

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

DAVID E. ORNELAS,	:	
Plaintiff-Appellant,	:	CASE NO. CA2011-08-094
- vs -	:	<u>OPINION</u>
	:	9/10/2012
CLOTILDE M. ORNELAS,	:	
Defendant-Appellee.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 2010DR34195

Michael J. Davis, 8567 Mason-Montgomery Road, P.O. Box 1025, Mason, Ohio 45040, for plaintiff-appellant

Christopher M. Alexander, 423 Reading Road, Mason, Ohio 45040, defendant-appellee

HENDRICKSON, P.J.

{¶ 1} Plaintiff-appellant, David E. Ornelas (husband), appeals a divorce decree of the Warren County Court of Common Pleas, Domestic Relations Division. For the reasons stated below, we partly affirm and partly reverse and remand the judgment of the trial court.

{¶ 2} Husband and defendant-appellee, Clotilde M. Ornelas (wife), were married in 1996, and three children were born during the marriage. Fourteen years later, on November

8, 2010, husband filed for divorce. A final hearing was held before the trial court on June 10, 2011.

{¶ 3} The evidence presented at the final hearing established the following relevant facts. In 2010, the couple had planned to visit husband's family in Mexico and wife's family in Texas. When the trip was cancelled, wife decided to take the children and visit her family in Texas for a summer vacation. Wife and the children left at the end of June. Both parties testified that they believed wife and the children would be returning to Ohio in a matter of weeks. However, in July, wife told husband that she was planning to stay in Texas permanently with the three children. She told him she was going to rent an apartment, look for a job, and enroll the children in school in Texas. During this time, wife also prepared divorce papers in Texas and sent them to husband. Although husband was aware that the children were staying in Texas at the beginning of the school year, he did not sign the Texas divorce papers, file for divorce in Ohio, or file a demand in court for the children to return to Ohio. In November, husband filed for divorce and requested the children return to Ohio. The trial court denied the request to return the children to Ohio, reasoning that it was not "comfortable" removing the children from school mid-year. Subsequently, the children remained in Texas with wife until the final hearing.

{¶ 4} During the marriage, husband was the primary wage earner. He has worked for the same employer for the past 13 years, and in 2010, he earned a salary of \$96,200. Husband testified that he has received yearly bonuses in the past but that he did not expect a bonus in 2011. Husband's employment required him to travel frequently. As a result, wife was the primary caregiver to the couple's three children although she worked a few jobs during the marriage. At the time of the hearing, wife was employed as a property manager earning \$30,000 a year. During the marriage, the couple incurred approximately \$50,423 of credit card debt. In addition to the credit card debt, husband was granted ownership of his

parent's residence in Mexico and then mortgaged the residence, in the amount of 3.5 million pesos.¹ This debt was part of a business plan where husband would use the mortgage money to build homes in Mexico and husband's parents would live off the proceeds. At the time of the final hearing, most of the proceeds from the mortgage of husband's parent's home were exhausted.

{¶ 5} On June 14, 2011, the trial court issued a written decision designating wife as the residential parent and legal custodian of the three children. Husband was granted six consecutive weeks of parenting time in the summer, one week of parenting time during Christmas, one week of parenting time during spring break, and at least one weekend of parenting time a month. The court determined that wife would be responsible for the travel expenses for summer visitation and that the parties would split the travel expenses associated with Christmas and spring break. The court ordered husband to pay \$1,103.81² per month and 13.5 percent of any gross bonus in child support. Additionally, husband was ordered to pay \$1,472.17³ per month and one-third of any gross bonus in spousal support to wife. The court granted wife the three tax exemptions for the children. Lastly, the court allocated the parties' marital debt. Husband was held responsible for the entire Mexico mortgage debt. He was also ordered to pay 62 percent of the marital credit card and contingent debt while wife was held responsible for 38 percent of the debt.

{¶ 6} Husband now appeals, raising six assignments of error. We will address these assignments of error out of order.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS

1. This is approximately \$291,667.

2. This amount does not include the 2 percent processing fee.

3. This amount does not include the 2 percent processing fee.

DISCRETION IN GRANTING [WIFE]'S REQUEST TO RELOCATE THE CHILDREN TO TEXAS WHEN ALLOCATING THE PARENTAL RIGHTS AND RESPONSIBILITIES IN THE FINAL DIVORCE DECREE.

{¶ 9} In husband's first assignment of error, he argues that the trial court erred when it designated wife the sole residential parent of the children and allowed wife to remain in Texas with the children.

{¶ 10} An appellate court reviews a trial court's custody determination for an abuse of discretion. *Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988); *Ruble v. Ruble*, 12th Dist. No. 2010-09-019, 2011-Ohio-3350, ¶ 10. An abuse of discretion constitutes more than an error of law or judgment; it requires a finding that the trial court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "The discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned." *Miller* at 74.

{¶ 11} In divorce proceedings, a domestic relations court must "allocate the parental rights and responsibilities for the care of the minor children of the marriage." R.C. 3109.04(A). If the parties fail to agree on a shared parenting plan or if neither party files a parenting plan that is consistent with the children's best interest, the domestic relations court "in a manner consistent with the children's best interest, shall allocate the parental rights and responsibilities for the children's care primarily to one of the parents, [and] designate that parent as the residential parent and legal custodian." *Id.* at (A)(1).

{¶ 12} In determining a child's best interest, the court must consider all relevant factors, including, but not limited to the enumerated factors in R.C. 3109.04(F)(1). The factors include "[i]f the court has interviewed the child in chambers * * * regarding the child's wishes and concerns as to allocation of parental rights and responsibilities," "[t]he child's

interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest," "[t]he child's adjustment to the child's home, school, and community," and "whether either parent has established a residence, or is planning to establish a residence, outside this state." *Id.* at (F)(1)(b)-(c), (j).

{¶ 13} A trial court has the inherent authority to decline a parent's request to relocate children during the initial custody determination. *Alvari v. Alvari*, 4th Dist. No. 99-CA-05, 2000 WL 133849, * 3 (Feb. 2, 2000); *Chirico v. Chirico*, 2nd Dist. No. 19722, 2003-Ohio-3238. Trial courts have this authority because the paramount concern of a custody determination is the "best interest of the child" and one of the factors in the "best interest" test is whether a parent will be establishing a residence out of state. *Alvari* at *3. However, a parent will not be denied custody simply because he or she wishes to relocate. *Chirico* at ¶ 15.; *Marshall v. Marshall*, 117 Ohio App.3d 182, 187 (3rd Dist.1997). As the Eighth District has held,

[t]he overwhelming weight of authority is to the effect that a nonresident or one who intends to become a nonresident will not be deprived of the right to custody of a child merely because of his nonresidence; and that if the best interests of the child will be promoted, custody will be awarded to nonresidents, the same as it would be to residents; one intending to become a nonresident will be permitted to remove the child to his or her new residence.

In re Marriage of Barber, 8 Ohio App.3d 372, 375 (8th Dist.1983).

{¶ 14} In *Chirico*, the Second District found that a trial court did not abuse its discretion when it awarded primary custody to a mother who was moving from Ohio to Utah and awarded father visitation for six weeks during the summer and two holidays. The court reasoned that although mother had moved frequently, mother provided a reasonable explanation for each of these moves. *Id.* at ¶ 24. Moreover, it was in the best interest of the child to be in mother's custody as mother was the child's primary caregiver, the child formed a close relationship with her half-siblings who lived with mother, and mother had liberally

allowed father to visit the child. *Id.*

{¶ 15} Upon a thorough review of the record, we do not find it was an abuse of discretion for the trial court to award custody to wife and to allow wife to remain in Texas. Although one of the best interest factors for a custody determination is whether a parent has established a residence outside of the state, the evidence shows that the other best interest factors lean in favor of wife being the residential parent. At the hearing, both wife and husband testified that husband's work involved significant traveling and that he was the primary wage earner while wife was the primary caregiver. Further, wife testified that husband was more interested in work and his activities than being involved with the children when he was at home. Although husband disagreed with this assertion, the trial court found wife to be more credible regarding this issue. The court also found that because of husband's extended absences, the children are more bonded with wife. Further, the evidence established that the children are used to changing schools, and even though the children did well in their school in Ohio, they were doing even better in their school in Texas. Wife also testified that most of her extended family lives in Texas and that they provide support for the children. One of the children expressed to the court that she wished to live with wife and remain in Texas.

{¶ 16} In finding that wife could stay in Texas with the children, the trial court reasoned,

No one should take this decision to mean that a party can uproot their children to another state and automatically be allowed to remain at that location. However, when a spouse has been permitted to establish some roots in another location, enroll the kids in school, obtain a job, and obtain substantial assistance from family without a prompt objection from the other party, it should be clear that a [c]ourt will not uproot the children again without substantial reason, especially where [wife] is the primary caregiver and [husband] has been an absent wage earner.

{¶ 17} We agree with the trial court that the factors discussed above establish that it is in the best interest of the children to remain in wife's custody in Texas. We also do not agree with husband's assertion that wife moved the children to Texas under the false pretense of a summer vacation. In this case, there was sufficient evidence to establish that wife initially went to Texas to visit her family and then decided later that she wanted a divorce. Therefore, we find that the trial court did not abuse its discretion in deeming wife to be the residential parent for the children and allowing her to remain in Texas. Husband's first assignment of error is overruled.

{¶ 18} Assignment of Error No. 3:

{¶ 19} THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE AMOUNT AND MANNER OF CHILD SUPPORT IT GRANTED TO APPELLEE/WIFE.

{¶ 20} In husband's third assignment of error, he argues that the trial court erred in the amount and manner of the child support award.

{¶ 21} Husband argues that the trial court erred when it awarded of 13.5% of his future bonuses as child support. Husband contends that this award amounted to a deviation from the child support schedule and that the trial court erred when it did not follow the proper deviation procedure pursuant to R.C. 3119.22. We would agree that the trial court erred by failing to follow the proper procedure for deviating child support under R.C. 3119.22. However, we find that the trial court erred on separate grounds. Specifically, we find that the trial court erred when it did not include husband's bonuses as part of his gross income for purposes of determining child support.

{¶ 22} We review a trial court's decision regarding child support for an abuse of discretion. *Murray v. Murray*, 128 Ohio App.3d 662, 666 (12th Dist.1999). Trial courts are required to include bonuses as income for purposes of child support determinations. R.C. 3119.01(C)(7) defines "gross income" as 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." Gross income does not include "non-recurring or unsustainable cash flow items" which are defined as income that a parent receives in any year, not to exceed three years that the parent does not expect to receive on a regular basis. *Id.* at (C)(7)(e) and (C)(8). In determining the gross income of a parent in regards to bonuses, the court is to include the lesser of either (1) "[t]he yearly average of all * * bonuses received during the three years immediately prior to the time when the person's child support is being computed" or (2) "[t]he total * * * bonuses received during the year immediately prior to the time when the person's child support obligation is being computed." R.C. 3119.05(D).

{¶ 23} For purposes of child support, a parent's income "shall be verified by electronic means or with suitable documents, including, but not limited to, paystubs, employer statements, receipts, and expense vouchers related to self-generated income, tax returns, and all supporting documentation and schedules for the tax returns." R.C. 3119.05(A). Courts have required that a parent must exactly adhere to this requirement and prove their current income by presenting those documents listed in R.C. 3119.05(A). *Ostmann v. Ostmann*, 168 Ohio App.3d 59, 2006-Ohio-3617, ¶ 53 (9th Dist.); *Ellis v. Ellis*, 7th Dist. No. 08-MA-133, 2009-Ohio-4964, ¶ 59-60. In *Ostmann*, the Ninth District held that a father's accountant's testimony that the father will not receive a bonus in the current year was insufficient to establish that the father's past bonuses should not be included in his gross income. *Id.* at ¶ 52. Instead, the court reasoned that "per statute, the trial court was restrained to review documents, not testimony, to establish [father's] income." *Id.* Therefore, the court found that the trial court must include the father's past bonuses in calculating his child support obligation. *Id.*

{¶ 24} In the final decree of divorce, the trial court ordered husband to pay \$1,103.81

per month in child support to wife. The decree also mandated that if husband is awarded any bonus during the term of child support, he shall pay wife 13.5 percent of the gross bonus. In calculating husband's child support obligation, the trial court relied on a child support computation worksheet. Despite husband's tax returns for the past three years showing substantial bonuses, the worksheet did not include these bonuses in the calculation of husband's gross income.

{¶ 25} We find that the trial court erred when it did not include husband's bonuses in determining his gross income for child support calculations. Furthermore, we find the present case is similar to *Ostmann*, as husband failed to present documents demonstrating that he would not receive a bonus in 2011, and instead merely presented testimony to this effect. Although "non-recurring" cash flow items are excluded from gross income, husband must present evidence properly verifying that his bonuses are "non-recurring." Allowing a party in a divorce proceeding to reduce his gross income level, and therefore his child support obligation, by testimony alone, without proper verification as required under R.C. 3119.05(A), is an abuse of the trial court's discretion. Accordingly, we find that the trial court erred when it did not rely on the documents in evidence in determining husband's gross income.

{¶ 26} In the vein of fairness, we also note that because the trial court retains jurisdiction to modify child support, husband is free to request a modification of his child support obligation if he fails to receive a bonus or his income changes and this results in a substantial change of circumstances. See R.C. 3119.79(A); *Loetz v. Loetz*, 63 Ohio St.2d 1, 2 (1980).

{¶ 27} Therefore, the trial court abused its discretion when it awarded a percentage of husband's bonuses for child support and did not include husband's past bonuses in calculating his gross income. Husband's third assignment of error is sustained.

{¶ 28} Assignment of Error No. 5:

{¶ 29} THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE AMOUNT AND MANNER IN WHICH IT DIVIDED MARITAL DEBT.

{¶ 30} In husband's fifth assignment of error, he argues that the trial court's allocation of marital debt, which allocated husband 62 percent of the debt while wife was given 38 percent, was inequitable. Specifically, husband argues that the trial court's division of marital debt is inequitable because wife will have the majority of the income after husband pays spousal support, child support, and taxes.

{¶ 31} A trial court has broad discretion in making a division of property in a divorce action. *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 1998-Ohio-403. A trial court's decision regarding property division will not be reversed absent an abuse of discretion. *Id.*

{¶ 32} In dividing marital property, the court must first classify the parties' property as either separate or marital. R.C. 3105.171(B). After the property has been classified, the court must then equitably divide the marital property. *Id.* at (C)(1). Although R.C. 3105.171(C)(1) does not explicitly mention debt, courts have found that the starting point for allocating marital property is an equal division of marital assets and debts. *Smith v. Smith*, 12th Dist. No. CA2001-10-251, 2002-Ohio-4232, ¶ 7.

{¶ 33} Pursuant to R.C. 3105.171(C)(1), "the division of marital property shall be equal." However, if a court determines that an "equal" division of property will not be "equitable," the court can order an unequal division of property. *Id.* It is axiomatic that "[e]quitable need not mean equal." *Cherry v. Cherry*, 66 Ohio St.2d 348, 355 (1981). Whether the trial court's division of property is equitable depends on the facts and the circumstances of each case. *Id.* The trial court shall divide the marital property prior to making any spousal support award and without regard to any spousal support award. R.C. 3105.171(C)(3). Moreover, spousal support given to a payee spouse is deductible from the payor spouse's gross income for federal income tax purposes. 26 U.S.C. 215(a); 26 U.S.C.

71.

{¶ 34} In this case, the parties have a mortgage on husband's parent's home in Mexico in the amount of 3.2 million pesos, credit card debt in the amount of \$50,423, and a contingent debt in the amount of \$2,000. The trial court found that the Mexico mortgage debt was primarily for the benefit of husband's parents and ordered husband to be solely responsible. Additionally, the court ordered that wife be responsible for 38 percent of both the credit card debt and the contingent debt while husband is responsible for 62 percent of the debt. The court recognized that this was an unequal division of debt but found this division equitable since the parties have a "significant disparity in income." It is undisputed that husband's current annual salary is \$96,200 and that he has in recent years earned substantial bonuses while wife's annual salary is \$30,000. At husband's current salary, he is in the 28 percent federal income tax bracket while wife is in the 15 percent federal income tax bracket.

{¶ 35} Under the facts and circumstances in this case, we do not find that "the division of the martial debt was 'inequitable.'" The evidence established that husband's salary is significantly higher than wife's salary, he has been employed at the same company for 13 years, he has received pay raises for the past four years, and he has been awarded substantial bonuses in previous years. Furthermore, husband's argument that wife will have more income than he is inaccurate. As stated above, the trial court was prohibited from considering husband's spousal support payments in regards to the division of martial property. Moreover, the amount of taxes husband alleges he will have to pay fails to take into account the alimony deduction, which will actually cause husband and wife to be in the same tax bracket. Even after husband pays his child support obligations and taxes, his total income will be approximately \$58,975 while wife's total income will be approximately \$35,675. Husband will be earning 62 percent of the total income between the pair while he

will also not be the residential parent for the parties' three children. Therefore, while the division of debt may not be equal, we find it equitable. See *Williams v. Williams*, 12th Dist. No. CA93-10-206 (Aug. 15, 1994); *Roberts v. Roberts*, 12th Dist. No. CA91-04-007, 1991 WL 278254 (Dec. 30, 1991).

{¶ 36} We find that the trial court did not abuse its discretion in the division of marital debt. Husband's fifth assignment of error is overruled.

{¶ 37} Assignment of Error No. 2:

{¶ 38} THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE AMOUNT AND MANNER OF SPOUSAL SUPPORT IT GRANTED TO APPELLEE WIFE.

{¶ 39} In husband's second assignment of error, he challenges the trial court's spousal support award. Specifically, husband argues that the trial court erred when it awarded a spousal support award that was based on a percentage of his bonuses. Additionally, husband argues that the trial court erred because after paying spousal support, he will be unable to pay his monthly expenses.

{¶ 40} A trial court has wide latitude in determining whether an award of spousal support is proper based on the facts and circumstances of each case. *Beamer v. Beamer*, 12th Dist. No. CA2009-08-107, 2010-Ohio-3143, ¶ 23, citing *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67 (1990). In turn, "absent an abuse of discretion, a spousal support award will not be disturbed on appeal." *Hutchinson v. Hutchinson*, 12th Dist. No. CA2009-03-018, 2010-Ohio-597, ¶ 16.

{¶ 41} A trial court may order an award of reasonable spousal support to either party in a divorce proceeding. R.C. 3105.18(B). In determining the nature, amount, and terms of payment and whether the spousal support is "appropriate and reasonable" the court will look at several factors. These factors include each party's income, earning abilities, age, retirement benefits, education, assets and liabilities, the duration of the marriage, their

standard of living, contributions during the marriage, the tax consequences of spousal support, and lost income capacity due to a party's fulfillment of marital responsibilities. *Brickner v. Brickner*, 12th Dist. No. CA2008-03-081, 2009-Ohio-1164, ¶ 21, citing R.C. 3105.18(C)(1)(a)-(m). A trial court is also free to consider any other factor it deems relevant and equitable. *Brickner* at ¶ 21, citing R.C. 3105.18(C)(1)(n).

{¶ 42} This court has recently clarified our jurisprudence regarding "need" and spousal support awards. *Kedanis v. Kedanis*, 12th Dist. No. CA2012-01-015, 2012-Ohio-3533. In *Kedanis*, we explained that our decision in *Carnahan v. Carnahan*, 118 Ohio App.3d 393 (12th Dist.1997) overemphasized establishing "need" of the payee spouse for a spousal support award. *Id.* at ¶ 18. Therefore, to the extent that *Carnahan* imposed "an overriding 'need' requirement rather than a balanced review of the R.C. 3105.18(C)(1) factors in determining what is appropriate and reasonable" it was overruled. *Id.* Instead, "a trial court must consider each of the factors listed in R.C. 3105.18(C)(1) * * * [n]eed is but one factor among many that the trial court may consider in awarding reasonable and appropriate spousal support." *Id.* at ¶ 19.

{¶ 43} In appellant's brief, he cites *Sutmoller v. Sutmoller*, 12th Dist. No. CA2011-03-020, 2011-Ohio-5450, in which this court found that a spousal support award that was based on a fixed amount and a percentage of the payor's spouse's income was in error. In so holding, we cited our opinion in *Carnahan*, which found that a spousal support award must be based on need. *Id.* at ¶ 9. In *Sutmoller*, we reasoned that a percentage spousal support award would fluctuate and therefore could not be based on the payee spouse's need. *Id.* at ¶ 12.

{¶ 44} We find that our recent decision in *Kedanis* requires that *Sutmoller* be overruled to the extent that it reversed the spousal support percentage award because it was not based on the payee spouse's need. We find that a spousal support award that is a percentage of a

payor spouse's income is not a per se abuse of the trial court's discretion.⁴ Instead, we will conduct a balanced review of the R.C. 3105.18(C)(1) factors as well as "need."

{¶ 45} In the present case, the court determined that spousal support was appropriate and reasonable under R.C. 3105.18(C). The trial court found that husband is 39 years old, has been employed at the same company for the past 13 years, and earns a salary of \$96,200. Husband also has earned significant bonuses for the past three years ranging from \$9,600 to \$14,000, although he testified that he does not expect a bonus in 2011. Wife is 38 years old and currently earns \$30,000 per year as a property manager. The court ordered husband to pay wife \$1,472.17 per month in spousal support for the next four years, either party's death, or wife's remarriage or cohabitation with an unrelated person in a relationship similar to marriage. Additionally, husband was ordered to pay wife, as spousal support, one-third of any gross bonus.

{¶ 46} Upon a thorough review of the record, we find that the trial court did not abuse its discretion in awarding wife \$1,472.71 per month for spousal support and one-third of any bonuses husband receives. It is clear that husband has more earning ability and that during the marriage husband was the primary wage earner. The evidence established that since at least 2007, husband has earned substantial bonuses and yearly raises. He has also been employed at the same company for 13 years. On the other hand, wife spent the majority of the marriage caring for the couple's three children. Although wife is currently employed, at the time of the hearing she had been at her job for less than a year. Her salary was \$30,000. The parties have also been married for 14 years. There was plenty of evidence that based on the facts and circumstances of this case and the factors of R.C. 3105.18(C), spousal

4. We recognize that the Ohio Supreme Court's decision in *Kunkle v. Kunkle*, 51 Ohio St.3d 64 (1990), which found that a percentage spousal support award is in error when the award is in the form of a penalty or is not based on the payee's need is still valid to the extent that a spousal support award must not be a penalty. However, due to the reasons explained in *Kedanis*, need is but one of many factors to be considered in issuing a spousal support award.

support in the amount of \$1,471.71 per month and one-third of husband's bonuses was appropriate and reasonable.

{¶ 47} Furthermore, we find that the spousal support award was reasonable despite husband's argument that the award renders him unable to pay his monthly expenses. Husband's income is \$96,200 per year before tax. After federal income taxes are deducted, husband's yearly income will be approximately \$72,150. As discussed in the fifth assignment of error, husband will be able to deduct the entire amount of spousal support from his taxable income and thus fall into a lower tax bracket. After deducting husband's child and spousal support obligations, his disposal income will be \$41,309 a year. On the other hand, after deducting wife's federal income tax obligation, wife will have \$48,924 from her yearly salary, child support, and spousal support. We do not find that this award constituted an abuse of discretion as wife will be responsible for supporting herself and three children on a moderately higher income than husband. Thus, we find that the trial court did not abuse its discretion in awarding spousal support to wife as spousal support was reasonable and appropriate based on the statutory factors of R.C. 3105.18(C)(1).

{¶ 48} The trial court did not abuse its discretion when it awarded wife the monthly spousal support payments of \$1,472.17 and one-third of husband's bonuses. Husband's second assignment of error is overruled.

{¶ 49} Assignment of Error No. 4:

{¶ 50} THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE AWARDING TO APPELLEE/WIFE ALL THREE (3) TAX EXEMPTIONS/DEDUCTIONS FOR THE PARTIES' MINOR CHILDREN. [SIC].

{¶ 51} In husband's fourth assignment of error, he argues that the trial court erred when it awarded the tax exemptions for the children to wife. Husband contends that he would receive a greater tax benefit than wife and thus he should have been awarded the tax

exemptions.

{¶ 52} An appellate court reviews a trial court's decision allocating tax exemptions for dependents under an abuse of discretion standard. *Rainey v. Rainey*, 12th Dist. No. CA2010-10-083, 2011-Ohio-4343, ¶ 38. However, this discretion is both guided and limited by the statutory requirements of R.C. 3119.82. *Pahls v. Pahls*, 12th Dist. No. CA2009-01-005, 2009-Ohio-6923, ¶ 21.

{¶ 53} When a trial court issues, modifies, or reviews a child support order, the court must decide which parent will receive the tax exemption for the minor children. R.C. 3119.82. The Internal Revenue Code creates a presumption in favor of awarding the tax exemption to the residential parent. *Burns v. May*, 133 Ohio App.3d 351, 356 (12th Dist. 1999); *Pahls* at ¶ 22. See 26 U.S.C. 152(e). However, a court may grant the non-residential parent the tax exemption for federal income purposes, if the court determines that this furthers the best interest of the children and the payments for child support are substantially current as ordered by the court for the year in which the child will be claimed as a dependent. *Pahls* at ¶ 22; R.C. 3119.82. If there is a disagreement as to which parent should claim a child as a dependent, "the burden is on the nonresidential parent to produce competent and credible evidence to show that allocating the dependency exemption to the nonresidential parent would be in the best interests of the child." *Meassick v. Meassick*, 171 Ohio App.3d 492, 2006-Ohio-6245, ¶ 15 (7th Dist.).

{¶ 54} In cases in which the parents do not agree on the allocation of the child tax exemption, the court shall consider the following factors: (1) any net tax savings, (2) the relative financial circumstances and needs of the parents and child, (3) the amount of time the child spends with each parent, (4) the eligibility of either or both parents for the federal earned income tax credit or other state or federal tax credit, and (5) any other relevant factor concerning the best interest of the child. R.C. 3119.82; *In re A.E.G.-D.*, 12th Dist. No.

CA2011-04-031, 2012-Ohio-547, ¶ 7. A trial court does not abuse its discretion in granting tax exemptions to the residential parent even though the non-residential parent would have received a greater tax benefit than the residential parent. *Burns v. Burns*, 12th Dist. No. CA2011-05-050, 2012-Ohio-2850, ¶ 28.

{¶ 55} We disagree with husband's claim that the trial court abused its discretion in awarding wife all three of the tax exemptions for the parties' children. Although husband would receive a greater tax benefit if granted the tax exemptions, this fact alone does not result in an abuse of discretion by the trial court. As discussed above, the court determined husband to be the nonresidential parent. Therefore, there is a presumption of allowing wife the tax exemptions. Other factors also support the trial court's decision that wife should receive the tax exemptions. Husband earns substantially more income, has a much longer employment history, and has a greater earning ability than wife. Although after the exchange of spousal and child support, husband and wife's income will be substantially similar, wife must support three children on almost the same income as husband. Moreover, as the residential parent, wife will be spending much more time with the children. Husband has failed to provide any evidence except that he will receive a greater tax benefit than wife to show that he should be awarded the tax exemptions pursuant to R.C. 3119.82.

{¶ 56} In light of the foregoing, we find that the trial court did not abuse its discretion in awarding wife all three tax exemptions for the parties' minor children. Husband's fourth assignment of error is overruled.

{¶ 57} Assignment of Error No. 6:

{¶ 58} THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE AMOUNT AND MANNER IN WHICH IT DIVIDED TRAVEL EXPENSES.

{¶ 59} In husband's sixth assignment of error, he argues that the trial court abused its discretion in the division of travel expenses associated with visitation. Husband argues that

the division of travel expenses was an abuse of discretion because he has less income than wife. He also argues that the trial court should have ordered a deviation in child support to account for travel expenses.

{¶ 60} When fashioning a visitation order for a non-residential parent, trial courts are required to issue an order that is "just and reasonable" under all the conditions the court directs. R.C. 3109.051. See *Carlson v. Carlson*, 3rd Dist. No. 14-88-20, 1990 WL 72413, *4 (citing R.C. 3109.05[B], which has since been modified but is similar to R.C. 3109.051). Although, there is not an express statutory provision authorizing trial courts to allocate travel expenses associated with visitation, courts have found that trial courts possess this authority. *Carlson* at *4; *Rayner v. Rayner*, 2nd Dist. No. 14011, 1994 WL 312930, *10 (June 29, 1994). In determining whether a trial court abused its discretion in allocating travel expenses, courts have considered the relative income of the parents and whether one parent moved from the place of residence. *Burnett v. Burnett*, 2nd Dist. No. 02-CA-04, 2002-Ohio-3561. In *Burnett*, a visitation order that required a mother to bear the entire expense associated with visitation was affirmed where the mother earned substantial more income than the father and where mother voluntarily moved away from the couple's marital residential area. *Id.* at ¶ 36.

{¶ 61} In the present case, the trial court ordered wife to be solely responsible for the costs of transportation for summer parenting time and then ordered husband and wife to equally spilt transportation costs for Christmas and Spring Break. The court then ordered husband to be responsible for all other transportation costs. As noted above, husband earns substantially more income than wife. Even though after taxes, spousal support and child support, wife will have slightly more disposal income than husband, her income must support herself and three children. Moreover, although wife moved the children away from husband, the trial court required her to bear the majority of the travel expenses. Husband also acquiesced in wife's move to Texas as he did not object or file an ex parte temporary order to

return the children to Ohio until several months after he was informed that the children would be staying in Texas. In light of the facts and circumstances of this case, we do not find that the trial court abused its discretion in its division of travel expenses associated with visitation.

{¶ 62} We also disagree with husband's contention that the trial court erred when it failed to decrease the amount of child support because of the travel expenses associated with visitation. A trial court may order 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 the amount calculated would be unjust or inappropriate and would not be in the best interest of the child. R.C. 3119.22. *See also, Marker v. Grimm*, 65 Ohio St.3d 139, 143 (1992). When determining whether a departure from the guideline child support amount is warranted, the trial court may consider whether a parent incurs extraordinary costs associated with visitation. R.C. 3119.23(D). If the parent incurs extraordinary travel costs, a downward deviation will only be granted if the trial court further finds that such a deviation is in the children's best interest. *Id.* As discussed above, husband makes substantially more income than wife and acquiesced to her move to Texas with the children. Moreover, the trial court's award requires wife to bear the majority of the travel expenses associated with visitation. Thus, we do not find that the trial court erred in its allocation of travel expenses associated with visitation.

{¶ 63} Husband's sixth assignment of error is overruled.

{¶ 64} Accordingly, we reverse the trial court's child support award to the extent that it did not include husband's bonuses as part of his gross income for purposes of child support calculation and remand for the trial court to recalculate husband's gross income based on the documents presented in accordance with R.C. 3119.05(A). We affirm the remainder of the court's decision.

PIPER, J., concurs.

RINGLAND, J., concurs in part and dissents in part.

RINGLAND, J., concurring in part and dissenting in part.

{¶ 65} I respectfully concur in part and dissent in part from the majority's decision. I concur with the majority's resolution of Husband's first through fifth assignments of error. However, I dissent as to the sixth assignment of error as I would find that the trial court abused its discretion in allocating travel expenses where Wife chose to move the children to Texas and has greater disposable income than Husband after factoring in payment of child and spousal support.

{¶ 66} The majority correctly recites that in allocating travel expenses, courts have considered the relative income of the parents and whether one parent moved from the place of residence. *Burnett*, 2002-Ohio-3561. While Husband earns significantly more than Wife, the court compensated for this in awarding Wife support sufficient to raise her disposal income level above that of Husband. In addition, the court burdened Husband with the greater proportion of the parties' debts, awarded wife a greater net portion of Husband's bonuses, and granted her all three of the tax exemptions for the parties' children. Despite the court having placed Wife in a position with greater disposable income than Husband, and despite Wife having made the decision to move the children a significant distance from Husband, thus causing travel expenses to grow exponentially, the court ordered what amounts to an equal allocation of travel expenses if Husband wishes to see the children with any frequency.

{¶ 67} On principles of fairness and equity, I would find that the trial court abused its discretion in allocating travel expenses given the post-support income of the parties and the fact that it was Wife who chose to move the children away from the place of residence.

{¶ 68} Therefore, I respectfully dissent from the majority's decision as to the sixth

assignment of error and would find the trial court erred in its division of travel expenses.

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