

IN THE SUPREME COURT OF OHIO

07 - 1320

Marka M. Tonti,	:	
	:	
Appellee,	:	On Appeal from the
	:	Franklin County Court
v.	:	of Appeals, Tenth
	:	Appellate District
	:	
Thomas . Tonti,	:	Court of Appeals
	:	Case No. 06AP-732
Appellant.	:	C.P.C. No. 92DR-06-3173

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT THOMAS A. TONTI

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 JUL 19 2007  
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 SUPREME COURT OF OHIO

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**I. EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS ALSO A CASE OF GREAT PUBLIC INTEREST**

It is an unfortunate and undesirable outcome of modern Ohio society that over 50% of all marriages end in divorce. Because of this high divorce rate, a substantial proportion of Ohio citizens find themselves in the unenviable position of either raising their children while divorced from the other parent or as children who are raised in two households.

All psychological and sociological studies show that children are much better off and have a higher chance of success as adults in society if they have a strong relationship with both their father and mother.

This evidence, that children are better off being raised by both parents even when they are divorced, has led to an incredible surge in joint custody, or Shared Parenting, in the last 30 years. This case looks at the treatment of Shared Parents by Judges and the statute to examine whether parents' constitutional rights are being adequately protected by the statute and the way the current system operates. As such, an extremely large number of Ohioans have an interest in the outcome of this case.

Constitutional Issues:

This case raises two of the most basic constitutional issues. The first has to do with the rights of individuals that are similarly situated to be treated as equals under the law (U.S. Constitution 14<sup>th</sup> Amendment, Ohio Constitution Article I Section 2).

It is Appellant's contention that the legislature properly has defined Shared Parents as members of the same class and has laid out a procedure that, when properly followed, treats both parents similarly by subjecting both parents to the same procedure (1 - determining income for each parent; 2 - determining the presumptive obligation of each parent; 3 -- performing a Deviation Analysis on each parent; 4 -- granting each parent an appropriate deviation; 5 -- determining how much, if any, financial support should be transferred to the other parent).

However, in this case, and numerous other similar cases, the courts have trampled on one Shared Parent's constitutional rights by treating the parents dissimilarly as follows:

Parent A

- 1) Determine income
- 2) Determine presumptive obligation
- 3) Perform deviation analysis
- 4) Grant appropriate deviation
- 5) Determine how much, if any, financial support should be transferred to parent B

Parent B

- 1) Determine Income
- 2) Determine presumptive obligation
- 3) Do not perform deviation analysis
- 4) Do not grant appropriate deviation
- 5) Do not determine how much, if any, financial support should be transferred to parent A

Appellant shows where the legislature defines Shared Parents as members of same class.

Appellant lays out the procedure the legislature prescribed in order to obtain a constitutionally sound procedure that actually treats equals as equals. The problem that exists in practice today is that most jurists do not follow the legislature's prescribed methodology. The result is most jurists treat Shared Parents dissimilarly as outlined above. This disparate treatment violates the parents' constitutional rights.

The second constitutional issue is a basic "Due Process Argument". One of the fundamental rights of Ohio and U.S. law is that all legal decisions consist of a two step method - first, determining the facts and second applying the law to the facts. In this case, the Magistrate made an incorrect determination of many crucial facts and then applied the law. Once the Trial Court appropriately corrected the incorrect factual assumptions made by the Magistrate the matter was sent back to the Magistrate. Instead of analyzing the correct facts and applying the law based on the real facts, the Magistrate refused to reanalyze the situation based on the correct facts and simply reissued the same conclusion of law. In essence, this case was decided by making "findings of fiction" (not fact) and applying the law to those fictions. To date, there has not been a legal decision that is based on the correct factual findings. When Appellant requested that the Magistrate reanalyze the situation under the real facts, the Magistrate refused. The Trial

Court also refused to order the Magistrate to do so and neither did the Court of Appeals. Thus, there has not been Due Process.

## **II. STATEMENT OF THE CASE AND FACTS**

### **A. Statement of the case.**

This case began as a post-decree motion for an increase in Appellant’s child support obligation. There followed a ten-day trial to a Magistrate, who issued a decision to which Appellant objected. The Judge reversed on several legal items and corrected numerous facts and remanded to the Magistrate for further action. The Magistrate issued a second decision without considering the corrected facts, therefore Appellant also objected. The Judge overruled all of Appellant’s objections and granted the motion to increase child support. The Franklin County Court of Appeals affirmed in part and reversed and remanded in part.

Upon remand from the Court of Appeals, the Magistrate issued a decision and the Trial Court for the first time decided on the merits whether Appellant’s treatment was constitutional. The Trial Court said it was. Appellant appealed to the Appeals Court this issue and the Appeals Court affirmed the Trial Courts’ ruling that Appellant did not have his constitutional rights violated.

### **B. Statement of facts.**

The facts as they relate to the “equal treatment” constitutional issue are as follows. The parties entered into a Shared Parenting agreement [which included the children spending 50% of the time residing with each parent].

As a part of rendering a decision, the Magistrate analyzed the parents as follows:

	<u>As to Appellant</u>	<u>As to Appellee</u>
Step 1:	Determined Appellant’s income	Determined Appellee’s income
Step 2:	Determined presumptive obligation	Determined presumptive obligation
Step 3:	Performed deviation analysis	Did not perform deviation analysis

Step 4:	Granted deviation (offset)	Did not grant deviation (offset)
Step 5:	Determined how much should be transferred	Did not determine if anything should be transferred to other parent

The treatment outlined above clearly treats one parent substantially different than the other.

The questions relating to this treatment that must be asked and answered are as follows:

- 1) In Shared Parenting, are the parents members of the same class that constitutionally must receive the same treatment?
- 2) In Shared Parenting, does the statute mandate this dissimilar treatment?
- 3) If the answer to #1 is yes, what is the proper treatment for dealing with Shared Parents?

Does a constitutionally sound method exist in the current statute?

- 4) If one concludes that Shared Parents are members of the same class, and a constitutionally sound methodology to treat Shared Parents similarly exists in the statute, this court must conclude that the Magistrate and Trial court deprived Appellant of his constitutional rights and must remand back to the Trial Court and order them to follow the methodology outlined in the statute. In the alternative if one concludes that Shared Parents are members of the same class but the statute does not provide a methodology consistent with the requirement to treat members of the same class similarly, then then The Court must declare the statute as it relates to Shared Parents unconstitutional. Only if one concludes that Shared Parents are not members of the same class can one affirm the Appellate Court decision.

### III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of law #1** - The former ORC 3113.215 when properly followed is constitutional. However, in this case, the Magistrate and Trial Court misapplied the law in such a way that two members of the same class were treated differently thereby denying Appellant his constitutional rights.

Both the U.S. and Ohio Constitutions guarantee "equal protection" under the law to its citizens. U.S. Constitution , fourteenth amendment ("no state shall deny to any person within its

jurisdiction the equal protection of the laws.”) Ohio Constitution, Article I Section 2 (“All political power is inherit in the people. Government is instituted for their equal protection and benefit....”)

Appellant contends that the former ORC 3113.215 requires that in shared parenting situations that parents be treated similarly as required by both the U.S. and Ohio Constitutions. However, in this case, the Magistrate and Trial Court failed to properly follow the methodology prescribed in the statute. The result is the Appellant was deprived his U.S. 14<sup>th</sup> Amendment and Ohio Article I Section 2 Constitutional rights. Appellant further states that the type of methodological error that occurred in this case is rampant within the Ohio Domestic Court system and thousands of Ohio citizens are having their constitutional rights trampled on.

The legislature has clearly and unequivocally defined shared parents as being members of the same class. The legislature has defined three classes of Parents, a) sole custodial parents – or sole residential parent and sole legal custodian; b) non custodial parents; c) shared parents.

The question is, are Shared Parents by definition meant to be considered as members of the same class? That the legislature clearly intends this to be the case is readily apparent when looking at the former ORC 3109.04(K)(6) which states:

“...if an order is issued by a court pursuant to this section and the order provides for shared parenting of a child, each parent, regardless of where the child is physically located or with whom the child is residing at a particular point in time, as specified in the order, is the “residential parent” the “residential parent and legal custodian,” or the “custodial parent” of the child.” (emphasis added)

If both parents are always custodial parents, then in Shared Parenting cases the parents are equals. A further look to the former ORC 3109.03 absolutely puts to rest any consideration that shared Parents are members of the same class.

#### **O.R.C. 3109.03 Equal Parental Rights of Father and Mother**

“When husband and wife are living separate and apart from each other, or are divorced, and the question as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children is brought before a court of competent jurisdiction, they shall stand upon an equality as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children, so far as parenthood is involved.” (emphasis added)

This statement clearly indicates that the parents are to be treated as equals. The allocation of the responsibility of providing economic support is a “parental right”. Therefore, when determining the allocation of the economic support between two Shared Parents, the same test or methodology must be used for each parent. Shared Parents are similarly situated.

The different treatment given Appellant and Appellee occurs in steps 3, 4 and 5 of a 5 step process.

Step 1 - Determine Income – this was done similarly for each parent (worksheet line 14)

Step 2 - Determine Presumptive Obligation of each parent – this also was done similarly (worksheet line 24)

Step 3 - For Appellant thereafter the fact that the Magistrate performed a “deviation analysis” on Appellant is absolutely clear as determined by the Magistrate’s statement that Appellant should be granted a “deviation of over 37%”(i.e.37.38%.) (Krippell decision 9/18/2000 pg 20).

Step 3 - For Appellee the fact that the Magistrate did not perform a deviation analysis on Appellee is also absolutely clear. Nowhere in either Magistrate’s 1<sup>st</sup> decision (9/18/00) or Magistrate’s 2<sup>nd</sup> decision (6/12/02) does Magistrate state that Appellee should be “granted a deviation in any amount from Appellee’s presumptive obligation”.

Step 4 – Appellant was granted a deviation. Step 4 – For Appellee was not performed.

Step 5 – For Appellant it was determined how much should be transferred to Appellee.

Step 5 – For Appellee the Magistrate failed to determine if Appellee should or should not transfer anything to Appellant.

In fact, the way Appellant and Appellee were treated by the Magistrate was no differently than the Magistrate would act in a sole custody situation. The failure to treat both parties the same by performing a deviation analysis on both and determining how much of a deviation

should be granted to each is the dissimilar treatment.<sup>1</sup>

Since the legislature has properly labeled Shared Parents as members of the same class requiring similar treatment, we must ask does the former ORC 3113.215 require the dissimilar treatment that occurred in this case (putting one parent through the “deviation analysis” test and determining how much of an offset or deviation that parent should receive and not putting the other parent through the same test)? Or was the failure to put both parents through the same test or procedure a methodological error made by the Magistrate and the Trial Court which thereby deprived Appellant of his constitutional rights? If the answer to the first question is yes then the statute is unconstitutional. If the answer to the second question is true then the Magistrate erred and abused her discretion by misapplying the statute in an unconstitutional manner.

It is Appellant’s contention that the former O.R.C. 3113.215 does require that in Shared Parenting situations that the parents be treated similarly.

The evidence that former O.R.C. 3113.215 requires that in shared parenting cases the parents be treated similarly:

- A. ORC 3109.04 (K)(6) previously cited (see page 5 for discussion)
- B. ORC 3109.03 previously cited (see page 6 for discussion)
- C. The Work Sheet**

The basic “Child support computation Sole residential parent or shared parenting order worksheet” ORC 3113.215(E) is used in common in both sole custody cases and shared parenting cases. However the legislature inserted a very important statement on the worksheet that makes it clear the Court is to treat shared parenting cases differently than they do in sole

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<sup>1</sup> Some may argue that in Magistrate’s 1<sup>st</sup> decision The Magistrate did list some expenditures paid by Plaintiff and state that this constitutes a deviation analysis on Plaintiff. That argument is incorrect. The fact is that since the Magistrate did not make a conclusion that Plaintiff should be “granted a deviation from Plaintiff’s line 24 presumptive obligation of \$4,404”, as to the 9/18/00 decision (or \$5,463.73 from the 6/12/02 decision) means that the Court did not perform a deviation analysis on Plaintiff. Further, the Court did not grant plaintiff a deviation (again dissimilar treatment) and did not determine how much, if any, financial support should be transferred to the other parent. Thus the Court treated members of the same class dissimilarly in violation of the constitution.

custody cases. That language is inserted near the top of the worksheet O.R.C. 3113.215(E), in its entirety, it reads as follows:

“The following parent was designated as the residential parent and legal custodian: (disregard if shared parenting order)”. (Emphasis Added.)

Since neither parent is designated as “residential parent and legal custodian” neither is entitled to the presumption<sup>2</sup> that their presumptive obligation is being spent on the children then this section of the statute tells us that in Shared Parenting cases both parents must earn any offsets or adjustments to their presumptive obligation by going through the deviation analysis and “earn” or “prove” that they are meeting all or part of their financial obligation to the children by making direct expenditures on them. The Court, after performing a deviation analysis on each parent, must then make a conclusion as to how much, if any, of a deviation is to be granted to each parent.

By performing a deviation analysis on each parent and determining how much each spends directly on the children and then determining the amount of deviation, offset or adjustment each parent is to receive the statute complies with the requirement for equal treatment of similarly situated individuals. In this case the Magistrate did not perform a deviation analysis on each parent. The treatment the Magistrate applied to the parents was identical to what it would have been if the case were a sole custody case.

D. The different standard for granting a deviation between Sole Custody cases and Shared Parenting cases.

E. The former O.R.C. 3113.215 specifies starkly different standards for deviating from a parent’s presumptive child support obligation in shared parenting situations then is called for in sole custody cases.

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<sup>2</sup> The former 3113.215(C) clearly states that, except in split parenting situations,

“a parent’s child support obligation for a child for whom the parent is the residential parent and legal custodian shall be presumed to be spent on that child and shall not become a part of the child support order.” It further states “and a parent’s child support obligation who is not the residential parent and legal custodian shall become part of a child support order”.(emphasis added)

In sole custody cases, the language that sets out when a court should not follow the line 24 presumptive child support obligation of the obligor i.e. the non-custodial parent is listed at O.R.C.3113.215 (B)(1)(b) and B 2(c)(i). O.R.C.3113.215 (B)(1)(b) “through line 24...its determination that that amount would be unjust or inappropriate and would not be in the best interest of the child.” O.R.C. 3113.215 B(2)(c)(i) The Court after “through line 24... would be unjust or inappropriate and would not be in the best interest of the child.”

Contrast the above language with the language used for Shared Parenting cases O.R.C. 3113.215(B)(6)(a) “If a Court issues a shared parenting order....through line 24, except that, if the application of the schedule and the worksheet, through line 24, would be unjust or inappropriate to the children or either parent and would not be in the best interest of the child because of the extraordinary circumstances of the parents.” (Emphasis added)

Further note that in O.R.C. 3113.215 B 6(b), the expenses each parent spends directly on the children are to be considered “extraordinary circumstances” of each parent.

Clearly in shared parenting cases the deviation standard is starkly different from the deviation standard for sole custody.

The biggest difference is as follows:

The language of sole custody cases clearly applies to only one person, the non custodial parent. Whereas the language for Shared Parenting, when talking about deviating it clearly applies to both parents. i.e. “either parent”

The reason it speaks of both parents is because both parents are supposed to go through the deviation analysis. Each parent must demonstrate to the court the amount she/he spends directly for the children and (providing those expenses for the children are ordinary, necessary and reasonable) the Court should grant each parent a deviation (or offset) against the parents’ line 24 presumptive child support obligation in the amount of any and all ordinary, reasonable and necessary expenditures each spends for the benefit of the children because that fits the definition of “extraordinary circumstances”.

If in shared parenting only one parent was to be considered for a “deviation” from their line 24 presumptive obligation the statute would not say “either parent”, either parent clearly means both parents, mother and father.

Again the Legislature installed this different language because the Legislature recognized that in Shared Parenting cases both parents are members of the same class and the Legislature recognizes the constitutional obligation it has to treat both parents similarly in Shared Parenting cases.

E. The Statute specifies that in shared parenting situations the instruction not to designate either the Mother or the Father as legal custodian means for worksheet purposes that both parents are to be treated as non-custodial parents.

Earlier we discussed the instructions on the child support worksheet O.R.C. 3113.215(E) to “disregard if Shared Parenting order” which parent is the legal custodian. The significance of the statement is clearly hammered home when it is viewed and in conjunction with O.R.C 3113.215 (C) which clearly states that, except in split parenting situations,

“a parent’s child support obligation for a child for whom the parent is the residential parent and legal custodian shall be presumed to be spent on that child and shall not become a part of the child support order,” it further states “and a parent’s child support obligation who is not the residential parent and legal custodian shall become part of a child support order”. (emphasis added)

The Legislature did not intend in shared parenting cases for one parent’s obligation to be presumed to be spent on the children and the other parent not to receive that benefit because they realized that to do so would be unconstitutional.

Another possibility that treats both parents similarly would be to “presume that both parents child support obligation is being spent on the children”. The problem with this is that would in no way protect the interests of the children. Since the children’s interests would not be protected, it must be excluded because it would not fulfill one of the primary purposes of the statute which is to make sure the children’s interests are protected.

The exclusion of the above approach leaves one method that: a) protects the children's interest and b) treats similarly situated individuals similarly.

Appellant contends that in shared parenting cases since neither parent's support obligation is to be "presumed to be spent on the children", the legislature clearly intended that both parents need to go through the deviation process, i.e. both parents should lay out for the Court the direct expenditures that each incurs for the children. This way the court can do the following analysis:

a.) Determine from the evidence and make findings as to what each parents' actual, ordinary, necessary and reasonable expenditures are for the children. b.) if a parent is being excessive or extravagant the Court has the right to disallow part or all of an expenditure. The Court should clearly state what type of expenditures it is disallowing, the amount of the expenditure and why. c) Compare the combined amount spent by the parents to the guideline amount from the table based on the parents' income to be reasonably sure that the amount actually being spent on the children is appropriate based on the parents' economic circumstances. d) Grant each parent an offset against their presumptive obligation in the amount of their actual, ordinary, necessary and reasonable expenditures. e) If after the above, one parent is overpaying and the other is underpaying, (or one is bearing more than their percentage share of the financial responsibility and the other is bearing less than their percentage share) then the one that is underpaying would make a support transfer payment to the other so that each parent's actual total contribution for the children approximated each parent's percentage share of the total financial responsibility (as shown on lines 16a and b of the worksheet). f) Discretion: Once the Court had done this analysis if the Court believed there was some extremely compelling reason why one parent should not bear their equitable or proportionate share of the financial responsibility for the children, the Court could state its reasons for not following the concept of proportionality.

By following the above procedure outlined in the statute the constitutional rights of all Shared Parents will be met.

The Court of Appeals (at Pg. 9 paragraph 15) states that “appellant’s initial premise is incorrect, that being ORC 3115.215 contains a presumption that in Shared Parenting cases, only one parent is presumed to pay child support.” The Appeals Court misstated Appellants’ premise.

Appellant argued that Appellant’s constitutional right to equal protection was denied him either through the former ORC 3113.215 being unconstitutional in that it requires dissimilar treatment for similarly situated individuals or in the alternative that Magistrate and Trial Court improperly applied the statute by only requiring one parent to go through the deviation test instead of both, thereby effectively treating Appellee’s child support obligation as if it were presumed to be spent on the children.

The Court of Appeals also misconstrues what *Pauly v. Pauly* (1997), 80 Ohio St. 3d 386; *Hubin V. Hubin* (2001), 92 Ohio St. 3d 240; *Spencer v. Spencer*, 2006-Ohio 1913; and *Glassman v. Glassman*, 160 Ohio App. 3d 648, 2005-Ohio-1936 stand for. None of those cases raised the question of the constitutional right to similar treatment for similarly situated individuals. The Supreme Court did not look at any of those cases from a constitutional view point because the issue was not raised.

No state shall deny to any person the equal protection of the laws, and the Equal Protection Clause operates so as to prevent a state from treating people differently on an arbitrary basis. *Harper v. Virginia State Bd. of Elections* (1966), 383 U.S. 663, 681.

An equal protection claim arises only in the context of an unconstitutional classification made by the state, i.e., when similarly situated individuals are treated differently. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 288-289. (Emphasis added)

However that is exactly what was done in this case. Two similarly situated individuals by definition (ORC 3109.03) were treated differently on an arbitrary basis because the statute was misapplied by the Magistrate.

Suppose for arguments sake, one was to say that ORC 3109.03 does not define two Shared Parents as members of the same class. What the Trial Court and Court of Appeals failed to do is determine what are “all relevant respects”<sup>3</sup> when it comes to parents. The answer comes back to whether the parent is considered 1) a sole custodial parent, 2) a non custodial parent, or 3) a Shared Parent. In sole custody cases the law does not classify the parents as being different by virtue of income or time spent or assets. The only determinant and “sole relevant respect” of parenting that matters is status as custodial parent or non custodial parent. Thus, in Shared Parenting, the only relevant issue is the parents standing, which is the same i.e. both are custodial parents.

In this case the Magistrate and Trial Court acted arbitrarily by treating Appellant (as a non custodial parent) significantly different than Appellee (treated as a custodial parent). Whether that treatment is mandated by the statute or not is irrelevant. The Appellant was deprived of his constitutional right to equal treatment under the law.

**Proposition of Law #2** - The former ORC 3113.215, when properly followed is not unconstitutionally vague and does not allow courts to make conclusions of law based on incorrect facts. However, the Magistrate and Trial Court improperly applied the statute by maintaining that it was proper for their conclusion of law to be based on fiction. This action deprived Appellant of his constitutional right to “due process”.

All citizens of the U.S. are protected under the Constitution’s Fifth Amendment (“no person shall be deprived of life, liberty or property without due process of law.”)

Part of Due Process is that any court’s decision(s) must be based on findings of fact and then applying conclusions of law to those facts.

In this case, a conclusion of law made by the Magistrate was that

“Defendant should be granted a downward deviation... of over 37%. Defendant’s child support obligation should therefore be set at \$1750/month.”. (Decision 9/18/00 at pg 20).

This conclusion was based on the facts as the Magistrate had believed them to be.

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<sup>3</sup> Franklin County Court of Appeals citing *F.S. Royster Guano Co. v. Virginia* (1920), 253 U.S. 412, 415, 40 S.Ct. 560, 561. The aim of the constitutional provisions is to keep governmental decision makers from treating differently persons who are in all relevant respects alike.

Once The Magistrate issued this decision, Defendant successfully challenged several of the key “factual findings” upon which The Magistrate determined that Defendant should only be granted a 37% deviation or offset against Defendant’s presumptive child support obligation. Defendant maintained that in light of the amount of direct expenses for the children, Defendant incurred, Defendant’s deviation should be much higher.

The Magistrate’s 9/18/00 decision ordered that Defendant pay \$1,750.00/monthly i.e. \$21,000/yr to Plaintiff. Plaintiff had claimed \$27,504/yr in direct expenses for the children. See Plaintiff’s Exhibit #51. One could argue that if Plaintiff’s direct expenses for the children were about \$27,504.00 less Plaintiff’s presumptive obligation of \$4,404 that Plaintiff needed approximately \$23,000/yr to meet the children’s needs. Ordering Defendant to pay \$21,000 /yr, from this view point only appears to show that the Magistrates decision was based, at least in part, on some sort of reason or logic.

However, the single most important factual correction made by the Trial Court involved Plaintiffs’ allegation that she incurred \$27,504 a year in direct expenses for the children. Judge Squire determined Plaintiff had allocated too high a percentage to the children. Judge Squire specified the correct percentages to apply. Judge Squire did not perform the calculations. But when one did these, the result was that Plaintiff’s actual direct expenses for the children were approximately \$15,300/year not \$27,504/year. That is over \$12,200 less per year than what the Magistrate had believed.

There were several other material facts that Judge Squire found the Magistrate incorrectly determined. (Squire Decision 5/24/02)

- a) Plaintiff did not borrow money from parents (at pg. 31)
- b) Plaintiff’s contention she “Must” use Her savings was not supported. (at pg. 32)
- c) Plaintiff’s contention that 50% of mortgage was attributable to Lauren and Sarah

Judge Squire, in her 5/24/02 decision, did not make a determination as to what amount of a deviation Defendant had earned based on the correct facts, but instead sent the matter back to the Magistrate.

Incredibly, despite the numerous critical factual changes and materially different factual determination made by Judge Squire, the Magistrate did not re-determine the amount of the deviation Defendant had earned based on the correct facts. The Magistrate merely plugged in the same 37.38% deviation percentage as before.

“The original deviation granted was 37.38%. The same percent of deviation should be applied to the new worksheet amount” (Krippell decision 6/12 /02).

Clearly if the statute is so vague that Judges and Magistrates do not have to base their decision on the actual facts but are free to base their decision on part fact and part fiction, then the statute is unconstitutionally vague.

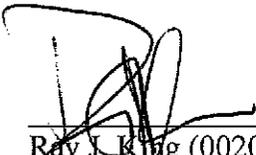
It is Defendants’ position that the former statute ORC 3113.215 does require all triers of fact base their conclusions of law on the actual facts of the case.

It is Defendant’s position that the Magistrate and Trial Court through their improper interpretation of the statute unconstitutionally voided Defendants’ right to due process when they improperly failed to perform a new deviation analysis on Defendant, this time plugging in all the correct facts and determining the amount of an offset, adjustment or deviation Defendant had earned against Defendant’s presumptive obligation in light of the actual facts of the case.

#### **IV. CONCLUSION**

This court should exercise its jurisdiction, allow this appeal and decide the case on the merits because of the serious constitutional matter raised.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served by regular U.S. Mail, postage pre-paid, this 19<sup>th</sup> day of July, 2007 upon:

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\_\_\_\_\_  
Ray J. King

**APPENDIX**

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<b>I. OPINION OF FRANKLIN COUNTY COURT OF APPEALS</b>	<b>1</b>
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IN THE COURT OF APPEALS OF OHIO

FILED  
COURT OF APPEALS  
FRANKLIN CO OHIO

TENTH APPELLATE DISTRICT

2007 MAY 31 PM 3:31

CLERK OF COURTS

Marka M. Tonti (nka Lyle), :

Plaintiff-Appellee, :

v. :

Thomas A. Tonti, :

Defendant-Appellant. :

No. 06AP-732

(C.P.C. No. 92DR-06-3173)

(REGULAR CALENDAR)

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O P I N I O N

Rendered on May 31, 2007

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*Adam S. Eliot*, for appellee.

*Ray J. King*, for appellant.

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

McGRATH, J.

{¶1} Defendant-appellant, Thomas A. Tonti ("appellant"), appeals from the May 18, 2005 judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, and the June 16, 2006 decision of the magistrate of that court.<sup>1</sup> For the reasons that follow, we affirm that judgment.

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<sup>1</sup> In resolving the instant appeal on its merits, we need not consider whether appellant's appeal of a magistrate's decision, and not the trial court's judgment entry adopting that decision, complies with the mandates of App.R. 3.

{¶2} Appellant filed his brief pro se, but retained counsel to appear at oral argument before this court. Appellee has failed to file an appellate brief, nor has she defended herself on appeal. Although appellant has filed a brief, it fails to comply, even minimally, with App.R. 16(A) in either form or substance.<sup>2</sup> Specifically, appellant's brief fails to include: (1) a table of contents; (2) a table of authority; (3) statement of the assignment of errors presented for review; (4) statement of the issues presented for review; (5) statement of the case; and (6) citations to legal authorities that support appellant's contentions. Because an appeal is decided on the merits of the assignments of error presented, and, here, appellant has not presented any for our review, we would be well within our discretion to dismiss the instant appeal. App.R. 12. Nevertheless, in the interests of justice, we will consider the issues raised by appellant, albeit, in a consolidated fashion.

{¶3} Turning to the merits, the following facts and procedural history are germane to our discussion. The parties to this action were married on September 9, 1988, and have two minor children. The marriage was terminated by decree of divorce on December 10, 1992, and since then, there have been numerous post-decree proceedings. A more complete history of the action is set forth in this court's most recent opinion, titled *Tonti v. Tonti*, Franklin App. No. 03AP-494, 2004-Ohio-2529 ("*Tonti I*"), in which we sustained three of appellant's assignments of error. Two of those assignments of error are at issue

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<sup>2</sup> We note, as an aside, that the Fifth District Court of Appeals has opined that "[s]uch noncompliance is tantamount to failure to file an appellant's brief and entitles [an appellate court] to dismiss the appeal" pursuant to App.R. 18(C). *White v. Lehmler* (July 28, 2003), Stark App. No. 2002CA00082; see, also, *City of Mt. Vernon v. Young*, Knox App. No. 2005CA000045, 2006-Ohio-3319; *Fuller & Assocs. v. All Am. Home Health Care, Inc.*, Stark App. No. 2003CA00377, 2004-Ohio-4342; *In re Burns* (June 26, 2000), Licking App. No. 99CA124.

here: the first involves the trial court's imputation of child care expenses, and the second concerns appellant's constitutional challenges to former R.C. 3113.215.<sup>3</sup>

### Imputed Child Care Expenses

{¶4} In *Tonti I*, appellant's fifth assignment of error charged that the trial court erroneously imputed child care expenses to appellee.<sup>4</sup> Specifically, appellant contended that the trial court: (1) had no authority to impute child care expenses to appellee; (2) improperly modified the child care provisions of the shared parenting plan; and (3) abused its discretion in imputing child care expenses to appellee because she had no plans to return to the workforce. We found that the trial court did not exceed its authority or abuse its discretion in imputing child care costs to appellee, but did find such was an improper modification to the parties' shared parenting agreement because neither the court nor the magistrate made a finding that doing so was in the best interests of the children as required by R.C. 3109.04(E)(2)(b). Appellant's fifth assignment of error was, therefore, overruled in part and sustained in part, and the matter was remanded to the trial court to enter a finding regarding the best interests of the children.

{¶5} Upon remand, the trial court referred the matter to the magistrate, and on June 9, 2006, the magistrate issued a decision. The magistrate found that it was in the children's best interest to modify the shared parenting agreement to require appellee to pay her own child care expense when the children were in her possession, explaining:

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<sup>3</sup> Section 3113.215 of the Ohio Revised Code was repealed effective March 22, 2001, and replaced by R.C. 3119.01 et seq.

<sup>4</sup> The shared parenting agreement was modified to require that each parent pay their respective child care costs when the children are in their possession.

The legislature long ago determined that daycare costs are part of child support and should be included on the worksheet when calculating child support. See former R.C. 3113.215 now R.C. 3119.022. In this case for purposes of calculating child support, Plaintiff's income was imputed, her local income tax was computed based upon imputed income and her daycare was imputed based upon the need for daycare if Plaintiff worked fulltime. A legal fiction was created to arrive at the child support worksheet amount.

The parties' original shared parenting plan provided that Defendant was to pay all daycare expenses. It is not in the children's best interest for Defendant to receive a childcare deduction based upon Plaintiff's imputed income and need for daycare in the event Plaintiff worked fulltime. In fact there is not income received by Plaintiff, there is no local tax paid on imputed income and there is no need for daycare because Plaintiff is not working fulltime. Therefore the Magistrate finds it in the children's best interest to modify the plan to require Plaintiff to pay her own daycare expenses during the time periods of the worksheet calculations.

(Mag. Decision, June 9, 2006, at 2.) On June 10, 2006, the trial court adopted the magistrate's decision. No objections were filed.

{¶6} When a party has not filed objections to a magistrate's decision and the trial court has entered judgment, appellate review is limited to plain error analysis. See *Buford v. Singleton*, Franklin App. No. 04AP-904, 2005-Ohio-753. The plain error doctrine is not favored in civil proceedings and "may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, syllabus. *Goldfuss* makes clear that the plain error doctrine is to be used sparingly and is not warranted in the absence of circumstances raising something more than a mere failure to object. *Brown v. Zurich*, 150 Ohio App.3d

105, 2002-Ohio-6099, at ¶28, quoting *R.G. Real Estate Holding, Inc. v. Wagner* (Apr. 24, 1998), Montgomery App. No. 16737.

{¶7} We fail to find plain error in the case at bar. This is not the extremely rare case that involves exceptional circumstances. Nor do we find any error in law or fact on the face of the magistrate's report. Accordingly, appellant has waived any appellate review of the trial court's adoption of the magistrate's decision.

Constitutional challenges to former R.C. 3113.215

{¶8} Another issue remanded to the trial court in *Tonti I* concerned the dismissal of appellant's motion challenging the constitutionality of former R.C. 3113.215(B)(6)(a). Appellant's motion requested that the trial court declare the statute unconstitutional as applied in equal time shared parenting cases on the following two bases: (1) the statute requires the court to presume that only one parent must pay child support, in violation of the Equal Protection Clause of the United States and Ohio Constitutions; and (2) the statute is unconstitutionally vague, violation of the Due Process Clause of the United States Constitution, because it "provides a court with absolutely no guidance on how to determine" which parent "must pay child support" and which "parent must not pay child support." (Appellant's motion requesting that the prior child support statute be declared unconstitutional, filed Aug. 5, 2002, at 5, 9, 10.) The trial court dismissed appellant's motion for lack of jurisdiction on the ground that he failed to serve upon the Ohio Attorney General a copy of the motion as required by R.C. 2721.12(A). In sustaining appellant's third assignment of error, we determined that because the action originated as an ordinary civil action containing no request for declaratory judgment, the service

requirement found in R.C. 2721.12(A) did not apply. Thus, the matter was returned to the trial court for reconsideration.

{¶9} On remand, the trial court rejected appellant's arguments that R.C. 3113.215 was unconstitutional. In finding that the statute did not run afoul of the equal protection clauses of the Ohio and United States Constitutions, the court explained:

\* \* \*[N]ot only is Defendant's argument misplaced and misapplied, it is also fatally flawed in several aspects. Defendant's argument is based on a faulty premise, for O.R.C. §3113.215 does not require a presumption that only one parent, in shared parenting cases, must pay child support. Furthermore, parents in "equal time" shared parenting cases are not similarly situated individuals solely due to spending the same amount of time with the child(ren). Even if such parents were to somehow qualify as similarly situated individuals, they are nevertheless not subjected to disparate treatment since courts are allowed to, in qualifying cases, deviate from the child support amounts calculated pursuant to the worksheet set forth in O.R.C. §3113.215. Finally, even if such parents were similarly situated individuals, who are arguably subjected to disparate treatment by way of their respective child support obligations, the Court finds that O.R.C. §3113.215 is nevertheless not unconstitutional as it is rationally related to a legitimate government interest.

(Trial Court decision, May 18, 2005, at 11-12.) The trial court also found appellant's argument that the statute was unconstitutionally vague to be without merit.

\* \* \*[A]s the statute makes plainly obvious, and as numerous courts to interpret the statute have held, *in shared parenting cases neither parent is to be designated as the nonresidential parent* since both parents are residential parents. Thus, since the presumption Defendant speaks of does *not* arise in shared parenting cases because no designation of residential parent is allowed in such cases, Defendant's vagueness argument is moot.

Id. at 25 (emphasis in the original).

{¶10} We begin our analysis with the principle that statutes carry a strong presumption of constitutionality. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, at ¶36. The party challenging the statutes bears the burden of proving that the legislation is unconstitutional beyond a reasonable doubt. *Id.*

{¶11} The Equal Protection Clause of the Fourteenth Amendment provides that no state shall deny to any person the equal protection of the laws, and operates so as to prevent a state from treating people differently under its laws on an arbitrary basis. *Harper v. Virginia State Bd. of Elections* (1966), 383 U.S. 663, 681, 86 S.Ct. 1079, 1089. The Ohio Constitution tracks its federal counterpart. Section 2, Article I, of the Ohio Constitution. These constitutional provisions, however, do not "forbid classifications." *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 199, quoting *F.S. Royster Guano Co. v. Virginia* (1920), 253 U.S. 412, 415, 40 S.Ct. 560, 561. Rather, their aim is to keep "governmental decisionmakers from treating differently persons who are in all relevant respects alike." *F.S. Royster Guano Co.*, at 415. Thus, an equal protection claim arises only in the context of an unconstitutional classification made by a state, i.e., when similarly situated individuals are treated differently. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 288-289; *State v. Chappell* (Feb. 24, 1998), Franklin App. No. 97APA04-543.

{¶12} In determining whether a statute passes muster under the equal protection clauses, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.* (1985), 473 U.S. 432, 440, 105 S.Ct. 3249 (citations omitted). In that regard, it is important to note that "[w]hen social or economic

legislation is at issue, the Equal Protection Clause allows the States wide latitude." *Id.* at paragraph one of the syllabus.

{¶13} With respect to the void for vagueness doctrine embodied in the due process clause, to pass constitutional muster, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," as well as "provide explicit standards" for the police officers, judges, and jurors who enforce and apply them." *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109, 92 S.Ct. 2294. It does not, however, require "statutes to be drafted with scientific precision. Nor does the doctrine require that every detail regarding the procedural enforcement of a statute be contained therein. Instead, it permits a statute's certainty to be ascertained by application of commonly accepted tools of judicial construction, with courts indulging every reasonable interpretation in favor of finding the statute constitutional." *Perez v. Cleveland* (1997), 78 Ohio St.3d 376, 378-379 (citations omitted).

{¶14} In challenging the trial court's determination that R.C. 3113.215 is not unconstitutional, appellant does not assign error to the court's May 18, 2005 decision, and, in fact, he does not even reference that decision in the section of his brief titled "Constitutional Issues." Instead, appellant devotes a significant portion of his brief to attacking certain modifications made by the magistrate (and adopted by the trial court) to the parties' shared parenting agreement as related to their respective child support obligations. Those same arguments, however, were raised by appellant, and rejected by this court in *Tonti I*. To the extent appellant's arguments herein can be construed as "proper" challenges to the trial court's May 18, 2005 decision, we find appellant's

unsupported assertions of unconstitutionality are insufficient to satisfy his burden, particularly in light of the well-recognized presumption of constitutionality.

{¶15} Putting aside appellant's briefing and technical failures, consideration of the merits leads us to the same conclusion. Upon review, we conclude that former R.C. 3113.215(B)(6)(a) withstands appellant's constitutional challenges. In reaching that conclusion, we agree with the trial court's assessment that appellant's initial premise is incorrect, that being, R.C. 3113.215 contains a presumption that in shared parenting cases, only one parent is presumed to pay child support. Indeed, the statute contains no express language to support that premise, nor are we aware of any court that has found the existence of such presumption. See, e.g., *Pauly v. Pauly* (1997), 80 Ohio St.3d 386, syllabus ("R.C. 3113.215[B][6] does not provide for an automatic credit in child support obligations under a shared parenting order. However, a trial court may deviate from the amount of child support calculated under R.C. 3113.215[B][6] if the court finds that the amount of child support would be unjust or inappropriate to the children or either parent and would not be in the best interest of the child"); *Hubin v. Hubin* (2001), 92 Ohio St.3d 240; *Spencer v. Spencer*, Stark App. No. 2005-CA-00263, 2006-Ohio-1913, at ¶44-50; *Glassner v. Glassner*, 160 Ohio App.3d 648, 2005-Ohio-1936, at ¶48 ("the fact that appellant and appellee equally share time with the children does not in and of itself justify a deviation to '0' of the child support guideline amount. \* \* \* In consideration of [the significant disparity between the parties' income,] and in view of the fact that there is nothing in the shared parenting plan placing the burden of any unusual or extraordinary parenting expenses on appellee, it was an abuse of discretion for the trial court to decline

to award child support to appellant"). Succinctly stated, because all of appellant's arguments flow from this faulty premise, they tumble like a house of cards.

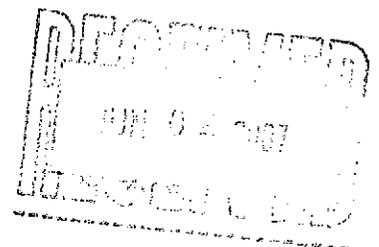
{¶16} For the foregoing reasons, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

*Judgment affirmed.*

BROWN and WHITESIDE, JJ., concur.

WHITESIDE, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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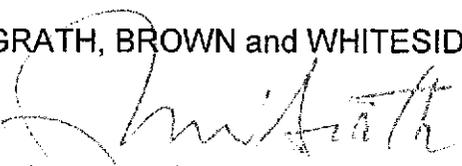
Marka M. Tonti (nka Lyle),  
Plaintiff-Appellee,  
v.  
Thomas A. Tonti,  
Defendant-Appellant.

No. 06AP-732  
(C.P.C. No. 92DR-06-3173)  
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on May 31, 2007, appellant's arguments relating to the court's decision of May 18, 2005, and the adoption of the magistrate's decision of June 16, 2006, are not well-taken, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed. Costs shall be assessed against appellant.

McGRATH, BROWN and WHITESIDE, JJ.

By   
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Judge Patrick M. McGrath

WHITESIDE, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.