) provides that if the combined gross income of both parents is greater than \$150,000 per year, the court shall determine the amount of the obligor's child support obligation on a case-by-case basis, considering the needs and the standard of living of the children and the parents. Unless the court determines that it would be unjust or inappropriate, the court must find a basic combined child support obligation that is at least as high as the obligation identified in the schedule for parents with a combined income of \$150,000 per year.

{¶ 40} The record shows that the trial court compared the respective child support obligations of Husband and Wife at the \$150,000 level with their respective obligations at their "actual" combined income of \$190,000, which was based upon the trial court's erroneous calculation of Wife's income. The trial court found that fixing child support obligations at the \$190,000 level would increase Husband's obligation by approximately \$1,900 per year, and Wife's obligation by approximately \$4,000 per year over the obligations imposed at the \$150,000 level. Based on the facts of the case, the trial court found it would not be in the best interest of the children or the parents to increase Husband's and Wife's respective obligations above the \$150,000 level.

{¶ 41} To the limited extent the trial court's decision on this issue was affected by the improper calculation of Wife's income, Father's second assignment of error is sustained.

{¶ 42} Assignment of Error No. 3:

{¶ 43} THE TRIAL COURT ERRED IN AWARDING THE MINIMAL AMOUNT OF \$300.00 PER MONTH AS AND FOR [SIC] SPOUSAL SUPPORT.

{¶ 44} In his third assignment of error, Husband argues the trial court's decision to award him only \$300 per month of spousal support for three years was unjust and inappropriate.

{¶ 45} In determining whether an award of spousal support is "appropriate and reasonable," and in determining the nature, amount, terms, and duration of spousal support, the trial court must consider the factors listed in R.C. 3105.18(C)(1). *Kedanis v. Kendanis*, 12th Dist. Butler No. CA2012-01-015, 2012-Ohio-3533, ¶ 19. One of these factors is the income of the parties. R.C. 3105.18(C)(1)(a).

{¶ 46} To the limited extent the trial court's determination of spousal support was based on the improper calculation of Wife's income, Husband's third assignment of error is sustained.

{¶ 47} Judgment reversed and the cause is remanded for further proceedings.

PIPER, P.J., and M. POWELL, J., concur.