ORIGINAL

IN THE SUPREME COURT OF OHIO

12-1674

Jeffrey Morrow,	:	
Appellant,	:	On Appeal from the Medina County Court of Appeals, Ninth Appellate District
v.	:	
Sherri P. Becker,	:	Court of Appeals Case No. 11CA0066-M
Appellee.	:	

MERIT BRIEF OF APPELLANT JEFFREY MORROW

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STATEMENT OF FACTS

This case arises from the attempt of appellant Jeffrey Morrow ("Morrow") to modify his child support obligation following the economic collapse of 2008-2009.[1] Due to the depressed economy and direct competition from Appellee's ("Becker") employer, Morrow's yearly income had dropped to $75,000. This was firmly established during the trial, and acknowledged by the court. (Transcript from August 10, 2010 hearing, hereafter "TR2" at 14-15;Appx. at A-49). Despite this, the court found Morrow's annual income to be $143,000 for purposes of calculating child support, even though the trial court never found Morrow to be voluntarily under-employed. The court arrived at the inflated figure by considering Morrow's earnings in past years and by including $16,756 in company benefits received from his employer, The Ohio College of Massotherapy ("OCM"), a non-profit organization. (Appx. at A-18;A-49).

Following an objection hearing, the trial court adopted the magistrate's decision not to modify the child support and filed its entry and orders on May 10, 2011. (Appx. at A-39). Morrow filed a timely notice of appeal to the Ninth District Court of Appeals on June 6, 2001.

While the trial to determine the modification of child support occurred in 2010, during a time when Morrow's yearly salary had been slashed to $75,000 a

[1] The appellate court also dealt with issues of parenting time which is not a part of this appeal.

year, the lower appellate court focused exclusively on his income in 2007 and 2008 when it discussed the issue of company benefits, stating, "While those salaries are not distinguished clearly on his 2007 tax return, his 2008 tax return indicates he was paid a salary of $121,897 by OCM and $110,316 by OCM Online. He testified that he received certain non-monetary benefits from his employment, including a lexus automobile, car insurance, a cell phone, and a laptop computer. He also admitted that the company buys four-seat season tickets for Ohio State University football game,..." (Appx. at A-19, ¶29). The appellate court completely ignored the fact that 1) those income figures did not represent his current income, 2) the incomes from 2007 and 2008 had been significantly cut by the OCM due to the economic decline and 3) the incomes from 2008 have yet to be restored. (TR2 at 13-16; Appx. at A-49 & 50).

The decision of the appellate court to restrict its analysis solely to Morrow's 2008 income when evaluating the appropriateness of including an employee's company benefits as gross income is disturbing, especially considering that the evidence at the trial unequivocally established that OCM's reduction of Morrow's salary was for legitimate purposes. (TR2, Passim). For instance, OCM's accountant, Mr. Ruther, testified that the downturn in the economy in 2008 had a devastating effect on OCM's financials. (TR2 at 93-94). OCM's operating liquid reserves dropped significantly from $207,000 in 2007 to $76,000 in 2008, creating

potential bank credit issues. Id. at 93& 97. The board's decision to slash expenses, including Morrow's salary, was a valid business decision. Id. at 96-97. Many employees and various positions, including an entire department, were cut, the 403(b) plan was discontinued and salaries were reduced. Id. at 13 & 94. Enrollment decreased significantly, further reducing OCM's revenue. Id. at 11-13.[2]

On August 29, 2012, the Ninth District Court of Appeals affirmed the judgment of the trial court in part, and reversed in part, finding that, for purposes of this appeal, including $16,756 as company benefits as part of Morrow's gross income for purposes of determining child support was either proper or harmless error (Appx. at A-7).[3] The Court of appeals ruled that company benefits that stem solely from employment, and not from self-employment or any ownership interest, may be included as gross income in the calculation of child support. (Appx. at A-20).

Morrow filed a Notice of Appeal (Appx. at A-1), Notice of Motion to Certify a Conflict, and a Memorandum In Support of Jurisdiction with the Ohio Supreme Court On October 4, 2012. On November 5, 2012, the Ninth District Court of Appeals issued an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. (Appx. at A-5). Morrow filed the Notice

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[2] Morrow's salary was reduced to $75,000 in April, 2009 (TR2 at 14).
[3] The appellate court found the trial court had erred by including the entire amount of four Ohio State Buckeyes season tickets that the business purchased for employees, but found that the error was harmless. (Appx. at A-21-22).

of Certified Conflict on November 8, 2012. (Appx. at A-3). On January 23, 2013, the Supreme Court granted jurisdiction to hear Proposition of Law 1 in Case 2012-1674 and determined that a confict exists in Case 2012-1898, consolidating the two cases on appeal. (Appx. at A-71 & 72).

ARGUMENT

Proposition of Law No. I: Employment benefits are includable income for purposes of calculating child support only if the party receiving those benefits is self-employed, the proprietor of a business, or is a joint owner of a partnership or closely held corporation, pursuant to R.C. 3119.01.

The issue before this court is whether company benefits, such as a company car, can be included as income for the purpose of child support calculations if the benefits the party receives do not come from self-employment, as a proprietor of a business, or as a joint owner of a partnership or closely held corporation. The Seventh District in *Spier v. Spier*, 7th Dist. No. 05 MA 26, 2006-Ohio-1289 and the Third District in *Botticher v. Stollings*, 3rd Dist. No. 11-99-08, 1999-Ohio-976 determined that such in-kind benefits cannot be attributable to the parent unless such benefits stem from "self-generated income." However, the Second District in *Merkel v. Merkel* (1988), 51 Ohio App.3d 110 (construing a similarly worded Child Support Guideline than which was utilized in the instant case) found that such a distinction between employee and employer benefits "inequitable", and

ruled that company benefits can be calculated as income for the purposes of child support, regardless of whether the parent is self-employed or simply an employee with no ownership interest in the benefits-providing company. The Ninth District, in the instant case, has cast its chips in the *Merkel* camp. *Morrow v. Becker*, 9th Dist. No. 11CA0066-M, 2012-Ohio-3875 at ¶ 5; Appx. at A-20.

A closer examination of both statutory law and the various appellate cases which have discussed this issue, reveal that the decisions in the third and seventh district stand on much stronger footing. Ohio Revised Code Chapter 3119.01 govern matters dealing with child support and require that the parties' gross incomes be used to calculate the proper amount of support.

R.C. 3119.01(C)(7) defines "gross income" and provides:

> " 'Gross income' means, except as excluded in division (C)(7) of this section, 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 to the extent described in division (D) of section 3119.05 of the Revised Code; commissions; royalties; tips; rents; dividends; severance pay; pensions; interest; trust income; annuities; social security benefits, including retirement, disability, and survivor benefits that are not means-tested; workers' compensation benefits; unemployment insurance benefits; disability insurance benefits; benefits that are not means-tested and that are received by and in the possession of the veteran who is the beneficiary for any service-connected disability under a program or law administered by the United States department of veterans' affairs or veterans' administration; spousal support actually received; and all other sources of income. 'Gross income' includes * * * self-generated income * * *."

This definition does not include employment-related benefits as income, leading to the conclusion that they should not be included as income. *Spier v. Spier*, et. al., 7th Dist. No. 05 MA 26, 2006-Ohio-1289 at ¶19.This conclusion is supported by the statutory definition of "self-generated income." Id.

" 'Self-generated income' means gross receipts received by a parent from self-employment, proprietorship of a business, joint ownership of a partnership or closely held corporation, and rents minus ordinary and necessary expenses incurred by the parent in generating the gross receipts. 'Self-generated income' includes expense reimbursements or in-kind payments received by a parent from self-employment, the operation of a business, or rents, including company cars, free housing, reimbursed meals, and other benefits, if the reimbursements are significant and reduce personal living expenses." Id. at ¶20 citing to R.C. 3119.01(C)(13).

The *Spier* court continued to further examine the issue and determined that if the phrase "gross income" included expense reimbursements or in-kind payments received in the course of employment, then there would be no need for the Revised Code to specifically include these kinds of employment-related benefits in the definition of "self-generated income." Id. at ¶21. The specific inclusion of these kinds of benefits in R.C. 3119.01(C)(13) indicate that they are not a part of a

person's "gross income" unless that person is self-employed, a proprietor of a business, or a joint owner of a partnership or closely held corporation. Id.

Moreover, "[t]he canon expressio unius est exclusio alterius tells us that the express inclusion of one thing implies the exclusion of the other." *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353 at ¶ 24. Therefore, when the legislature included in-kind benefits from *self-employed* individuals in the calculation of child support, it was, in essence, excluding in-kind benefits from *employed* individuals.

In addition to *Spier*, the Third District Appellate Court also arrived at this same conclusion. In *Botticher*, the appellant argued that the trial court erred in failing to account for appellee's use of a company car. *Botticher v. Stallings*, 3rd Dist. No. 11-99-08, 1999-Ohio-976, 2. Appellant claimed that appellee was deriving an economic benefit from the use of the company car and therefore its value should be included in her gross income. Id. However, the court explained that the statutory language did not include any description of in-kind payments such as the use of a company car, except as specifically identified as "self-generated income." Id.

Although the court in *Botticher* analyzed a separate statute from the one in the instant case, the definition of self-generated income was essentially identical. The court found that appellee's company car came from her employment with Archibold Wash & Fill, and there was no evidence that she was self-employed. Id.

Therefore, since self-generated income included in-kind payments such as company cars only when "received by a parent for self-employment, the operation of a business, or rents, * * * if the reimbursements are significant and reduce living expenses," the court held that it was correct to exclude appellee's use of a company car when calculating her gross income. Id.

However, the lower reviewing court, in the instant case, held that employment benefits, such as a company car, is income for purposes of child support calculations, regardless of whether the parent is self-employed or has an ownership interest in the business. *Morrow v. Becker*, Ninth Dist. No. 11CA0066-M, 2012-Ohio-3875 at ¶31;Appx. at A-20 & A-21. The court reasoned that R.C. 3119.01(C)(7) expressly includes "all other sources of income" in the definition of gross income without regard for the parent's employment circumstances. Id. This, however, is faulty reasoning because it rests on an inaccurate premise. Not only does R.C. 3119.01(C)(7) consider the parent's employment circumstances, it *expressly* identifies under what circumstances those benefits, such as a company car, can be attributed to gross income. For instance, R.C. 3119.01(C)(7), in pertinent part, states: "Gross income" includes * * * self-generated income. If one were to substitute the relevant part of the definition of self-generated income for the phrase itself, the statutuory meaning becomes patently obvious. For example, consider R.C. 3119.01(C)(7) after substitution: Gross income includes expense

reimbursements or in-kind payments received by a parent from *self-employment, the operation of a business, or rents*, including company cars, free housing, reimbursed meals, and other benefits, if the reimbursements are significant and reduce personal living expenses. (emphasis added).

The lower court's holding completely ignores the plain language of R.C. 3119.01(C)(13). If these in-kind benefits, such as a company car, are already included in gross income under R.C. 3119.01(C)(7) regardless of employment status, as the lower court asserts, then there is absolutely no reason to distinguish "self-generated income", and R.C. 3119.01(C)(13) is both unnecessary and superfluous. Certainly this cannot be the intent of the General Assembly.

Therefore, a proper reading of the statute identifies three circumstances that must be present before a court may include company benefits to a parent's gross income: 1) the benefit must come from self-employment or from the operation of a business 2) the benefit must be significant and 3) the benefit must reduce personal living expenses. Since it is indisputable from the record that the company benefits Morrow received came from his *employment* at the Ohio College of Massotherapy, the trial court erred when they included these benefits in his gross income for purposes of child support calculations. (TR2 at 19 & 35;Appx. at 48 & 49)

While the statutory meaning is quite apparent if one undergoes an honest evaluation of the language, the Seventh District Appellate Court in *Merkel* ignored

the statutory language and decided that it wasn't equitable to distinguish between self-employed and employed individuals when determining child support. *Merkel v. Merkel* (1988) 51 Ohio App.3d 110, 112. In the instant case, this same sentiment regarding equitability was echoed by one appellate panel member during oral argument. While the law itself determines what is fair, and all Ohio citizens suffer when courts are allowed to substitute their own individual principles of equitability at the expense of the rule of law, the Ohio legislature had sound, just and equitable reasons for distinguishing between an employee and a self-employed individual when determining the calculation of child support. For instance, every possible source of available funds is considered in the calculation of child support. However, Morrow's company benefits are not "available funds" because he shares no ownership interest in the benefits. Thus, Morrow would not be permitted to sell the assets, such a company car, in order to generate an income stream that he or his children could enjoy.

Perhaps a brief illustration can demonstrate the inequity that results if benefits from an employee and a self-employed individual are treated identically in the calculation of gross income. Assume that two individuals, one self-employed and the other employed at a company, each earn $50,000 a year respectively. Each individual travels often in the course of their work, and each individually incur monthly vehicle expenses of a $1,000.00. However, for the employee, his

employer provides the company car and pays for the expenses. While the yearly $12,000 benefit the self-employed individual enjoys would initially be calculated as income, the self-employed individual is able to deduct ordinary and necessary business expenses. *State ex rel. Osborn v. Hill*, No. 7759-M, 1999 WL 61441 (Ohio App. 9th Dist., 1999), * 2. After the vehicle deductions, $50,000 of the income from the self-employed individual would be subject to child support calculations. In other words, the $12,000 vehicle benefit would fall off for the self-employed worker after deductions. The employee, however, is not so fortunate. The law does not allow him to deduct his business expenses for child support purposes. Id. Therefore, if this Court were to adopt the Ninth District's interpretation of the statute, the $12,000 benefit would be tacked on the employee's $50,000 salary, making his income $62,000 for purposes of calculating child support. This result would be inequitable because the employee is using the company car while traveling for his employer. This benefit does not reduce his personal living expenses, but rather merely advances an asset that is being used on behalf of his employer. To count the company car as an additional income for purposes of computing child support payments would be equivalent of counting part of the employee's salary twice.

Such an over-inflation of a parent's actual income can have grave consequences, particularly for a parent with minimal income. Imagine a working

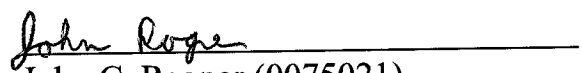
mother, such as the ones identifed in both *Botticher* and *Spier*, estranged from her children's father, who is fortunate enough to have an employer that provides her with a few company benefits, such as a company car and medical insurance. If the Ninth District ruling is allowed to stand in this case, it would mean that the mother's non-monetary company benefits would now be figured into the child support calculations, inflating her actual income. Should she retain custody of her children, such a holding would ultimately mean less support.

Clearly, the lower court's decision erroneously interprets R.C. 3119.01.The decision ignores the plain meaning of the statute, essentially ignores the sound legal reasoning applied in *Spier* and *Botticher* and offends the basic tenets of statutory construction. The decision must be reversed. Applying the unmistakable language of R.C. 3119.01, this Court should hold that Revised Code 3119.01(C)(13) is not superfluous. Moreover, insuring accurate and a fair calculation of child support obligations is a legitimate state interest, and the distinction between self-employed individuals and the rest of the workforce is relevant to achieving that interest.

CONCLUSION

The lower court's decision is fundamentally wrong in its reasoning, and this Court should resolve the conflict in favor of the reasoning expounded by the Seventh District in *Spier* and the Third District in *Botticher*. The evidence demonstrates that Morrow's benefits stemmed from his employment at the Ohio College of Massotherapy. Therefore, R.C. 3119.01(C)(13) does not apply to him. The trial court could not have included his employment-related benefits as income for the purposes of calculating child support. Morrow respectfully asks this Honorable Court to reverse the decision of the lower court and remand it back to the trial court for a new trial.

Respectfully submitted,



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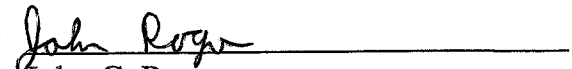
Proof of Service

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail to counsel for appellee, Linda Hoffman, 273 Main Street, Suite 200, Wadsworth, OH 44281 on March 12, 2013.



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ORIGINAL

IN THE SUPREME COURT OF OHIO

12-1674

Jeffrey Morrow, Appellant, v. Sherri P. Becker, Appellee.	:	On Appeal from the Medina County Court of Appeals, Ninth Appellate District Court of Appeals Case No. 11CA0066-M

NOTICE OF APPEAL OF APPELLANT JEFFREY MORROW

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FILED
OCT 04 2012
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SUPREME COURT OF OHIO

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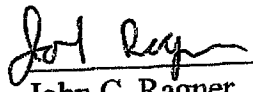
Notice of Appeal of Appellant Jeffrey Morrow

Appellant Jeffrey Morrow hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Medina County Court of Appeals, Ninth Appellate District, entered in Court of Appeals case No. 11CA0066-M on August 29, 2012.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



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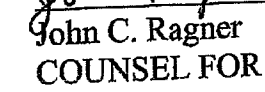
Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Linda Hoffman, 273 Main Street, Suite 200, Wadsworth, OH 44281 on October 2, 2012.



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ORIGINAL

IN THE SUPREME COURT OF OHIO

12-1898

Jeffrey Morrow, Appellant, v. Sherri P. Becker, Appellee.	On Appeal from the Medina County Court of Appeals, Ninth Appellate District Court of Appeals Case No. 11CA0066-M

NOTICE OF CERTIFIED CONFLICT

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NOV 09 2012
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SUPREME COURT OF OHIO

Notice of Certified Conflict

Appellant Jeffrey Morrow hereby gives notice that the Ninth District Court of Appeals has issued an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. Attached to this notice is the court of appeals journal entry certifying a conflict, a copy of the certifying court's opinion, and a copy of the conflicting court of appeal's opinion. On October 4, 2012, Appellant had filed a Notice of Appeal, Notice of Motion to Certify a Conflict, and a Memorandum In Support of Jurisdiction with the Ohio Supreme Court.

Respectfully submitted,

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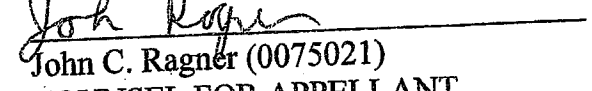
Certificate of Service

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail to counsel of record for appellee, Linda Hoffman, 273 Main Street, Suite 200, Wadsworth, OH 44281 on November 7, 2012.



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STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
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DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

JEFFREY MORROW

Appellant

v.

SHERRI BECKER

Appellee

C.A. No. 11CA0066-M

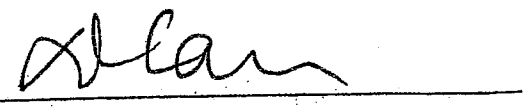
JOURNAL ENTRY

Appellant has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on August 27, 2012, and the judgment of the Seventh District Court of Appeals in *Spier v. Spier*, 7th Dist. No. 05 MA 26, 2006-Ohio-1289. Appellee has not responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993).

Appellant has proposed that a conflict exists between the districts on the following issue: "Whether company benefits, such as a company car, can be included as income for the purpose of child support calculations if the benefits the party receives do[] not come from self-employment, as proprietor of a business, or as a joint owner of a partnership or closely held corporation."

We find that a conflict of law exists; therefore, the motion to certify is granted.



Judge

Concurs:
WHITMORE, P.J.

Dissents:
BELFANCE, J.

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

COURT OF APPEALS
2012 AUG 29 AM 10: 09
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DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JEFFREY MORROW

Appellant

v.

SHERRI BECKER

Appellee

C.A. No. 11CA0066-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 04 PA 0199

DECISION AND JOURNAL ENTRY

Dated: August 27, 2012

CARR, Judge.

{¶1} Appellant Jeffrey Morrow appeals the judgment of the Medina County Court of Common Pleas, Domestic Relations Division. This Court affirms in part and reverses in part.

I.

{¶2} Jeffrey Morrow ("Father") and Sherri Becker ("Mother") are the parents of two children ("Mo" and "Mac"). Mac, who is two years younger than Mo, has special needs arising out of Down Syndrome. Mother was designated as the residential parent and Father was awarded parenting time with the children as follows: every other Wednesday from 6 p.m. until 9 a.m. the following morning with both children; alternate weekends from 6 p.m. Thursday until 9 p.m. Sunday with Mo; and the same alternate weekends on Sunday from 11 a.m. until 9 p.m. with Mac. The court order allowed for alternative parenting time arrangements as the parties may agree. Father was also ordered to pay child support in the amount of $2,198.05 per month.

{¶3} A little over a year later, the trial court issued a judgment entry after a hearing on motions to modify parenting time. The trial court awarded Father parenting time pursuant to the court's standard visitation schedule, with the following modifications: the parties must exchange the children in public places; the parties would share time with the children equally during Thanksgiving and winter breaks; and Father would not have summer vacation parenting time. The standard order of visitation provided for alternate weekend visits from 6 p.m. Friday until 6 p.m. Sunday, plus one weekday evening, consisting of three hours on Wednesdays if the parties could not otherwise agree. Father appealed the trial court's reduction of his parenting time. This Court affirmed the trial court's judgment. *Morrow v. Becker*, 9th Dist. No. 07CA0054-M, 2008-Ohio-155.

{¶4} In August 2009, Father filed a motion to modify and reduce his child support obligation. A couple weeks later, Mother filed a motion to modify parenting time. Four months later, she filed a motion for contempt, alleging that Father had failed to pay child support as ordered. The magistrate scheduled and continued hearings on the motions multiple times at the parties' request. The magistrate heard Mother's motion to modify parenting time on July 27, 2010, and scheduled a hearing on the issues of the modification of child support and contempt for August 10, 2010. On July 29, 2010, Father's attorney moved to withdraw. His subsequent attorney moved on August 2, 2010, to continue the August 10 hearing. Given the numerous prior continuances coupled with Father's assertion that his new counsel would be prepared for hearing, the magistrate denied the motion for a continuance. She heard Father's motion to modify child support and Mother's motion for contempt on August 10, 2010. The magistrate issued separate decisions arising out of the two hearings. Father filed objections to both decisions.

{¶5} The trial court overruled the objections, although it corrected one typographical error. In sum, the trial court ordered the following. Father would have parenting time with the children on alternating weekends from Friday at 6:00 p.m. until Monday when he delivered the children to school or child care. He was no longer granted mid-week visitations, although the parties were free to consider overnight Wednesday visitations for Mo if Father's international travel schedule abated in the future. The parties were required to follow the court's standard parenting time schedule for holidays and days of special meaning if they could not otherwise agree regarding such days. Father would not have extended parenting time, including Christmas break, spring break, and summer, unless Mother agreed to such extended time. The trial court ordered Father to pay child support in the amount of $2,154.95 per month, plus a 2% processing charge. The trial court found Father in contempt solely for failing to pay his child support obligation through wage withholding, imposed a $250.00 fine, and ordered Father to pay Mother $575.00 for attorney fees and costs expended to prosecute the contempt motion. Father appealed, raising five assignments of error for review. Some assignments of error are consolidated to facilitate review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ABUSED ITS DISCRETION BY (1) ELIMINATING MR. MORROW'S WEDNESDAY, THANKSGIVING, SPRING AND CHRISTMAS BREAK PARENTING TIME, AND (2) RESTRICTING MR. MORROW'S VISITATION WITH HIS CHILDREN TO ALTERNATING DAYS OF SPECIAL MEANING/HOLIDAYS AND EVERY OTHER WEEKEND UNLESS MS. BECKER AGREES TO ADDITIONAL VISITATION, THEREBY COMMITTING REVERSIBLE ERROR AND VIOLATING MR. MORROW'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED BY MISINTERPRETING THE MAGISTRATE'S DECISION, THEREBY COMMITTING REVERSIBLE ERROR AND VIOLATING MR. MORROW'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶6} Father argues that the trial court abused its discretion by modifying his parenting time with the children. Specifically, Father argues that the trial court erred by misinterpreting the magistrate's decision, reducing his parenting time, and leaving the issue of additional visitation to Mother's sole discretion. This Court disagrees.

{¶7} In cases where the matter was initially heard by a magistrate who issued a decision to which objections were filed and disposed, "[a]ny claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision. In other words, the standards for appellate review do not apply to the court's acceptance or rejection of the magistrate's findings or proposed decision." *Mealey v. Mealey*, 9th Dist. No. 95CA0093, 1996 WL 233491 (May 8, 1996), *2. Civ.R. 53(D)(4)(d) requires the trial court to conduct an independent review of the record when ruling on objections. Civ.R. 53(D)(4)(b) allows the trial court to adopt or reject the magistrate's decision, in whole or in part, with or without modification. In this case, the trial court conducted the required independent review and issued its judgment based on that review. Because we are constrained to consider the issues on appeal as they arise out of the trial court's determinations and orders, Father's argument that the trial court misinterpreted the magistrate's decision is not well taken. The second assignment of error is overruled.

{¶8} As we recognized in Father's first appeal, "'A trial court's decision regarding visitation rights will not be reversed on appeal except upon a finding of an abuse of discretion.'"

Morrow at ¶ 8, quoting *Harrold v. Collier*, 9th Dist. No. 06CA0010, 2006-Ohio-5634, ¶ 6. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶9} First, Father argues that the trial court abused its discretion by reducing his parenting time by eliminating Wednesday evening visitation, as well as spring, Thanksgiving, and Christmas break parenting time.

{¶10} As an initial matter, the record indicates that, rather than reducing his parenting time, the trial court in fact increased Father's parenting time. Although the trial court eliminated the three-hour Wednesday evening visitation, it increased his bi-weekly weekend visitation to include an additional evening and overnight, which necessarily also gave him additional time on Monday morning with the children. Mother testified that both children suffer when faced with inconsistency and that Father's tardiness, failure to appear for some visits, and frequent absences due to international travel have disrupted their routines to their detriment. The evidence presented at the hearing demonstrated that Father made frequent trips to China which caused him to miss many scheduled visits with the children. In addition, Father missed some scheduled parenting time due to jet lag and his decision to attend Ohio State University football games instead of exercising visitation. Father admitted that his international travel would continue into the foreseeable future and that he could not commit to being available to spend every Wednesday evening with the children. In ordering the modification of parenting time, the trial court reasoned that eliminating the mid-week three-hour parenting time, while extending Father's

parenting time on alternate weekends was in the best interest of the children as it promoted consistency, stability, and structure for the children. Under the circumstances, this Court cannot say that the trial court abused its discretion when it so modified the parenting time order.

{¶11} Moreover, Father is incorrect in his assertion that the trial court eliminated his parenting time during spring, Thanksgiving, and Christmas breaks. The trial court ordered that "holidays and days of special meaning are to be divided as the parties agree or, if no agreement can be reached, pursuant to the Court's Standard Parenting Time Order." The Medina County Domestic Relations Court Standard Parenting Time Schedule, attached to the trial court's judgment, sets out a "Holiday Parenting Time" schedule in section II. That section identifies "Holiday[s]" including "Spring Break," "Thanksgiving," and "Winter break." Because these times are expressly designated as "holidays," the trial court's order entitles Father to visitation as delineated pursuant to the schedule, unless the parties agree to modify that parenting time. The trial court's standard order sets forth two options for visitation during each of the above-referenced holidays and states that "in the event an option is not specified and the parties do not agree, then Option 1 shall be in effect." Therefore, pursuant to the plain language of the trial court's order and standard parenting time schedule, Father's parenting time during spring, Thanksgiving, and Christmas breaks has not been eliminated. Accordingly, his argument in that regard is not well taken.

{¶12} Second, Father argues that the trial court abused its discretion by leaving the issue of extended parenting time in the sole discretion of Mother. In support, Father relies on *Barker v. Barker*, 6th Dist. No. L-00-1346, 2001 WL 477267 (May 4, 2001), in which the appellate court concluded that the trial court abused its discretion by leaving the decision to reinstate the father's visitation in the sole discretion of the child's psychologist. The *Barker* court concluded

such an order was unreasonable, however, because the child's psychologist could withhold her consent for visitation based on matters beyond the father's control and because the psychologist had previously exhibited bias in favor of the mother. *Id.* at *5. That is not the situation in this case.

{¶13} Here, the trial court ordered that "[Father] should receive no *extended* parenting time unless agreed to by [Mother]." (Emphasis added.) In contrast to *Barker*, the trial court did not empower Mother to determine whether Father could exercise parenting time at all. He clearly had the right to certain visitation with the children. Instead, the trial court merely acknowledged that Mother could allow Father to have additional time with the children beyond that which had been ordered. This Court concludes that the trial court did not abuse its discretion.

{¶14} Finally, Father complains that the trial court's parenting time order is biased against him because it penalizes him with forfeiture of parenting time if he is more than 30 minutes late when picking up the children for visitation. He argues that Mother, on the other hand, may disregard the times determined for exchange of the children with impunity.

{¶15} The trial court's order merely reiterates the court's local rule subsumed in the standard parenting time schedule under Section VI., captioned "Promptness." Loc.R. 6.05, Form 6.04A. The rule states in pertinent part: "The residential parent has no duty to wait for the nonresidential parent to pick up the children longer than thirty (30) minutes, unless the nonresidential parent notifies the residential parent that she/he will be late, and the residential parent agrees to remain available after the thirty (30) minute waiting period. A parent who is more than thirty (30) minutes late loses the parenting time period."

{¶16} The Ohio Supreme Court has held that state courts may adopt rules of local practice and that such local rules are enforceable as long as they are not inconsistent with the Ohio Rules of Civil Procedure. *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 554 (1992); *see, also*, Ohio Constitution, Article IV, Section 5(B); Civ.R. 83; Sup.R. 5. Loc. R. 1.01 of the Local Rules of the Court of Common Pleas of Medina County, Domestic Relations Division, states that these rules "were promulgated by the Medina County Court of Common Pleas, Domestic Relations Division, pursuant to Article IV, Section 5(B) of the Ohio Constitution and Rule 5 of the Ohio Supreme Court Rules of Superintendence for the Courts of Common Pleas." Father has not argued that Loc.R. 6.05, which incorporates the standard parenting time schedule, is inconsistent with the Ohio Rules of Civil Procedure. Moreover, he has not demonstrated how such a local rule would be unenforceable.

{¶17} In addition, Father is incorrect in his assertion that Mother is free to delay his access to the children by disregarding the times designated for exchange. Mother is bound to comply with the court's orders regarding parenting time. If she refuses or otherwise fails to do so, Father may file a motion for contempt and Mother would be subject to contempt sanctions. Accordingly, Father's argument that the trial court's order is biased in favor of Mother is not well taken. The first assignment of error is overruled.

{¶18} For the above reasons, Father's first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO GRANT A CONTINUANCE AFTER MR. MORROW'S FORMER COUNSEL ABANDONED HIM ON THE EVE OF TRIAL, THEREBY COMMITTING REVERSIBLE ERROR AND VIOLATING MR. MORROW'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH

AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶19} Father argues that the trial court erred by denying his motion to continue the hearing on his motion to modify child support. Additionally, he argues that the denial of his request for a continuance violated his right to due process of law. This Court disagrees.

{¶20} It is well settled that the decision to grant or deny a continuance lies in the sound discretion of the trial judge. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). The United States Supreme Court emphasized that "not every denial of a request for more time [] violates due process even if the party fails to offer evidences or is compelled to defend without counsel." *Ungar*, 376 U.S. at 589. Whether a denial of a request for a continuance is so arbitrary as to violate due process depends on the circumstances of the case, particularly the reasons articulated to the trial court in support of the request. *Id.* "In determining whether the trial court abused its discretion by denying a motion for a continuance, this court must 'apply a balancing test, weighing the trial court's interest in controlling its own docket, including facilitating the efficient dispensation of justice, versus the potential prejudice to the moving party.'" *Kocinski v. Kocinski*, 9th Dist. No. 03CA008388, 2004-Ohio-4445, ¶ 10, quoting *Burton v. Burton*, 132 Ohio App.3d 473, 476 (3d Dist.1999).

{¶21} Father filed his motion to modify/reduce child support on August 4, 2009. The trial court scheduled a hearing on the motion on October 23, 2009. The hearing on Mother's motion to modify parenting time was subsequently scheduled for the same date and time. Father moved to extend the time in which he must respond to Mother's discovery requests until October 19, 2009, merely four days before the scheduled hearing. The hearing date was converted to a pretrial and the hearing was rescheduled for February 24 and 25, 2010. Father filed his witness and exhibit lists on February 11, 2010. Thirty-six minutes before the hearing was scheduled to

begin, Father filed a motion to continue because his attorney was involved in an ongoing complex trial in another court. The magistrate continued the hearing until May 21, 2010. On May 20, 2010, Father moved to continue the hearing due to his aunt's death on May 15, 2010, and an obligation to leave town for the funeral. The trial court bifurcated the motion hearings and continued the hearing on Mother's motion to modify parenting time to July 27, 2010, and continued the hearing on Father's motion to modify child support to August 10, 2010.

{¶22} On July 29, 2010, Father's attorney moved to withdraw from further representation. The trial court granted the motion. The record contains a signed letter from Father to the magistrate in which Father asserted that he did not challenge his attorney's withdrawal, that he had secured alternate counsel, and that his new attorney would be prepared for the hearing on August 10, 2010. On August 2, 2010, Father's new attorney filed a notice of appearance, a supplemental witness and exhibit list, and a motion to continue the hearing. In support of a continuance, Father's attorney asserted that he needed additional time to review documents and provide Mother's counsel with a supplemental witness and exhibit list. He further asserted that Father would be unfairly prejudiced by the inability to call any additional witnesses he might disclose in a supplemental witness list. Father did not suggest a new date for the hearing. The magistrate denied the motion to continue on August 4, 2010. The same day, Father's attorney filed a second supplemental witness and exhibit list. Father's attorney orally renewed his motion to continue immediately prior to the hearing. The magistrate again denied the motion.

{¶23} Based on a review of the circumstances of this case, this Court cannot say that the domestic relations court abused its discretion by denying Father's August 2, 2010 motion to continue the hearing on his motion to modify child support. Father filed his motion nearly a year

earlier, at a time he believed he could present evidence to justify the reduction. He moved for multiple prior continuances, which the court granted. Father's attorney did not move to withdraw on the "eve of trial," as Father asserts, but rather twelve days prior to trial. Father informed the magistrate by letter the following day that he had secured new counsel who "will prepare and be prepared for the hearing on August 10, 2010 regarding the modification of child support." Father's new counsel filed two supplemental witness and exhibit lists and requested leave to file a third supplement. Although the trial court denied leave to file the third supplement, Father was not precluded from presenting any evidence at the hearing, even over Mother's objection that he had not identified such evidence prior to hearing. Father was permitted to file two supplemental witness and exhibits beyond the deadline, and he was not precluded from presenting any witnesses at the hearing.

{¶24} Given the indefinite nature of the requested continuance, Father's role in creating the circumstances giving rise to the latest request, the inconvenience of repeated delays and uncertainty for Mother, the trial court's right to control its docket coupled with the efficient dispensation of justice outweighs any potential prejudice to Father. *See Kocinski* at ¶ 10. In fact, because Father was not precluded from presenting all evidence and testimony he desired, he has not demonstrated that he was prejudiced at all, let alone unfairly. Although he argues that he had no time "to investigate the approximately $25,000 of unknown funds deposited into [Mother's] bank account in 2009[,]" he presented copies of Mother's bank statements evidencing such activity on her account and was able to cross-examine Mother extensively on the issue. Accordingly, the denial of a continuance did not violate Father's right to due process, and the trial court did not abuse its discretion by denying Father's third motion for a continuance. Father's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ABUSED ITS DISCRETION BY (1) IMPUTING AN ADDITIONAL $16,756 OF INCOME FOR CORPORATE BENEFITS WHEN CALCULATING MR. MORROW'S CHILD SUPPORT OBLIGATION (2) AVERAGING MR. MORROW'S AND MS. BECKER'S INCOME OVER THE PRIOR THREE YEARS THEREBY IMPUTING A GROSS INCOME THAT DOES NOT ACCURATELY REFLECT CURRENT EARNINGS OR EITHER PARTY AND (3) IGNORING THE BASIC CHILD SUPPORT SCHEDULE AND TREATING THE INSTANT ACTION ON A CASE-BY-CASE BASIS. THUS, THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED MR. MORROW'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶25} Father argues that the domestic relations court abused its discretion in its calculation of child support. Specifically, Father argues that the trial court erred by (1) including corporate benefits in his gross income, (2) averaging the parties' incomes and imputing income to Father, and (3) establishing child support outside the basic child support schedule. This Court disagrees.

{¶26} As an initial matter, a trial court's decision regarding child support obligations will not be overturned absent a showing of an abuse of discretion. *Booth v. Booth*, 44 Ohio St.3d 142, 144 (1989).

Corporate benefits as income

{¶27} Father argues that the trial court erred by including $16,756 as company benefits as part of his gross income for purposes of determining his child support obligation. That amount consisted of the annual values of a company car ($9,600), insurance ($4,356), a cell phone ($1,200), and Ohio State University football tickets ($1,600). The trial court did not include the value of the laptop computer provided to Father by his business.

{¶28} R.C. 3119.02 requires the court to calculate the child support obligation in accordance with the applicable child support computation worksheet. The worksheet requires that child support be based on the gross income of the parents. 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 * * *." The statute then sets out a non-exclusive list of the types of income included, for example, salaries, wages, tips, rents, interest, and pensions. The list concludes with "and all other sources of income." Moreover, the statute expressly includes "self-generated income" in a parent's gross income. However, certain types of income are expressly excluded from the definition of gross income. R.C. 3119.01(C)(7)(a)-(f). One such exclusion is "Nonrecurring or unsustainable income or cash flow items[.]" R.C. 3119.01(C)(7)(e).

{¶29} Father is the president of Ohio College of Massotherapy (OCM) and OCM Online. OCM is a non-profit corporation, while OCM Online is a for-profit corporation. Father receives a salary from both businesses. While those salaries are not distinguished clearly on his 2007 tax return, his 2008 tax return indicates he was paid a salary of $121,897 by OCM and $110,316 by OCM Online. He testified that he received certain non-monetary benefits from his employment, including a Lexus automobile, car insurance, a cell phone, and a laptop computer. He also admitted that the company buys four-seat season tickets for Ohio State University football games, but claimed those were a perk for "my" employees but a necessary business expense for himself when he attended games. It is not entirely clear whether OCM provided these benefits to Father or whether he received them from employment with both OCM and OCM Online.

{¶30} Father does not dispute that the monetary value of the above benefits comports with the trial court's finding. Rather, he argues that none of the above benefits should have been included in the calculation of his gross income. Specifically, he argues that the value of such benefits could only be included as "self-generated income" pursuant to R.C. 3119.01(C)(13), and that that provision is not applicable because Father has not received those benefits as "gross receipts received * * * from self-employment, proprietorship of a business, joint ownership of a partnership or closely held corporation, and rents[.]" Because R.C. 3119.01(C)(13) includes in the definition of self-generated income expense reimbursements and in-kind payments such as company cars, Father argues that such benefits are necessarily excluded as gross income under R.C. 3119.01(C)(7).

{¶31} This Court does not agree that reimbursements and in-kind payments such as company cars may only be included as gross income if a parent is self-employed or has an ownership interest in the business merely because R.C. 3119.01(C)(13) lists examples of such benefits. There is nothing in the statute which indicates that the provision of company cars, housing, meals, or other benefits may only be considered as gross income under the limited circumstances where a parent receives them as self-generated income. R.C. 3119.01(C)(7) expressly includes "all other sources of income" in the definition of gross income without regard for the parent's employment circumstances. R.C. 3119.01(C)(7) identifies six types of income expressly excluded from the definition of gross income. None of those exclusions mention benefits of the type included in the trial court's calculation of Father's gross income. "Inasmuch as the legislature chose not to include such an exception it must be presumed that none was intended." *Patton v. Diemer*, 35 Ohio St.3d 68, 70 (1988). Accordingly, even assuming that

Father received the above benefits from OCM, a non-profit corporation in which he necessarily had no ownership interest, there is no statutory support for excluding the value of those benefits.

{¶32} On the other hand, if Father received those benefits from his employment with OCM Online, a for-profit corporation in which he had an ownership interest, the value of most of those benefits would necessarily be included in his gross income as self-generated income because the benefits "are significant and reduce personal living expenses." *See* R.C. 3119.01(C)(13).

{¶33} In either event, Father testified that he had no other car or cell phone for personal use. He admitted that he had no land line telephone at home. He testified that the company paid for his car insurance. He admitted in his appellate brief that he would lose the benefit of these items if he lost his job. He would, therefore, have to pay for such items out of pocket. Accordingly, the trial court did not abuse its discretion by including the value of these benefits as part of Father's gross income.

{¶34} On the other hand, in regard to the Ohio State tickets, Father testified that he provided the dates of the football games to his employees and asked them to let him know which games they were interested in attending. He further testified that he sometimes gives some tickets away to non-employees who have business with the companies. While Father attends some football games every season, he reasonably does not derive a personal benefit from all four seats of every game. Therefore, while he derives some personal economic benefit, he does not derive the full $1,600 value of the tickets as a benefit. He did not, however, testify regarding how many tickets he used for himself and his personal guests, such as his child Mo. Accordingly, the trial court erred by including that entire amount in his gross income. However, based on our resolution of the remaining issues in this assignment of error and the negligible

result the slightly reduced income would have on Father's child support obligation, any error was harmless.

Imputation of income and income averaging

{¶35} Father argues that the trial court erred because it averaged his income from the prior three years and imputed the averaged income to him without making an express finding that he was underemployed. He further argues that the trial court erred by averaging Mother's income to calculate her gross income.

{¶36} R.C. 3119.01(C)(5) defines "income" depending on the circumstances of the parent: "(a) For a parent who is employed to full capacity, the gross income of the parent; (b) For a parent who is unemployed or underemployed, the sum of the gross income of the parent and any potential income of the parent." This Court has consistently held that a trial court must expressly find a parent to be voluntarily unemployed or underemployed before imputing income to that parent. *Misleh v. Badwan*, 9th Dist. No. 24185, 2009-Ohio-842, ¶ 7, citing *Musci v. Musci*, 9th Dist. No. 23088, 2006-Ohio-5882, ¶ 17. However, in this case, the trial court did not impute income to Father. Instead, the trial court averaged Father's income based on fluctuations in his income. Father's reliance on law that requires the trial court to make an express finding of voluntary underemployment before averaging income is misplaced.

{¶37} R.C. 3119.05(H) states: "When the court or agency calculates gross income, the court or agency, when appropriate, may average income over a reasonable period of years." This Court had held that the decision as to the propriety of averaging a parent's income lies in the sound discretion of the trial court which is in the best position to weigh the facts and circumstances. *Akin v. Akin*, 9th Dist. Nos. 25524, 25543, 2011-Ohio-2765, ¶ 13; *Krone v. Krone*, 9th Dist. No. 25450, 2011-Ohio-3196, ¶ 32.

{¶38} Father testified that his income has fluctuated based on the recent decrease in student enrollment. His accountant testified that the businesses have recently rebounded after the economic downturn. Father testified as to the changes he made in the year before the hearing to cut business overhead, and the accountant testified that those actions greatly improved the companies' financial positions. Under the circumstances, the trial court did not abuse its discretion by averaging Father's income from the prior three years based on the fluctuations in his income.

{¶39} Father further argues that the trial court erred by averaging Mother's income because her income has steadily increased rather than fluctuated. His argument is not supported by the record. Mother's tax returns submitted into evidence indicated that Mother's adjusted gross income was $58,588 in 2007, $42,212 in 2008, and $51,716 in 2009. She testified that she received a one-time $500 employee of the month bonus and a one-time $5000 employee of the year bonus in 2009. By averaging Mother's income over the past three years, properly not including the bonuses as nonrecurring or unsustainable income pursuant to R.C. 3119.01(C)(7)(e), the trial court arrived at an amount nearly $3000 more than it would have had it merely used Mother's gross income from 2009 minus the nonrecurring income. By doing so, a higher percentage of the support obligation was attributed to Mother, thereby inuring a benefit to Father. Under the circumstances, the trial court did not abuse its discretion by averaging Mother's income from the prior three years based on fluctuations in her income.

Basic child support schedule

{¶40} Father argues that the trial court erred by failing to apply the basic child support schedule because the parents' combined gross income was not more than $150,000.

{¶41} R.C. 3119.021 sets out the basic child support schedule which must be used to calculate child support unless the parents' combined gross income is less than $6,600 or more than $150,000. R.C. 3119.04(B) states, in relevant part: "If the combined gross income of both parents is greater than one hundred fifty thousand dollars per year, the court * * * shall determine the amount of the obligor's child support obligation on a case-by-case basis and shall consider the needs and the standard of living of the children who are the subject of the child support order and of the parents."

{¶42} Father argues that the trial court was precluded from determining his child support obligation on a case-by-case basis because the combination of the parents' actual income is less than $150,000. He argues that, because R.C. 3119.01(C)(7) defines gross income as income earned during a calendar year, the trial court erred by using the parties' averaged incomes. This Court has already concluded that the trial court did not err by averaging the parents' prior three years' incomes to determine their annual gross incomes. The average of Father's prior three years' incomes was $143,622, while Mother's was $49,954, resulting in a combined gross income of $193,576 for the parents. Accordingly, the trial court was required to determine Father's child support obligation on a case-by-case basis.

{¶43} Father further argues that his child support obligation is more than 50% of his current take home pay. In support, he cites *Siebert v. Tavarez*, 8th Dist. No. 88310, 2007-Ohio-2643, ¶ 36, for the proposition that the trial court must "ensure that the obligor parent is not so overburdened by child support payments that it affects that parent's ability to survive." Father fails, however, to explain how his current obligation impacts his ability to survive.

{¶44} On the other hand, the evidence adduced at trial demonstrated that Father continued to live well. He recently bought a $405,000 home with a pool on which he was able to

make an $80,000 down payment even before he sold his prior home for $260,000. He made certain improvements to the property and acquired new furnishings. Father was driving a Lexus automobile, furnished by OCM, as well as an $11,000 motorcycle for which he paid cash. He continued to travel internationally, ostensibly for business, although he had not secured any new business opportunities from his numerous and frequent trips to China. Moreover, even though Father recently voted to decrease his salary, because of the control he exerts on the board of trustees for the college, he retains considerable power to establish his salary. He did not testify that his recent decrease in salary caused him to downsize his lifestyle in any way.

{¶45} Moreover, Father cites no law to show that withholding of "over 50%" is not permissible under these circumstances. In fact, in a garnishment context, 15 U.S.C. 1673(b)(2)(B) would allow withholding of up to 60% of Father's disposable earnings as he is not supporting a spouse or other dependent children. Accordingly, Father's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING MR. MORROW IN CONTEMPT, THEREBY COMMITTING REVERSIBLE ERROR AND VIOLATING MR. MORROW'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶46} Father argues that the trial court erred by finding him in contempt for failing to pay his child support obligation through wage withholding. This Court agrees.

{¶47} This Court reviews contempt proceedings for an abuse of discretion. *Akin* at ¶ 44, citing *Thomarios v. Thomarios*, 9th Dist. No. 14232, 1990 WL 1777 (Jan. 10, 1990). An abuse of discretion connotes that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore*, 5 Ohio St.3d at 219.

{¶48} As this Court previously recognized: "Contempt of court is defined as disobedience of an order of a court. It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." *Poitinger v. Poitinger*, 9th Dist. No. 22240, 2005-Ohio-2680, ¶ 31, quoting *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55 (1971), paragraph one of the syllabus. Although contempt is generally classified as either civil or criminal to facilitate review, the Ohio Supreme Court has recognized that contempt proceedings are sui generis, i.e., neither wholly civil nor wholly criminal. *Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 253. The *Brown* court elaborated:

> While both types of contempt contain an element of punishment, courts distinguish criminal and civil contempt not on the basis of punishment, but rather, by the character and purpose of the punishment. Punishment is remedial or coercive and for the benefit of the complainant in civil contempt. Prison sentences are conditional. The contemnor is said to carry the keys of his prison in his own pocket, since he will be freed if he agrees to do as ordered. Criminal contempt, on the other hand, is usually characterized by an unconditional prison sentence. Such imprisonment operates not as a remedy coercive in its nature but as punishment for the completed act of disobedience, and to vindicate the authority of the law and the court. Therefore, to determine if the sanctions in the instant cause were criminal or civil in nature, it is necessary to determine the purpose behind each sanction: was it to coerce [Father] to obey the [child support order], or was it to punish [him] for past violations?
>
> (Internal citations omitted.) *Id.* at 253-254.

{¶49} In this case, the trial court fined Father after finding that he had failed to pay his child support through wage withholding. However, the court gave him the opportunity to purge his contempt and avoid paying the fine by establishing wage withholding within thirty days of the court's judgment. Because the trial court's punishment was remedial and coercive in nature, and Father had the opportunity to purge the contempt, it was civil in nature. In civil contempt proceedings, a finding of contempt must be premised on clear and convincing evidence. *Romans*

v. Romans, 9th Dist. No. 23181, 2006-Ohio-6554, ¶ 9. This Court has long recognized that the movant's burden of proving a prima facie case of contempt may be met by producing the order and proof of the contemnor's failure to comply. *Rossen v. Rossen*, 2 Ohio App.2d 381, 383-384 (9th Dist.1964).

{¶50} Mother alleged in her contempt motion that Father had failed to pay child support and that he had failed to effect the mandatory wage withholding. The trial court found Father in contempt solely on the basis that he had failed to pay his child support obligation by wage withholding "as ordered by this Court and pursuant to the Ohio Revised Code." The domestic relations court cited to the parties' March 30, 2005 agreed judgment entry which addressed interim issues of parenting time and child support pending trial to ultimately resolve those issues. The March 30, 2005 entry ordered Father to pay child support by wage withholding through the Ohio Child Support Payment Central, in Columbus. That entry included the following order in bold font: "All child support and spousal support under this order shall be withheld or deducted from the income or assets of the Obligor pursuant to a withholding or deduction notice or appropriate court order issued in accordance with Section 3121.03 of the Ohio Revised Code." Mother cited neither the March 30, 2005 order nor R.C. 3121.03 in her contempt motion.

{¶51} On March 1, 2006, the domestic relations court issued a final judgment in which it designated Mother as the residential parent; ordered parenting time for Father, and ordered Father to pay child support. The child support order stated: "Effective October 1, 2005, Mr. Morrow shall pay child support through the Medina County Child Support Enforcement Agency in the amount of $2,198.05 per month, which includes 2% processing fee." There was no order that the support be paid through wage withholding. Moreover, the March 1, 2006 order did not

include any notice identical or similar to the notice in the March 30, 2005 order, referencing R.C. 3121.03 or otherwise mentioning wage withholding.

{¶52} Mother relied on the March 1, 2006 order for her allegation that Father was required to pay child support by wage withholding. However, at the hearing, Mother admitted that the current order for child support ordered Father to pay CSEA directly, not by wage withholding.

{¶53} Mother failed to present clear and convincing evidence that Father violated the current child support order. Before a party may be held in contempt for disobeying a court order, the prior order "'must spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him.'" *Collette v. Collette*, 9th Dist. No. 20423, 2001 WL 986209 (Aug. 22, 2001). The interim child support order issued on March 30, 2005, was superseded by the final judgment issued on March 1, 2006. While the interim order ordered Father to pay child support by wage withholding to the central agency in Columbus, the final judgment ordered Father to pay child support directly to Medina County CSEA. Moreover, the final judgment made no reference to R.C. 3121.03 or any other code provision which would have put Father on notice of any obligation to pay child support by wage withholding. Accordingly, the domestic relations court erred when it found Father in contempt for failing to pay child support by wage withholding based on the evidence adduced at trial. Father's fifth assignment of error is sustained.

III.

{¶54} Father's first, second, third, and fourth assignments of error are overruled. Father's fifth assignment of error is sustained. The judgment of the Medina County Court of

Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part, and the cause remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
Reversed in part,
And cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

DONNA J. CARR
FOR THE COURT

WHITMORE, P. J.
BELFANCE, J.
CONCUR.

APPEARANCES:

JOHN C. RAGNER, Attorney at Law, for Appellant.

LINDA HOFFMAN, Attorney at Law, for Appellee.

C

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Seventh District, Mahoning County.
Katina Marie SPIER, Plaintiff-Appellee,
v.
Michael Ewald SPIER, et al., Defendants-Appellant.

No. 05 MA 26.
Decided March 7, 2006.

Civil Appeal from Common Pleas Court, Domestic Relations Division, Case No. 04 DR 113. Affirmed.
Attorney Mark A. DeVecchio, Canfield, for Plaintiff-Appellee.

Attorney Lynn Sfara Bruno, Youngstown, for Defendant-Appellant.

DEGENARO, J.

*1 {¶ 1} Defendant-Appellant, Michael Spier, appeals the decision of the Mahoning County Court of Common Pleas, Domestic Relations Division, that granted a divorce between he and Plaintiff-Appellee, Katina Spier, and, among other things, established a child support order and divided the marital property. Michael raises eight issues on appeal which address these aspects of the trial court's divorce decree, but none of the arguments Michael raises in his eight assignments of error have any merit. Accordingly, the trial court's decision is affirmed.

Facts

{¶ 2} Michael and Katina were married in April 1994. At the time of the marriage, Michael owned a home in Canfield, Ohio, which subsequently became the marital residence. The parties have three children who are all unemancipated. During the marriage, Michael worked for General Motors and was the primary wage-earner. Near the end of the marriage, Katina began working for Avon and became a manager. As part of her employment package, Katina paid Avon $135.00 per month for unlimited use of a vehicle, gasoline, and automobile insurance.

{¶ 3} Katina filed a complaint for divorce in February 2004. After a hearing, a magistrate entered temporary orders dealing with child custody, child support, and spousal support in April 2004. That order, among other things, required that Michael pay child and spousal support, prevented either party from incurring debt on the credit of the other party, and provided that Katina would only be responsible for the monthly expenses set forth in her affidavit of income.

{¶ 4} While the divorce was pending, Michael fell behind in paying his child and spousal support and incurred an arrearage. Furthermore, he gave several checks directly to Katina, rather than to the child support agency, and sought to have these payments credited toward his arrearage at the final divorce hearing.

{¶ 5} Prior to the final hearing, the parties entered into an agreement regarding the custody of the children, which left only monetary issues related to child support, spousal support, and the property division for the trial court to decide. They also stipulated that the de facto date the marriage ended was April 3, 2004.

{¶ 6} During the divorce hearing, Michael requested that he be reimbursed for one-half of the mortgage payments and other expenses he paid while the divorce was pending. He also tried to introduce evidence showing that much of the appreciation in the value of the marital residence since the marriage was due to improvements he made to the home prior to the marriage.

{¶ 7} In its judgment, the trial court refused to award Michael any increase in the value of his separate property interest in the marital home, finding that he failed to prove that any increase in the value of the home was passive income. It also refused to reimburse Michael for the payments he made toward various obligations while the divorce was pending. The trial court further refused to credit most of the payments Michael made directly to Katina toward his arrearage. Finally, the trial court refused to impute income to Katina based on the automobile-related employment

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benefits she enjoyed.

*2 {¶ 8} On appeal, Michael has raised eight assignments of error, but some of these assignments of error address similar subjects. Accordingly, we will address those together.

Standard of Review

{¶ 9} In each of his eight assignments of error, Michael challenges either the manner in which the trial court calculated child support or the manner in which it divided the couple's marital property. We review both child support orders and property divisions under the same standard, abuse of discretion. *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, at ¶ 5; *Pauly v. Pauly*, 80 Ohio St.3d 386, 390, 1997-Ohio-0105. The term "abuse of discretion" implies more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. This court may not substitute its judgment for that of the trial court unless, considering the totality of the circumstances, the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131. Further, this court should not independently review the weight of the evidence but should be guided by the presumption that the trial court's findings are correct. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74.

Imputing Income for Child Support Purposes

{¶ 10} In his first assignment of error, Michael argues:

{¶ 11} "The court failed to impute necessary income to the Appellee in the Ohio Child Support Guidelines Worksheet pursuant to Ohio Revised Code Section 3109.05(A)(1) and Ohio Revised Code Section 3119.01 through 3119.967 which was set forth in Exhibit B in the fact and conclusions of law order filed by the court on or about February 1, 2005."

{¶ 12} According to Michael, Katina had two sources of income other than her salary from her employer: 1) income from teaching aerobics and 2) vehicle-related benefits, such as a car, auto insurance, and gasoline reimbursement, from her employer. He believes this income should be imputed to her for the purposes of child support. In particular, Michael argues that R.C. 3119.07(C)(7) requires that the vehicle-related benefits be included as part of her income for child support purposes.

{¶ 13} Michael argues that Katina's aerobics-related income was not included in the child support calculations because he assumes that her Avon-related income would be listed on the first line of the child support computation worksheet, while her aerobics income would be listed on the sixth line of that worksheet. His argument ignores both the plain language of the worksheet and the trial court's findings of fact and conclusions of law.

{¶ 14} First, line one of the child support computation worksheet does not distinguish between types of employment-related income. Instead, it requires that the trial court use "annual gross income from employment" to fill that line. Michael's claim that a trial court should only include a party's income from his or her primary employer on this line ignores the language in the worksheet. The phrase "annual gross income from employment" clearly contemplates that a party's total income from all employment be listed on this first line of the worksheet. Michael's argument to the contrary is meritless.

*3 {¶ 15} Second, the trial court's findings of fact and conclusions of law explicitly states at page 18 that Katina was employed both as a district sales manager for Avon and an aerobics instructor. The trial court calculated Katina's total income from both employers to be $40,430.84, the amount listed on the first line of the child support computation worksheet. Michael's claim that the trial court erred by not including Katina's aerobics-related income is factually incorrect.

{¶ 16} His argument regarding the employment benefits is just as meritless. Michael refers to R.C. 3119.01(C)(7) to argue that these employment benefits are income for the purposes of child support calculations. However, these kinds of benefits are income only if the party receiving those benefits is self-employed, the proprietor of a business, or is a joint owner of a partnership or closely held corporation.

{¶ 17} R.C. Chapter 3119 requires that the parties' gross incomes be used to calculate a proper amount of child support. R.C. 3119.01(C)(7) defines "gross income" and provides:

{¶ 18} " 'Gross income' means, except as ex-

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cluded in division (C)(7) of this section, 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 to the extent described in division (D) of section 3119.05 of the Revised Code; commissions; royalties; tips; rents; dividends; severance pay; pensions; interest; trust income; annuities; social security benefits, including retirement, disability, and survivor benefits that are not means-tested; workers' compensation benefits; unemployment insurance benefits; disability insurance benefits; benefits that are not means-tested and that are received by and in the possession of the veteran who is the beneficiary for any service-connected disability under a program or law administered by the United States department of veterans' affairs or veterans' administration; spousal support actually received; and all other sources of income. 'Gross income' includes * * * self-generated income * * *."

{¶ 19} This definition does not specifically include employment-related benefits as income, leading to the conclusion that they should not be included as income. This conclusion is supported by the statutory definition of "self-generated income."

{¶ 20} " 'Self-generated income' means gross receipts received by a parent from self-employment, proprietorship of a business, joint ownership of a partnership or closely held corporation, and rents minus ordinary and necessary expenses incurred by the parent in generating the gross receipts. 'Self-generated income' includes expense reimbursements or in-kind payments received by a parent from self-employment, the operation of a business, or rents, including company cars, free housing, reimbursed meals, and other benefits, if the reimbursements are significant and reduce personal living expenses." R.C. 3119.01(C)(13).

*4 {¶ 21} If the phrase "gross income" included expense reimbursements or in-kind payments received in the course of employment, then there would be no need for the Revised Code to specifically include these kinds of employment-related benefits in the definition of "self-generated income." The specific inclusion of these kinds of benefits in R.C. 3119.01(C)(13) indicates that they are not a part of a person's "gross income" unless that person is self-employed, a proprietor of a business, or a joint owner of a partnership or closely held corporation.

{¶ 22} This conclusion is not altered by the cases Michael cites. In *Pruden-Wilgus v. Wilgus* (1988), 46 Ohio App.3d 13, the trial court included employment-related benefits in a husband's income when calculating his child support obligation, but the husband was self-employed at the time of the divorce. Likewise, in *Offenberg v. Offenberg*, 8th Dist. Nos. 78885, 78886, 79425, 79426, 2003-Ohio-0269, the parent whose employment-related benefits were used to calculate his child support obligation came from the operation of a closely held corporation which he owned. These cases do not support Michael's argument that these kinds of benefits should be imputed to Katina; they merely show that they must be imputed to a parent if the income is self-generated.

{¶ 23} In this case, the evidence demonstrates that Katina was employed by Avon and, therefore, R.C. 3119.01(C)(13) does not apply to her. The trial court could not have included her employment-related benefits as income for the purposes of calculating child support. Michael's argument to the contrary is meritless.

Child Support Arrearage

{¶ 24} In his second assignment of error, Michael argues:

{¶ 25} "With regard to the order of the court, specifically at page 36, paragraph 7, the court erred in failing to consider in kind contributions and credibility of the Appellee in establishing that no child support arrearage should have been assessed to the Appellant based upon direct payment to the Appellee as and for the benefit of the parties' minor children."

{¶ 26} Michael does not challenge the trial court's conclusion that he owed a child support arrearage; rather, he argues the trial court erred by not giving him more credit for payments he made directly to Katina. According to Michael, Katina's testimony demonstrated that her credibility was suspect and that the trial court erred when it relied on her statement that she only received $500.00 for child support payments.

{¶ 27} R.C. 3121.44 and 3121.45 require that any payment to satisfy a child support obligation be made to the office of child support in the department of job and family services and that any payment made di-

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rectly to the other parent will be considered a gift, unless the payment is made to discharge an obligation other than child support. These statutes became effective in 2001, but their predecessor, R.C. 2301.36, contained the same mandatory language. Nevertheless, Ohio appellate courts have held that a trial court has the discretion to credited in-kind payments made while a divorce was pending toward a child support arrearage. See *Rodriguez v. Frietze,* 4th Dist. No. 04CA14, 2004-Ohio-7121, at ¶ 43; *Campbell v. Campbell,* 9th Dist. No. 21996, 2004-Ohio-5553, at ¶ 8; *Neiheiser v. Neiheiser* (Jan. 13, 2000), 8th Dist. No. 75184. A trial court's decision to credit in-kind contributions for child support will not be reversed absent an abuse of discretion. *Rodriguez* at ¶ 43.

*5 {¶ 28} In this case, the trial court did precisely that; it credited a $500.00 in-kind payment toward the child support arrearage which occurred while the divorce was pending. Michael's argument is that the trial court did not credit him enough. According to Michael, he introduced evidence that he gave her three other checks totaling $2,200.00 and that this amount should also be credited to his arrearage since "the Appellee was not able to prove that those were for anything other than support."

{¶ 29} This statement shows that Michael misunderstands the burden of proof on this issue. R.C. 3121.45 states that all child support obligations be paid through the child support office and places the burden of rebutting the presumption that any payment not made through that office was a gift. *Cox v. Cox* (1998), 130 Ohio App.3d 609, 616. In other words, Katina did not need to prove that the payments were for something other than support; rather, Michael must prove that the payments were for the purposes of child support.

{¶ 30} In her testimony, Katina admitted that Michael gave her a check for $1,200.00 on February 19, 2004, but denied that it was for the purposes of child support. Instead, she testified that Michael wrote her the check because her paycheck was improperly deposited in the wrong bank account. She also admitted that Michael wrote her two checks for $500.00 apiece in March 2004. She stated that one of those checks was to reimburse her for charges he made on her credit card and admitted that the other one was for child support.

{¶ 31} Michael testified that he gave her each of these checks because Katina "needed money for her bills, * * * for this, * * * for that, and for my kids not to go without anything." When specifically asked about each of these checks, Michael's testimony tended to support Katina's version of events. He stated that he gave Katina the February 19th check because she deposited money into the account, but didn't have any money and he "felt sorry for her and [ ] wanted to make sure [his] kids had food to live on." He denied knowing whether Katina's check had been improperly deposited in his account. While this version of events does not precisely correlate to the version given by Katina, it is reasonable to interpret Michael's testimony as a garbled version of Katina's version of events. Michael further testified that he gave both of the March checks so Katina could "take care of [his] children" and denied that either check was meant to reimburse Katina for charges to her credit card.

{¶ 32} Given these facts, the trial court reasonably concluded that the only check which was intended as an in-kind payment for the purposes of child support was one of the $500.00 March checks. Although Michael challenges Katina's credibility, the credibility of witnesses and the weight of the evidence are matters to be determined by the trier of facts. *Simoni v. Simoni* (1995), 102 Ohio App.3d 628, 634. Accordingly, Michael's second assignment of error is meritless.

Separate Property

*6 {¶ 33} In his third and eighth assignments of error, Michael argues

{¶ 34} "The court erred at paragraph 12, page 38 of its order in awarding to the Appellee a portion of the certificate of deposit located at Sky Bank to be equally divided between the parties when the certificate of deposit was separate premarital property and no claim, testimony or evidence was made to same during the course of the trial on this matter."

{¶ 35} "The court failed to adequately protect and preserve the Appellant's premarital interest in the marital residence known as 6900 Kirk Road, Canfield, OH 44406."

{¶ 36} In these assignments of error, Michael maintains that the trial court erred when it determined the nature and value of his separate property in two

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respects: 1) by not recognizing that a certificate of deposit was separate property and 2) by undervaluing his separate property interest in the marital residence. He contends that Katina never proved that the certificate of deposit was a marital property or that she made any contribution toward that certificate of deposit. According to Michael, he sufficiently proved that the certificate of deposit was his marital property since it was in his name only. He further argues that the evidence demonstrates that much of the increase in the value of the marital residence was due to improvements he made to the home before the marriage.

{¶ 37} R.C. 3105.171(B) requires that a trial court determine what constitutes marital property and what constitutes separate property. The phrase "marital property" includes, among other things, "[a]ll real and personal property that currently is owned by either or both of the spouses, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage." R.C. 3105.171(A)(3)(a)(i). In contrast, "separate property" includes, among other things, "[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage." R.C. 3105.171(A)(6)(a)(ii).

{¶ 38} When the parties contest whether an asset is marital or separate property, the presumption is that the property is marital, unless proven otherwise. *Sanor v. Sanor,* 7th Dist. No.2001 CO 37, 2002-Ohio-5248, at ¶ 53. The burden of tracing separate property is upon the party claiming its existence. *DeLevie v. DeLevie* (1993), 86 Ohio App.3d 531, 536. An appellate court applies a manifest weight of the evidence standard of review to a trial court's designation of property as either marital or separate. *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 159. Therefore, the judgment of the trial court will not be disturbed upon appeal if supported by some competent, credible evidence. *Fletcher v. Fletcher,* 68 Ohio St.3d 464, 468, 1994-Ohio-0434.

{¶ 39} Although Michael's third assignment of error deals with the trial court's division of the certificate of deposit, he refers to the property divided as an "account" throughout his brief. This leads Katina to conclude that Michael is confusing the Sky Bank certificate of deposit with a Sky Bank savings account. This conclusion may be correct since Michael's argument refers to contributions made to the "account" during the marriage, premarital savings accounts or the lack thereof, and the possible commingling of marital assets in that "account." Of course, a certificate of deposit is not a savings account. So none of the evidence about premarital savings accounts or the commingling of assets in an account have any relevance to whether this certificate of deposit is a marital asset.

*7 {¶ 40} At page six of its judgment entry, the trial court found as follows:

{¶ 41} "Defendant testified that he had a certificate of deposit at Mahoning Bank, now known as Sky Bank. Defendant testified that prior to marriage the certificate had an original balance of $2,000.00. Defendant did not present documentation of this account showing the balance prior to marriage. In fact, neither party testified to the present day balance, the term of said certificate, or whether said account actually exists. Plaintiff did not admit that the certificate is Defendant's separate property and requested in her Proposed Findings of Fact and Conclusions of Law that it be divided between the parties. The Court finds that Defendant failed to prove that he has a separate property interest in the certificate. The Court finds that the certificate is a marital asset subject to distribution by the Court."

{¶ 42} The trial court's description of the facts in this regard is accurate. The only place in the transcript where this certificate of deposit is addressed is in Michael's testimony. He stated that he owned a certificate of deposit with Mahoning National Bank, which is now known as Sky Bank, in the 1980s and that the value of that certificate in the 1980s was $2,000.00, but that it would probably be worth more now. However, he admitted that he could not support his claim that this was a separate asset with any documentation.

{¶ 43} Although the evidence introduced into the record states that the property is separate property and there is no evidence contradicting that testimony, the trial court is the ultimate trier of fact in this case. It believed that Michael did not prove by a preponderance of the evidence that this certificate of deposit, if it now exists, was actually separate property since he provided absolutely no documentation supporting his claim. The trial court's decision in this regard is rea-

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sonable, since Katina had no burden to prove that the property was marital property. Thus, Michael's arguments regarding the certificate of deposit are meritless.

{¶ 44} The same holds true for Michael's argument that the trial court undervalued his separate property interest in the parties' marital residence. Michael bought the residence in 1988 for $75,000.00 and, at the time of the marriage, it was worth $91,600.00. The trial court found that a mortgage balance of $48,872.00 was outstanding at the time of the marriage. Thus, it concluded that he had a separate property interest in that real estate of $42,728.00 at the time of the marriage.

{¶ 45} Michael argues this valuation was incorrect. During the divorce hearing, Michael tried to have expert witnesses to gauge the present value of the various improvements he made to the marital residence before the marriage and mentions these attempts in his appellate brief, but the value of the improvements would have been reflected in the value of the home at the time of the marriage. If Michael were to be awarded the value of the home at the time of the marriage and the value of the improvements he made to the home prior to the marriage, then he would be receiving a windfall. The trial court recognized this by finding that "[a]lthough Defendant made many substantial improvements to the residence prior to marriage, those improvements would have been reflected in the value of the property at the time of marriage." Michael's arguments in this regard are meritless.

*8 {¶ 46} Michael also argues that the trial court erred when it failed to find that he was entitled to any passive interest on his premarital interest in the property. Separate property includes "[p]assive income and appreciation acquired from separate property by one spouse during the marriage." R.C. 3105.171(A)(6)(a)(iii). "Passive income" is defined as "income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse" and includes an increase in the value of property resulting from either inflation or the property's location. R.C. 3105.171(A)(4); *Slomcheck v. Slomcheck,* 11th Dist. No.2001-T-0098, 2002-Ohio-4952, at ¶ 11.

{¶ 47} In this case, the trial court concluded that Michael failed to meet his burden of proof to demonstrate that any increase in the value of the marital residence after the marriage was Michael's passive income, rather than a result of the labor, monetary, or in-kind contribution of either spouse during the marriage. In order to prove that some portion of the marital residence's value was passive income, Michael presented the testimony of an accountant, Louis DiPaolo, who presented two different ways to calculate Michael's passive income. First, DiPaolo used the interest rates published by the federal Treasury Department for a treasury bill to calculate a conservative interest rate. He then used this interest rate to calculate the passive growth in Michael's separate interest in the property, which was $73,900.00 in April 2004. According to DiPaolo, this is the standard practice to estimate passive growth. However, on cross-examination DiPaolo conceded that he did not know if the value of the marital residence appreciated at the same rate as a treasury bill.

{¶ 48} DiPaolo was also asked to calculate Michael's passive income based on the change in value in the residence during the marriage. According to DiPaolo, the value of the residence increased by 43% during the marriage. He testified that if Michael's separate interest in the property increased at the same rate, then his separate interest in the property would be valued at $61,101.00 at the time of the divorce.

{¶ 49} The trial court refused to accept either of the options presented by DiPaolo. It found "that the improvements that were made after the parties were married could have very well affected the value of the martial residence" and "were the direct result of labor, monetary, or in-kind contribution from the parties during the marriage." In particular, the trial court pointed to the fact that Michael never presented any evidence showing "that the appreciation on his separate property interest was limited to outside passive forces, such as location or inflation." Given the "insufficient evidence showing that the increase in value was due to passive appreciation," the trial court refused to increase Michael's share of the marital property above $42,728.00.

*9 {¶ 50} The trial court's conclusion is reasonable and supported by the evidence. Michael bore the burden of proving that any increase in value after the marriage was passive income. The evidence in the record shows that the value of the residence increased during the marriage, but also showed that the couple made improvements to the home during the marriage.

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Michael failed to introduce any evidence distinguishing from an increase in value due to passive income from the increase in value due to the labor, monetary, or in-kind contribution of either spouse during the marriage. Accordingly, Michael's challenge to the trial court's valuation of his separate interest in the marital residence is meritless.

Credit for Mortgage Payments while Divorce was Pending

{¶ 51} In his fourth and fifth assignments of error, Michael argues:

{¶ 52} "The court erred in allowing Appellant upon sale or auction of the vacant property owned by the parties only one-half (1/2) credit for any payments made from the date of the entry of February 1, 2005 until the property is sold or auctioned. The Appellant should have been granted one hundred percent (100%) credit for those payments."

{¶ 53} "At page 41, the court further erred in not granting the Appellant credit for mortgage payments made including payments on insurance and real estate taxes on the former marital residence during the pendency of the divorce and after the stipulated de facto termination date of the marriage which was prejudicial to the Appellant."

{¶ 54} The parties stipulated that the marriage was terminated on April 3, 2004. After this date, Michael was ordered to continue to make the mortgage payments on the parties' real estate while the divorce was pending. Michael argues the trial court erred when it failed to award him a greater share of the parties' marital real estate, or reimburse him in another manner, for the payments made after the marriage ended. However, Michael waived these arguments by not moving either to set aside or modify the magistrate's temporary order.

{¶ 55} Civ.R. 53(C)(3)(a) gives magistrates the power to enter orders without judicial approval in, among other things, hearings under Civ.R. 75(N), which governs temporary child support, spousal support, and custody orders while a divorce is pending. If a party is unsatisfied with a magistrate's orders entered under Civ.R. 53(C)(3)(a), then that party may move to set the order aside, stating the party's objections with particularity, within ten days after the magistrate's order is entered. Civ.R. 53(C)(3)(b). A party may also move to modify a temporary order entered under Civ.R. 75(N). Civ.R. 75(N)(2).

{¶ 56} Courts have held that a party who moves neither to set aside an order entered under Civ.R. 53(C)(3)(a) nor to modify that order cannot raise any issue which could have been addressed in that order at the final divorce hearing. See *Douglas v. Douglas* (1996) 110 Ohio App.3d 615, 621; *Beran v. Beran*, 6th Dist. No. WD-03-070, 2004-Ohio-2455, at ¶ 30; *Wichman v. Wichman* (Mar. 22, 1996), 2nd Dist. No. 95 CA 31. Who will pay the mortgage while a divorce is pending and whether that party will receive credit for that payment are issues that are clearly within the scope of Civ.R. 75(N). For instance, in *Watson v. Watson*, 10th Dist. No. 03AP-104, 2003-Ohio-6350, at ¶ 14, the appellate court specifically approved of a magistrate's temporary order which ordered one party to make the payments for the parties' mortgage and ordered that the party making the payments "receive credit for one-half of the payments made to the mortgage company and on the equity line of credit."

***10** {¶ 57} In this case, the magistrate's temporary orders required that Michael pay the mortgage on both parcels of property, but did not specify that he would receive credit for those payments. Michael never moved to set aside that order and he never moved to modify that order. Accordingly, he has waived any argument regarding whether he should receive credit for the mortgage payments on those properties made while the divorce was pending. Thus, these arguments are meritless.

Division of Marital Property

{¶ 58} In his sixth assignment of error, Michael argues:

{¶ 59} "The Appellee was not assessed her fair portion of the outstanding marital debt."

{¶ 60} Michael maintains the trial court did not equitably divide the marital debt. He particularly complains about the division of the credit card debt, but he also mentions the home mortgage, utility, tax, insurance, and dental costs associated with the marital debt.

{¶ 61} Although Michael's argument is framed in the context of the trial court's property division, the record does not support such an argument. Michael

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introduced evidence of the various aspects of the marital debt in February 2004, when Katina left the marital residence, but he failed to introduce any evidence showing the status of those debts in April 2004, the de facto date the marriage was terminated, or at the time of the final hearing. At the final hearing, he did not ask that the remaining debts be divided between the parties; rather, he asked that the trial court order that Katina reimburse him for one-half of the payments he made toward the bills outstanding at the time the parties separated in February 2004.

{¶ 62} In essence, even though this assignment of error is couched in terms of property division, it appears to be another effort to challenge the temporary order issued by the magistrate. For the reasons stated above, Michael waived these issues since he moved neither to set aside the magistrate's order nor to modify that order. See *Douglas* at 621.

{¶ 63} Furthermore, since the record contains no evidence about the state of these marital obligations at the time of the divorce, the trial court could not have equitably divided these debts. We previously held that a trial court does not need to equitably divide an asset or debt if the record does not provide sufficient evidence for the trial court to value and equitably divide that asset or debt. *Didisse v. Didisse,* 7th Dist. No. 04 BE 4, 2004-Ohio-6811, at ¶ 23. For these reasons, these arguments are meritless.

2003 Tax Preparation and Refund

{¶ 64} In his seventh assignment of error, Michael argues:

{¶ 65} "The court failed to adequately divide the 2003 tax refund and give the Appellant credit made to the State of Ohio for the parties' joint marital taxes and payment made to the tax preparer."

{¶ 66} In its judgment entry, the trial court found that someone received a $763.00 tax refund at the marital residence, but both parties denied receiving that refund. Thus, the trial court found that there was "insufficient evidence concerning the whereabouts of the refund" and it "decline[d] to award either party a share of same." According to Michael, the trial court should have split the tax refund between the parties even though both parties claim they never received the check. He further contends that he should be reimbursed for the costs of preparing and filing the taxes.

*11 {¶ 67} A trial court does not need to equitably divide an asset if the record does not provide sufficient evidence for the trial court to value and equitably divide that asset. *Didisse* at ¶ 23. In this case, both parties denied receiving the tax refund and, without an equitable way to decide which party to believe, the trial court could not have equitably divided that asset. Accordingly, the trial court did not abuse its discretion when it refused to divide the 2003 tax refund.

{¶ 68} The trial court also did not err when it refused to reimburse Michael for the cost of preparing the taxes and paying back taxes. The trial court refused to reimburse Michael for those expenses because he voluntarily incurred them without first seeking a modification of the magistrate's Civ.R. 75(N) temporary order. As discussed above, the failure to request a modification of a temporary order waives the issue for purposes of appeal. See *Douglas* at 621. Thus, Michael's final assignment of error is meritless.

Conclusion

{¶ 69} Michael challenges various aspects of the divorce decree relating to the property division and child support. However, each of his assignments of error is meritless. He failed to preserve many of his arguments by failing to move to either set aside the magistrate's temporary order or to modify that order and his other assignments of error are not supported by the record. Accordingly, the judgment of the trial court is affirmed.

DONOFRIO, P.J., concurs.
WAITE, J., concurs.

Ohio App. 7 Dist.,2006.
Spier v. Spier
Not Reported in N.E.2d, 2006 WL 696093 (Ohio App. 7 Dist.), 2006 -Ohio- 1289

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COMMON PLEAS COURT

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IN THE COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
MEDINA COUNTY, OHIO

JEFFREY MORROW,	)	**CASE NO. 04 PA 0199**
Plaintiff,	)	
vs.	)	**JUDGE MARY R. KOVACK**
SHERRI BECKER,	)	**JUDGMENT ENTRY**
Defendant.	)	

This case is before Judge Mary R. Kovack on the Plaintiff's objection to the Magistrate's Decision of August 30, 2010, which modified the parties' parenting time schedule. This case is also before the Court on the Plaintiff's objection to the Magistrate's Decision of January 12, 2011 and her subsequent Supplemental Decision of January 18, 2011, both of which addressed the denial of the Plaintiff's Motion to Modify Child Support.

The Plaintiff's objections were heard separately before the undersigned. Plaintiff Jeffrey Morrow was present at both hearings and represented by Attorney John C. Ragner. Defendant Sherri Becker was also present at both hearings and represented by Attorney Linda Hoffmann.

The Court finds that the Plaintiff's objections are not well taken for the reasons described herein.

I. THE PLAINTIFF'S OBJECTION TO THE MAGISTRATE'S DECISION CONCERNING PARENTING TIME.

The parties, who were never married, have been continuously litigating parenting time and support issues since their relationship ended in December of 2004. The Defendant has always been the custodial parent of the parties' two minor daughters, Mackenzie (DOB January 13, 2004) and Morgan (DOB June 21, 2002). This Court first established a parenting time schedule on March 1, 2006, in which the Plaintiff was granted a modified version of the Medina County Standard Parenting Time Schedule. The Plaintiff was given parenting time with Morgan every other weekend from 6:00 PM Friday to 9:00 PM Sunday

night, and parenting time with Mackenzie from 11:00 AM to 9:00 PM on the same Sunday that the Plaintiff had parenting time with Morgan. The Plaintiff was also granted parenting time with both girls every other Wednesday from 6:00 PM to 9:00 AM on Thursday.

In 2007, upon a motion by the Defendant, the Court modified the schedule by affording the Plaintiff parenting time as strictly set forth in the Court's Standard Parenting Time Schedule. Thus, the Plaintiff's scheduled mid-week parenting time was reduced from an overnight stay to Wednesday evening from 5:00 p.m. to 8:00 p.m. The parties were ordered to follow "Option 1" for Thanksgiving and Winter Break, in which each break is split evenly. The only exception to the Standard Parenting Time Schedule in the 2007 modification was the Court's decision not to award any summer vacation parenting time to the Plaintiff.

At some point thereafter, the parties agreed on an informal schedule that was never journalized as an order of this Court. However, the Defendant once again moved to modify the parenting time schedule on August 28, 2009. As grounds for the Motion, the Defendant noted that the Plaintiff frequently traveled out of the country for long periods of time and that his travels interfered with his ability to exercise parenting time. The Defendant also expressed concern over an incident where the Plaintiff did not seek necessary medical care for Mackenzie.

After a hearing at which both parties testified, a Magistrate granted the Defendant's Motion. In revising the parties' parenting time schedule, the Magistrate actually *increased* the Plaintiff's parenting time. While the Magistrate eliminated the Plaintiff's Wednesday evening mid-week visits, she increased the length of each weekend visit from 6:00 p.m. on Friday to Monday morning (instead of 6:00 p.m. on Sunday) for both children. The Plaintiff is required now to deliver the children to school on Monday mornings. Thus, despite the loss of the three-hour mid-week visits, the Plaintiff's standard parenting time increased from four overnights per month to six overnights per month.

With regard to summer parenting time, the 2007 order prohibited the Plaintiff from any summer vacation parenting time. The Magistrate clarified and expanded this order by stating that the Plaintiff shall have extended parenting time as mutually agreed upon by both parties. Finally, the Magistrate ordered that the Plaintiff shall forfeit any parenting time he misses while traveling out of the country or for which he is more than a half-hour late to the exchange.

In his objections, the Plaintiff accuses the Magistrate of demonstrating a bias against him and argues that the Magistrate lacked any justification for reducing his parenting time. He further objects to the Magistrate's orders that require the Plaintiff to forfeit his parenting time if he is over thirty minutes late for the exchange or if he is out of the country during his parenting time weekend. Finally, he argues that the Magistrate's Decision lacks clarity with respect to holidays and days of special meaning. After an independent review of the record, the Court finds that the Plaintiff's objections are not well-taken.

An allocation of parental rights and responsibilities must serve the best interests of the minor children subject to the order. R.C. 3109.04. In response to the Plaintiff's first argument, the Court reiterates that the modified parenting time schedule increased the Plaintiff's parenting time. Not only did the Plaintiff's parenting time increase, the new schedule was designed to ameliorate concerns over the lack of consistency in the girls' lives. Throughout this entire case, the Court[1] and the Defendant have expressed concern over the Plaintiff's failure to consistently honor the parenting time schedule. In both the original March 1, 2006 Judgment Entry and the April 26, 2007 Judgment Entry modifying the Plaintiff's parenting time, the Court noted that the Plaintiff did not regularly exercise all the parenting time available to him. *See* Judg. Entry of March 1, 2006 at 2; Judg. Entry of April 26, 2007 at 2. In affirming the 2007 modification, the Ninth District Court of Appeals noted that "[b]oth parties acknowledged the importance of a definite schedule for the girls" and held that the modification was in the children's best interests because "it provided structure that the children needed." ¶ 18.

Unfortunately, however, it appears that the 2007 modification did not ensure stability and structure in the parenting time schedule. At the July 27, 2010 hearing before the Magistrate, both parties acknowledged that the Plaintiff frequently missed mid-week and weekend visits throughout 2009 and 2010. Most of the missed visits coincided with the Plaintiff's regular business trips to China, which have lasted anywhere from ten days to two weeks at a time. In 2009, the Plaintiff traveled to China at least seven

[1] This case was initially filed in the Medina County Juvenile Court. As the Defendant's son is employed in that court, a visiting judge was appointed to this case. During the pendency of this action, jurisdiction over parentage cases was transferred to the Medina County Domestic Relations Court pursuant to R.C. 2301.03(U). For the sake of clarity, any references to "the Court" will encompass all prior trial courts and their judges and magistrates that, at any point in time, presided over this action.

times, and as of July, 2010, he had made at least four trips that year and indicated plans to return several times before the end of December, 2010.

In addition to being out of the country, the Plaintiff testified that he has missed parenting time with at least one of the girls or returned the girls to the Defendant early in order to accommodate a variety of other events, such as a flight schedule, jet lag, or an Ohio State football game. At the hearing, the Defendant expressed a concern for the impact the lack of consistency has on the parties' children: "I told [the Plaintiff] I didn't think it was very healthy for him to be disrupting the girls like this because the girls do want a schedule regular [sic] where they know something is going on. That's how they operate, both of them." Tr. at 35.

The Plaintiff, however, does not outwardly share the Defendant's concern for the stability of the girls. He does not dispute that he missed mid-week and weekend parenting time throughout 2009 and 2010. Although the Plaintiff assured the Court that the frequency and duration of his travels to China would both decrease in 2011, when asked whether he could plan any future trips to China to avoid missing his weekend parenting time, the Plaintiff replied, "I can't honestly sit here and say yes when I don't think it's going to be entirely possible." Tr. at 112. After setting forth his plan for increased parenting time with the girls, including mid-week overnight visits every Wednesday, the Plaintiff qualified his desire for regular mid-week visits by stating that "[y]ou know, I don't want to sit here and talk like I'm going to be just available every single Wednesday when honestly things are not stable quite yet." Tr. at 109. Neither the Plaintiff's actions nor testimony demonstrate a willingness to honor a consistent parenting time schedule.

In his objection, the Plaintiff cites the missive of Local Rule VI to "ensure that minor children have *frequent and consistent* contact with both parents." [emphasis added]. The Court finds that the sole inhibitor of frequent and consistent contact with his daughters is the Plaintiff himself. Given that the Plaintiff's own testimony indicates a strong likelihood that his work and personal needs will continue to interfere with the parenting time schedule, the Court certainly does not find that granting the Plaintiff mid-week visits is in the children's best interests.

Instead, the Court finds that eliminating mid-week visits furthers the children's best interests. The modified parenting time schedule accommodates both the Plaintiff's and Defendant's work schedules. Plaintiff is now able to travel for up to eleven days at a time without disrupting the parenting time

schedule, and the Defendant can continue to work every other weekend without a need for child care. By tailoring the parenting time schedule to the demands of the parties' employment schedules, it is the hope of this Court that the girls will enjoy a consistent schedule that includes regular and reliable parenting time with each parent. The Court's standard parenting time schedule is designed to ensure children have frequent and consistent contact with both parents. Loc. R. 6, Form 6.04(A).

The Court further finds that the order forcing the Plaintiff to forfeit parenting time missed due to his travels abroad serves the best interests of the children. As an initial matter, the Court's standard parenting schedule (Loc. R. 6, Form 6.04(A), Sections 6 and 7) specifically states that "[a] parent who does not exercise parenting time forfeits the time."

The Court is also concerned by the Plaintiff's cavalier attitude towards the parenting time schedule. The record demonstrates that the Plaintiff frequently misses visits but expects to "make up" parenting time whenever it suits him. The Plaintiff displays no regard for the impact his erratic schedule has on his daughters. The Court finds that forcing the Plaintiff to forfeit missed parenting time in accordance with the Court's Standard Schedule encourages the Plaintiff to maintain a regular parenting time schedule rather than deal in "parenting time currency" that the Plaintiff saves up and then attempts to cash in whenever is most convenient for him.

The Plaintiff also objects to the order that he forfeit parenting time if he is more than a half-hour late. He argues that it is unreasonable to restrict one party without placing a similar restriction on the other party. However, the Magistrate's order in this regard was just a recitation of the Court's standard parenting time schedule, Loc. R. 6, Form 6.04(A), Section 6, which provides as follows:

> The residential parent has no duty to wait for the nonresidential parent to pick up the children longer than thirty (30) minutes, unless the nonresidential parent notifies the residential parent that she/he will be late, and the residential parent agrees to remain available after the thirty (30) minute waiting period. A parent who is more than thirty (30) minutes late loses the parenting time period.

Moreover, the Defendant provided a substantial amount of testimony explaining how disruptive the Plaintiff's tardiness at exchanges can be to the minor children. Tr. at 50-51. The Court does not find any credibility in the Plaintiff's claim that he was only late once in picking up the

children. The cited portion of the transcript does not describe the one time the Plaintiff was late, it describes the one time the Plaintiff completely missed his parenting time without so much as a phone call to the Defendant. At the hearing, the Plaintiff did not address the Defendant's complaints concerning his tardiness. As the Defendant's testimony was not disputed, the Court finds the testimony credible. Not only is the restriction a standard order of this Court, it is particularly warranted and in the children's best interests under the specific facts of this case.

Finally, with the exception of one typographical error, the Court finds no merit in the Plaintiff's argument that the Magistrate's Decision is ambiguous in relation to holidays, school vacations, and periods of parenting time that extend beyond the Plaintiff's regular weekend visits. With respect to these special categories of parenting time, the Magistrate ordered as follows:

> Plaintiff should receive no extended parenting time unless agreed to by the Plaintiff. This includes Christmas break, spring break, and summer. The parties should alternate holidays and days of special meaning as agreed. If they cannot agree, they should follow the Court's Standard Parenting Time Order for these special days.

The Court finds that the second mention of the "Plaintiff" in the first quoted sentence is an error. The sentence should read, "Plaintiff should receive no extended parenting time unless agreed to by the Defendant." The Court finds the Plaintiff's objection well-taken to the extent that the second "Plaintiff" in the first sentence shall be changed to "Defendant."

The order as modified herein very clearly establishes that holidays and days of special meaning are to be divided as the parties agree or, if no agreement can be reached, pursuant to the Court's Standard Parenting Time Order. The term "holiday" is not synonymous with "school vacation;" the order limits the application of the Standard Parenting Time Order to actual holidays. There is nothing ambiguous about the Magistrate's treatment of holidays in the parenting time schedule, and nothing in the Magistrate's Decision denies the Plaintiff the opportunity to celebrate holidays and days of special meaning with his children.

Likewise, the order permits the Plaintiff "extended parenting time" as agreed upon by the parties. "Extended parenting time" is any period longer than the extended weekend he is entitled to under the ordered schedule. The order instructs the parties to observe their regular alternating weekend schedule without any regard for the school calendar. The only exceptions to this schedule are holidays and days of special meaning, which are allocated

by agreement of the parties or the Standard Parenting Time Order. The Court finds that the plain meaning of the Magistrate's Decision regarding holidays, days of special meaning, and extended parenting time is clear and lacks any ambiguity. Moreover, the Court notes that this order also represents an expansion of the Plaintiff's prior parenting time order, as the previous order denied the Plaintiff any extended summer parenting time.

Furthermore, the Court rejects the Plaintiff's contention that providing extended parenting time as agreed upon by the parties is equivalent to giving the Defendant sole discretion over whether the Plaintiff can exercise extended parenting time. The Plaintiff expressed frustration with caring for all of Mackenzie's needs. He admitted that has not been actively assisting in potty training Mackenzie and cannot communicate with her through sign language. Moreover, during his last extended summer visit with the girls, the Plaintiff demonstrated difficultly immediately treating Mackenzie's medical needs. The testimony is undisputed that, on the second day of the Plaintiff's week-long summer parenting time, Mackenzie fell ill with synovitis. When visiting the girls on that Tuesday at Morgan's gymnastics class, the Defendant noticed that Mackenzie was in a significant amount of pain and had lost the ability to walk. The Defendant mentioned this to the Plaintiff and requested that he take her to see the doctor immediately the next morning. When the Defendant called the Plaintiff from work the next day to follow up, the Plaintiff had failed to take Mackenzie to the doctor and expressed ambivalence about her medical condition. He refused the Defendant's request to immediately rush her to the emergency room. Instead, the Plaintiff dropped Mackenzie off at the Defendant's workplace so the Defendant could obtain medical treatment for her daughter (at the expense of her work obligations).

While there is no dispute that the Plaintiff's care of Mackenzie did not cause or contribute to the synovitis, the failure of the Plaintiff to promptly seek medical treatment for Mackenzie causes this Court to question the Plaintiff's ability to place his daughters' immediate needs before his own. The Court finds that it is in the best interests of the parties' children to provide the Plaintiff with extended parenting time only as the parties agree.

Upon hearing the arguments of the parties and reviewing the Court's file, the Court grants the Plaintiff's objection to the typographical error on page five of the Magistrate's Decision. The Court overrules the remainder

of the Plaintiff's objections. The Magistrate's Decision of August 30, 2010 is affirmed subject to the modification discussed herein.

II. THE PLAINTIFF'S OBJECTION TO THE DENIAL OF HIS MOTION TO MODIFY CHILD SUPPORT.

The Plaintiff also raises several objections to the Magistrate's Decision of January 12, 2011 and her supplemental Decision of January 18, 2011. After independently reviewing the record, the Court does not find the Plaintiff's objections to be well-taken.

A. THE MAGISTRATE DID NOT VIOLATE THE PLAINTIFF'S DUE PROCESS RIGHTS BY FAILING TO CONTINUE THE HEARING.

As the Ninth District Court of Appeals recently observed, "not every denial of a request for more time violates due process even if the party fails to offer evidence or is compelled to defend without counsel." *Vaughan v. Vaughan*, Medina App. No. 10CA0014-M, 2010 Ohio 5928 at ¶ 9, citing *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921. The Court must balance any potential prejudice to the moving party against the Court's right to control its docket and the public interest in the timely and efficient dispatch of justice. *Id.*

Specifically, the Ninth District considered the following factors:

> The length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case. *Id.*

After reviewing these factors, the Court finds that the Plaintiff's due process rights were not violated by the denial of the Plaintiff's August 2, 2010 Motion to Continue.

This Motion was originally filed on August 4, 2009 by the Plaintiff. At a pretrial conducted on October 23, 2009, the Court set a trial date of February 24, 2010. Parties exchanged final witness and exhibit lists two weeks prior to the original trial date.

On the scheduled day of the trial, the Plaintiff filed what would be the first of three motions to continue. The Plaintiff's first two motions to continue were granted, and the trial was ultimately rescheduled from February 24, 2010 to August 10, 2010. During that six month delay, and despite

already having filed their witness and exhibit lists, the parties continued to exchange discovery and filed supplemental witness and exhibit lists. *See* Def. Mtn. to Continue, May 7, 2010 (stating that discovery began in the fall of 2009 and was ongoing as of the date of the Defendant's Motion). In addition to his original exhibit list of February 11, 2010, the Plaintiff subsequently filed two supplemental exhibit lists in August of 2010. Despite being untimely, both of these exhibit lists were filed in the record. When the Plaintiff moved for both a third continuance and leave to file a third supplemental exhibit list, the Magistrate denied the Plaintiff's requests.

This Court must ensure that cases are resolved in a timely fashion. The parties' financial circumstances can fluctuate on a daily basis, placing child support modification cases at risk of lingering discovery in perpetuity. If given the opportunity, there are always additional financial documents for counsel to demand and information to exchange. At some point, the Court must cut off the exchange of information and force the parties to proceed.

The record demonstrates that the parties' behavior required the Court to firmly close the discovery window. The parties were given ample opportunity over the course of a full year to engage in the discovery process and prepare for trial. The Plaintiff filed three different exhibit lists over a six-month time period, two of which were submitted within eight days of the trial. Although the Magistrate denied the Plaintiff's request to file a fourth supplemental exhibit list, the Magistrate granted considerable leeway in admitting exhibits at trial regardless of whether they were listed on an exhibit list. Tr. at 68.

Furthermore, the Plaintiff's choice to retain new counsel on the eve of trial does not justify another delay in the final hearing date. Mr. Ragner is the sixth attorney who has made an appearance in this case on behalf of the Plaintiff since the initial Complaint was filed in 2004. On two occasions prior to 2010, the Plaintiff retained new counsel within two weeks of a significant hearing date.[2] On each of those occasions, the Court accommodated the Plaintiff's choice to switch attorneys by delaying the final hearing. The Plaintiff's timing and history of seeking new counsel

[2] On April 28, 2005, the Plaintiff's first attorney of record withdrew five days prior to a hearing date. His second attorney immediately filed for a continuance in light of his limited familiarity with the case. The Plaintiff's second attorney of record moved to withdraw on August 7, 2005, only four months after being retained and less than two weeks prior to the final hearing. Once again, the final hearing date was continued to accommodate the Plaintiff's change in counsel.

immediately before a court date raises the Court's concerns of a possibly dilatory motive.

The Court finds that the denial of the Plaintiff's third Motion to Continue did not result in any prejudice. Moreover, given the Plaintiff's history in this case, the Court's interests in controlling its docket outweigh the alleged harm suffered by the Plaintiff. Plaintiff's due process concerns are unfounded.

B. THE MAGISTRATE DID NOT ERR IN CALCULATING CHILD SUPPORT

The Plaintiff objects to numerous components of the Magistrate's child support calculation. As explained herein, the Court does not find that any of the Plaintiff's objections to the child support order have merit.

1. THE MAGISTRATE DID NOT MISCALCULATE THE PLAINTIFF'S SALARY

The Plaintiff erroneously argues that R.C. 3119.05(B) requires the Court to deduct the amount of the child support order at issue from the obligor's gross income prior to calculating the final order. This is a misreading of the statute. R.C. 3119.05(B) clearly orders a deduction for all *prior* court-ordered child support for other children not subject to the order being calculated.

Permitting an obligor to deduct the amount of the order at issue from his income prior to the calculation of the order is essentially giving the obligor a credit for his payment of the order. That is not what the statute intended to do. The child support worksheet is designed to consider all household income available for the support of the child. R.C. 3119.05(B) codifies the Ohio public policy that a previously court-ordered child support payment should not count towards income available for the support of a subsequent child. That is not the case here - rather the obligor seeks a credit for his payment for the support of the child subject of this order.

The Plaintiff also objects to the inclusion of the value of the Plaintiff's work-related benefits in his gross income. The Magistrate properly considered work-related benefits when computing the Plaintiff's annual salary for child support purposes.

The definition of "gross income" is expansive and includes all variations of regular income. *See Merkel v. Merkel* (Montgomery Cty. 1988), 51 Ohio App. 3d 110, 113, 554 N.E.2d 1346 ("Under the facts of this case, we find that the receipt of free housing is a significant benefit for the appellee and that it would be inequitable for the trial court not to consider such a factor in determining his total gross income."); *Kiehborth v. Kiehborth* (Delaware Cty. 2006), 169 Ohio App. 3d 308, 169 Ohio App. 3d 308.

It is irrelevant whether the Plaintiff is a salaried employee or self-employed; courts have found that the value of in-kind employment benefits shall count as gross income regardless of the obligor's position. *See Merkel, supra* at 112. As the Plaintiff notes in his own brief, these benefits would cease if the Plaintiff left his employment. This fact underscores that these benefits, just as his salary, are conditioned on his continued employment and are designed, in part, as repayment for his services to the company. *Cf. Peterman v. Peterman*, Hancock App. No. 5-2000-11, 2000 Ohio 1895 at *16 (declining to include the monthly value of the appellant's rent-free condo in her gross income because "the living arrangement was wholly unrelated to [appellant's] job.") Therefore, it was reasonable to include the value of these benefits in the Plaintiff's gross income.

The Plaintiff further objects to the "imputation" of an annual income of $143,622. His objections to this figure are all somewhat related and will be addressed together. When calculating a child support amount, the Court must first determine the parties' respective gross annual incomes. The Plaintiff alleges that the Court "imputed" him income of $143,622. This is incorrect. Imputed income is potential income that the Court finds a voluntarily underemployed party is capable of earning. *Rock v. Cabral* (1993), 67 Ohio St. 3d 108, 110, 616 N.E.2d 218. The Magistrate's child support calculation was not based on *potential* income; rather, the $143,622 figure was derived from the average of his *actual* earnings in 2008, 2009, and projected income in 2010. The 2010 income was based on the Plaintiff's own testimony of his salary draw of $75,000 plus the value of the in-kind benefits as discussed *supra*. R.C. 3119.05(H) permits the Court to average the Plaintiff's income if appropriate. The Court finds that the income figure used for the purpose of calculating child support was based on the Plaintiff's salary history, which was appropriately averaged over the preceding three years due to its significant fluctuations.

The Plaintiff compares his situation with that of the obligor in *McGuire v. McGuire*, Scioto App. No. 01CA2789, 2002 Ohio 1061. In *McGuire*, the court found that income averaging was inappropriate where the obligor's income was "fixed for the foreseeable future" as a result of the obligor's severe accident. The resulting disability left the obligor physically unable to earn any income other than his disability benefits. *Id.* at *2.

In the instant case, the limited earning capacity of the Plaintiff is less certain. The Court is painfully aware of the current economic climate. However, economic conditions are fluid; simply because the Plaintiff's

business is currently experiencing a slump does not mean these conditions are permanent or fixed for the near future. Unlike the obligor in *McGuire*, the Plaintiff is not under any physical burden that prevents him from performing his job. Given the variability in his income over the last three years, and the lack of evidence that the Plaintiff's reduced income is "fixed for the foreseeable future," the Court finds that averaging the Plaintiff's income is appropriate and reasonable.[3]

Finally, the Plaintiff objects to the application of R.C. 3119.04(B) to the parties' child support calculation. Quixotically, the Plaintiff argues that, "[a]lthough income averaging might be appropriate in certain situations, a court cannot then take that average income over a period of years and apply it to the child support calculations and override the $150,000 statutory cap." Pl. Br. at 18. Not surprisingly, the Plaintiff provides no legal support for this argument.

A child support calculation is based on the parties' gross incomes. Chapter 3119 provides various methods of computing a party's gross income when the party's sources of income are more complex than a typical salaried employee. As discussed earlier, the Magistrate employed the income-averaging method as authorized in 3119.05(H) to determine the Plaintiff's actual gross income.

Once it establishes each party's annual gross income, the Court must next determine the amount of the combined support obligations. *See* R.C. 3119.022, line 17a of the worksheet. The combined support amount is taken directly from a table created by the Ohio legislature and codified in R.C. 3119.021. The amount of the support obligation is based directly on the parties' combined household income. The required level of support is then allocated to each party in proportion to his or her share of the total amount of household income. *See* R.C. 3119.022, lines 16 and 18.

The table created by the Ohio legislature only lists support levels for households making up to $150,000. If the parties' combined gross income exceeds $150,000, R.C. 3119.04(B) gives the Court the discretion to calculate a support amount "necessary to maintain for the children the standard of living they would have enjoyed had the marriage continued." *Freeman v. Freeman*, Wayne App. No. 07CA0036, 2007 Ohio 6400 at ¶ 23. The Court is not required to make special findings supporting the support amount unless the order is less than the statutory

[3] In fact, the Plaintiff's accountant testified that the Plaintiff's business was in much better financial shape in 2009 than in 2008, indicating that the business' financial situation may be improving. Tr. at 95, 110.

support amount for combined incomes of $150,000. R.C. 3119.04(B); *see also Freeman, supra* at ¶ 22.

In this case, the Magistrate appropriately considered the standard of living enjoyed by the children prior to the parties' split, and calculated the parties' combined support obligation beyond $150,000 at 10.5% of their combined household income. This figure is reasonable and less than the ratio of support to household income reflected at the highest end of the statutory table. R.C. 3119.021; *see also Freeman, supra* at ¶ 24 (noting that the ratio of statutory support to household income in a household with two children and $150,000 of combined income is 14.6%). Therefore, the Court finds that the Magistrate's calculation of child support pursuant to R.C. 3119.04(B) is appropriate, reasonable, and based on the evidence presented at the hearing.

2. THE MAGISTRATE DID NOT MISCALCULATE THE DEFENDANT'S SALARY

While the definition of "gross income" is expansive, it nonetheless excludes "[n]onrecurring or unsustainable income or cash flow items." R.C. 3119.01(C)(7)(e). The Plaintiff argues that the Magistrate erred in failing to consider "$27,000 of unaccounted for income that Ms. Becker made in 2008." Pl. Br. at 6. Because there is no evidence that this income is recurring or sustainable income, it is inappropriate for the Court to include this amount in the Defendant's gross income when calculating child support payments.

The "unaccounted for income" the Plaintiff references are the deposits the Defendant made into her checking account in 2008. On cross examination, the Plaintiff's counsel questioned the Defendant extensively about the source of each deposit. While the Defendant could not recall the exact source of each amount, she did explain that she received two one-time cash bonuses in 2008 for her exemplary work performance. These bonuses were a reward for her designation as "employee of the month" and "employee of the year," and were reported on her tax returns. She also attributed a portion of these deposits to tax refunds and child support payments she received from the Plaintiff, as well as rent received from leasing a residential property the Defendant owns.

All of these monies were appropriately considered by the Magistrate. As the bonuses were reported as taxable income, they were included in the Magistrate's average of the Defendant's previous three years of income. However, because they are not recurring or sustainable sources of income, it is inappropriate to inflate her annual income by this amount every year. With regard to the rental property, the Defendant testified that the rental

income is less than the Defendant's monthly mortgage payment. Therefore, this is not revenue that should be added to her gross income.

The Defendant repeatedly stated that her sole sources of income were from her two jobs: a full-time position as a nurse and a part-time position in student services at Hamrick School. The Plaintiff did not present any evidence contradicting this testimony or demonstrating that the Defendant received any additional source of regular revenue or income. Moreover, although the Defendant could not explain the source of some of her checking account deposits, the various forms of revenue she cited in 2008 approximately equal the amount of cash the Plaintiff concluded was deposited in her account in 2008. Therefore, the Court finds the Defendant's explanation credible. Without any evidence refuting the sources of the questioned deposits, it is inappropriate for this Court to attribute any additional income to the Defendant.

At the hearing before this Court, the Plaintiff also objected to averaging the Defendant's income. The Defendant testified before the Magistrate that the number of hours she works for Hamrick School in her part-time position fluctuates. As noted *supra*, the Defendant has also received one-time bonuses for her performance as an employee. Therefore, the Court does not find that it is inappropriate to average the Defendant's income for the purpose of determining her gross income. *See* R.C. 3119.05(H).

The Court finds that the income attributed to the both parties in the Magistrate's child support calculation is accurate and supported by the evidence presented before the Magistrate.

III. THE PLAINTIFF WAS IN CONTEMPT OF AN ORDER TO PAY CHILD SUPPORT VIA WAGE WITHHOLDING.

The Plaintiff objects to the Magistrate's finding of contempt for his failure to pay his child support obligation through wage withholding. He mistakenly believes that he was never ordered to pay child support through wage withholding.

When the Plaintiff's support order was first established in this case on March 30, 2005, the Plaintiff was ordered to "pay child support in the amount of $803.74 per month per child . . . by wage withholding through the Ohio Child Support Payment Central . . . Support shall continue until further order of the Court." Agreed Judg. Entry at 2. This order was never vacated by a subsequent order of this Court. While the amount of the Plaintiff's child support order may have been subsequently modified by the Court, the mechanism by which the Plaintiff

was ordered to pay was not. Furthermore, R.C. 3105.21 and 3121.03 require the Plaintiff to pay child support by wage withholding.

The Court further finds that the Magistrate was justified in levying a fine against the Plaintiff conditioned on his subsequent compliance with the wage withholding order. As the president of his employer company, the Plaintiff possesses the power to execute the wage withholding order and willfully ignored the 2005 order and relevant statutory requirements. He failed to present any explanation for his disregard of the wage withholding requirement other than his mistaken belief that it did not apply to him. Therefore, the Plaintiff's objection to the Magistrate's finding of contempt is not well-taken.

The Court finds that the Plaintiff's objections to the Magistrate's Decisions of January 12, 2011 and January 18, 2011 are not well-taken and hereby denied. The Magistrate's Decisions of January 12, 2011 and January 18, 2011 are hereby adopted as an Order of this Court.

It is therefore ordered as follows:

1. Plaintiff shall continue to pay $2,154.95 per month plus 2% processing charge.

2. Plaintiff in contempt for failing to establish wage withholding as ordered by this Court and pursuant to the Ohio Revised Code. For his contempt Plaintiff shall pay a fine of $250

3. In order to avoid paying the fine Plaintiff must begin wage withholding on his wages from OCM and OCM Online as previously ordered within thirty (30) days of the date of this judgment entry.

4. There will be a purge hearing before Judge Mary R. Kovack on **June 24, 2011 at 9:30 until 9:45 a.m.** to determine whether Plaintiff has purged himself of contempt. Plaintiff is cautioned that he must appear or a capias will issue for his arrest.

5. Defendant and her counsel are awarded $575 in attorney fees and court costs. Plaintiff should pay to Defendant and her counsel $575 within thirty (30) days of the judgment entry. If Plaintiff pays as ordered, no interest shall attach. If Plaintiff fails to pay as ordered, interest shall attach at the statutory rate for any amount due and owing from the date of judgment.

6. The Plaintiff's April 19, 2011 Motion for Temporary Restraining Order and Preliminary Injunction is set for hearing before Magistrate Owen on July 22, 2011 at 3:00 P.M.

   The Court finds that Civ. R. 75(I) pertains specifically to the issuance of a temporary restraining order. Pursuant to Civ. R. 75(I), a restraining order shall not issue to protect a child unless a party demonstrates that the child

"is about to suffer physical abuse, annoyance, or bodily injury by the other party." *Id.* at (2).

The Court finds that the Plaintiff's Motion and accompanying Affidavit did not meet the threshold standard set forth in Civ. R. 75(I) justifying the immediate issuance of a restraining order. The Plaintiff did not provide any explanation as to why his daughter's visits with a counselor would cause the child to suffer abuse, annoyance, or bodily injury.

Moreover, Local Rule 4.03(B) states that emergency ex *parte* orders will only be granted "where there are exigent circumstances that may result in irreparable harm for which there is no other adequate remedy."

The Defendant is currently the sole custodian of the child with legal authority to make decisions concerning the child's mental and physical health.

Moreover, the Defendant disclosed on the record in the hearing on July 27, 2010 in the presence of the Plaintiff and his counsel that the child was seeing a psychologist. Tr. at 44. Therefore, the Plaintiff's Motion nine months later and accompanying Affidavit did not present any exigent circumstance warranting emergency relief. In accordance with Local Rule 4.3, the matter is set for hearing as soon as practicable.

All child support and spousal support under this order shall be withheld or deducted from the income or assets of the obligor pursuant to a withholding or deduction notice or appropriate Court order issued in accordance with Chapters 3119, 3121, 3123, and 3125 of the Revised Code or a withdrawal directive issued pursuant to Sections 3123.24 to 3123.38 of the Revised Code and shall be forwarded to the Obligee in accordance with Chapters 3119, 3121, and 3125 of the Revised Code. [Per O.R.C. 3121.27(A)]

NOTICE

EACH PARTY TO THIS SUPPORT ORDER MUST NOTIFY THE CHILD SUPPORT ENFORCEMENT AGENCY IN WRITING OF HIS OR HER CURRENT MAILING ADDRESS, CURRENT RESIDENCE ADDRESS, CURRENT TELEPHONE NUMBER, CURRENT DRIVER'S LICENSE NUMBER, AND OF ANY CHANGES IN THAT INFORMATION. EACH PARTY MUST NOTIFY THE AGENCY OF ALL CHANGES UNTIL FURTHER NOTICE FROM THE COURT. IF YOU ARE THE OBLIGOR UNDER A CHILD SUPPORT ORDER AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY BE FINED UP TO $50.00 FOR A FIRST OFFENSE, $100.00 FOR A SECOND OFFENSE. IF YOU ARE AN OBLIGOR OR OBLIGEE UNDER ANY SUPPORT ORDER AND YOU WILLFULLY FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY BE FOUND IN CONTEMPT OF COURT AND BE SUBJECTED TO FINES UP TO $1,000.00 AND IMPRISONMENT FOR NOT MORE THAN NINETY (90) DAYS.

IF YOU ARE AN OBLIGOR AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY NOT RECEIVE NOTICE OF THE FOLLOWING ENFORCEMENT ACTIONS AGAINST YOU: IMPOSITION OF LIENS AGAINST YOUR PROPERTY; LOSS OF YOUR PROFESSIONAL OR OCCUPATIONAL LICENSE, DRIVER'S LICENSE, OR RECREATIONAL LICENSE; WITHHOLDING FROM YOUR INCOME; ACCESS RESTRICTION AND DEDUCTION FROM YOUR ACCOUNTS IN FINANCIAL INSTITUTIONS; AND ANY OTHER ACTION PERMITTED BY LAW TO OBTAIN MONEY FROM YOU TO SATISFY YOUR SUPPORT OBLIGATION. [Per O.R.C.3121.29]

IT IS SO ORDERED.

Judge Mary R. Kovack

5/10/11
Date

cc: John C. Ragner, Esq., Counsel for Plaintiff
Linda Hoffmann, Esq., Counsel for Defendant

mrk/jgm

COPY

CHILD SUPPORT COMPUTATION WORKSHEET
SOLE RESIDENTIAL PARENT OR SHARED PARENTING ORDER

Names of Parties:
Sherri Becker
Jeffrey Morrow

Date: Jan 03, 2011
Case No.:
Judge:

The following parent was designated as the residential parent and legal custodian: ____ Mother ____ Father X Shared

No. of Minor Children 2

	COLUMN I FATHER	COLUMN II MOTHER	COLUMN III COMBINED
1a. Annual gross income from employment or, when determined appropriate by the court or agency, average annual gross income from employment over a reasonable period of years (Exclude overtime, bonuses, self-employment income, or commissions)	143,622	49,954	
1b. Amount of overtime, bonuses and commissions	0	0	

	FATHER	MOTHER
Year 3 (Three years ago)	0	0
Year 2 (Two years ago)	0	0
Year 1 (Last calendar year)	0	0
AVERAGE	0	0

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

2. For Self-Employment Income:		
a. Gross receipts from business	0	0
b. Ordinary and necessary business expenses	0	0
c. 5.6% of adjusted gross income or the actual marginal difference between the actual rate paid by the self-employed individual and the FICA rate	0	0
d. Adjusted gross income from self-employment (Subtract the sum of 2b and 2c from 2a)	0	0
3. Annual income from interest and dividends (whether or not taxable)	0	0
4. Annual income from unemployment compensation	0	0
5. Annual income from workers' compensation, disability insurance benefits, or Social Security Disability/Retirement benefits	0	0
6. Other annual income		
a. Other Taxable Income	0	0
b. Cash Perks	0	0
c. Spousal support received	0	0

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Worksheet: Sole/Shared
Date: Jan 03, 2011
Case No.:

	COLUMN I FATHER	COLUMN II MOTHER	COLUMN III COMBINED
7a. Total annual gross income (add lines 1a, 1b, 2d & 3-6)	**143,622**	**49,954**	
7b. Health insurance maximum (multiply line 7a by 5%)	**7,181**	**2,498**	
ADJUSTMENTS TO INCOME			
8. Adjustment for minor children born to or adopted by either parent and another parent who are living with this parent; adjustment does not apply to stepchildren (number of children times federal income tax exemption less child support received, not to exceed the federal tax exemption)	0	0	
9. Annual court-ordered support paid for other children	0	0	
10. Annual court-ordered spousal support paid to any spouse or former spouse	0	0	
11. Amount of local income taxes actually paid or estimated to be paid	2,872	999	
12. Mandatory work-related deductions such as union dues, uniform fees, etc. (Not including taxes, Social Security or retirement)			
a. Mandatory Work Related/Other Deduction	0	0	
b. Mandatory Work Related/Other Deduction	0	0	
13. Total gross income adjustments (add lines 8 through 12)	2,872	999	
14a. Adjusted annual gross income (subtract line 13 from line 7a)	**140,750**	**48,955**	
14b. Cash medical support maximum (If the amount on line 7a, Col. I, is under 150% of the federal poverty level for an individual, enter $0 on line 14b, Col. I. If the amount on line 7a, Col. I, is 150% or higher of the federal poverty level for an individual, multiply the amount on line 14a, Col. I, by 5% and enter this amount on line 14b, Col. I. If the amount on line 7a, Col. II, is under 150% of the federal poverty level for an individual, enter $0 on line 14b, Col. II. If the amount on line 7a, Col. II, is 150% or higher of the federal poverty level for an individual, multiply the amount on line 14a, Col. II, by 5% and enter this amount on line 14b, Col. II.)	**7,038**	**2,448**	

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Worksheet: Sole/Shared

Date: Jan 03, 2011

Case No.:

		COLUMN I FATHER	COLUMN II MOTHER	COLUMN III COMBINED
15. Combined annual income that is basis for child support order (Add line 14a, Col. I and Col. II)				**189,705**
16. Percentage of parent's income to total income:				
a. Father (divide line 14a, Col. I, by line 15, Col. III)		74.19%		
b. Mother (divide line 14a, Col. II, by line 15, Col. III)			25.81%	
17a. Basic combined child support obligation (From schedule on income up to $150,000 - Amounts between schedule values are calculated)				**21,971**
17b. Support on Income over $150,000				4,169
Income for which support is to be applied	189,705			
Percent to be used on income over $150,000	10.50%			
17c. Total child support obligation				26,140
18. Annual support obligation per parent				
a. Father-Multiply line 17c, Col. III by line 16a		19,393		
b. Mother-Multiply line 17c, Col. III by line 16b			6,747	
19. Annual child care expenses for the children who are the subject of this order that are work-, employment training-, or education-related, as approved by the court or agency (deduct tax credit from annual cost, whether or not claimed)		0	8,797	
a. Less federal child care tax credit		0	(1,200)	
b. Less OH child care tax credit		0	0	
c. Net child care costs		0	7,597	
20a. Marginal, out-of-pocket costs, necessary to provide for health insurance for the children who are the subject of this order (contributing cost of private family health insurance, minus the contributing cost of private single health insurance, divided by the total number of dependents covered by the plan, including the children subject of the support order, times the number of children subject of the support order)		4,356	1,509	
20b. Cash medical support obligation (enter the amount on line 14b or the amount of annual health care expenditures estimated by the United States Department of Agriculture and described in section 3119.30 of the Revised Code, whichever amount is lower)		1,954	0	

21. ADJUSTMENTS TO CHILD SUPPORT WHEN HEALTH INSURANCE IS PROVIDED:

Father (Only if obligor or shared parenting)

a. Additions: Line 16a times the sum of amounts shown on line 19c, Col. II and line 20a, Col. II	6,756
c. Subtractions: Line 16b times sum of amounts shown on line 19c, Col. I and line 20a, Col. I	1,124

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Case No.:

	COLUMN I FATHER	COLUMN II MOTHER	COLUMN III COMBINED
Mother (Only if obligor or shared parenting)			
b. Additions: Line 16b times the sum of amounts shown on line 19c, Col. I and line 20a, Col. I)		1,124	
d. Subtractions: Line 16a times sum of amounts shown on line 19c, Col. II and line 20a, Col. II		6,756	
22. OBLIGATION AFTER ADJUSTMENTS TO CHILD SUPPORT WHEN HEALTH INSURANCE IS PROVIDED:			
a. Father: Line 18a plus or minus the difference between line 21a minus line 21c	25,025		
b. Mother: Line 18b plus or minus the difference between line 21b minus line 21d		1,115	
23. ACTUAL ANNUAL OBLIGATION WHEN HEALTH INSURANCE IS PROVIDED:			
a. Line 22 for the obligor parent	25,025	0	
b. Any non-means-tested benefits, including Social Security and Veterans' benefits, paid to and received by a child or a person on behalf of the child due to death, disability, or retirement of the parent	0	0	
c. Actual annual obligation (subtract line 23b from 23a)	25,025	0	
24. ADJUSTMENTS TO CHILD SUPPORT WHEN HEALTH INSURANCE IS NOT PROVIDED:			
Father (Only if obligor or shared parenting)			
a. Additions: Line 16a times the sum of amounts shown on line 19c, Col. II and line 20b, Col. IIb	5,636		
c. Subtractions: Line 16b times sum of amounts shown on line 19c, Col. I and line 20b, Col. I	504		
Mother (Only if obligor or shared parenting)			
b. Additions: Line 16b times the sum of amounts shown on line 19c, Col. I and line 20b, Col. I)		504	
d. Subtractions: Line 16a times sum of amounts shown on line 19c, Col. II and line 20b, Col. II		5,636	
25. OBLIGATION AFTER ADJUSTMENTS TO CHILD SUPPORT WHEN INSURANCE IS NOT PROVIDED:			
a. Father: Line 18a plus or minus the difference between line 24a minus line 24c	24,525		
b. Mother: Line 18b plus or minus the difference between line 24b minus line 24d		1,615	

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Case No.:

	COLUMN I FATHER	COLUMN II MOTHER	COLUMN III COMBINED
26. ACTUAL ANNUAL OBLIGATION WHEN INSURANCE IS NOT PROVIDED:			
a. Line 25 for the obligor parent	$24,525	$0	
b. Any non-means-tested benefits, including Social Security and Veterans' benefits, paid to and received by a child or a person on behalf of the child due to death, disability, or retirement of the parent	$0	$0	
c. Actual annual obligation (subtract line 26b from 26a)	$24,525	$0	
27a. Deviation from sole residential parent support amount shown on line 23c or 26c if amount would be unjust or inappropriate: (See section 3119.23 of the Revised Code.) (Specific facts and monetary values must be stated.)	0		0

Reason:

27b. Deviation amount - shared parenting (health ins. provided)	0		0
27c. Deviation amount - shared parenting (health ins. not provided)	0		0

(See sections 3119.23 and 3119.24 of the Revised Code.) (Specific facts including amount of time children spend with each parent, ability of each parent to maintain adequate housing for children, and each parent's expenses for children must be stated to justify deviation.)

Reason:

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	WHEN HEALTH INSURANCE IS PROVIDED	WHEN HEALTH INSURANCE IS NOT PROVIDED
28. **FINAL CHILD SUPPORT FIGURE:** (This amount reflects final annual child support obligation; in Col. I, enter line 23c plus or minus any amounts indicated in line 27a or 27b; in Col. II, enter line 26c plus or minus any amounts indicated in line 27a or 27b)	**25,025**	**24,525**
	Father is Obligor	
29. **FOR DECREE:** Child support per month (divide obligor's annual share, line 28, by 12) plus any processing charge.	**2,085.42**	**2,043.75**
Including 2% processing charge	2,127.13	2,084.62
30. **FINAL CASH MEDICAL SUPPORT FIGURE:** (this amount reflects the final, annual cash medical support to be paid by the obligor when neither parent provides health insurance coverage for the child; enter obligor's cash medical support amount from line 20b)	1,954	
31. **FOR DECREE:** Cash medical support per month (divide line 30 by 12)	162.83	
Including 2% processing charge	166.09	

Comments:

PREPARED BY:
COUNSEL: _____ PRO SE: _____
Representing
CSEA: _____ OTHER: _____

WORKSHEET HAS BEEN REVIEWED AND AGREED TO:

_____ _____
MOTHER DATE

_____ _____
FATHER DATE

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MEDINA COUNTY DOMESTIC RELATIONS COURT
STANDARD PARENTING TIME SCHEDULE
[LOCAL RULE VI, FORM 6.04A]

Effective 03/01/2002

Parties are encouraged to create their own parenting time plans. For parties who cannot agree, however, the Court has designed this plan to ensure that minor children have frequent and consistent contact with both parents.

If you are unable to agree to a different plan, but have objections to this plan because of special circumstances (*e.g.*, travel time, work schedules) or problems (*e.g.*, substance abuse, mental illness, violence) be prepared to present specific facts in a scheduled hearing to show why this parenting time schedule is not in the best interests of your children.

Parents shall share responsibility for parenting time transportation. Unless otherwise agreed, the parent receiving possession of the children shall provide transportation for weekend and holiday visits. The nonresidential parent shall provide all other transportation. Unless otherwise agreed or provided by Court order, all pick-up and return shall be at the parental residence.

I. **WEEKEND AND MIDWEEK PARENTING TIME.**

A. For children from birth to twelve (12) months, three (3) times per week for two (2) to four (4) hours on the following days and times as agreed by the parties: Every _____ from _____ until _____, every _____ from _____ until _____, and every _____ from _____ until _____. (If the parties are unable to agree, then the days shall be every Saturday from 2:00 p.m. to 6:00 p.m. and every Tuesday and Thursday from 5:30 p.m. until 8:00 p.m. unless otherwise ordered by the Court.) Parents shall adjust the parenting time schedule for children ages birth to twelve (12) months to provide for alternate holiday time consistent with the holiday parenting time schedule hereinafter set forth.

B. For a child twelve (12) months to two (2) years, two (2) times per week and one (1) overnight on alternating weekends on the following days and times as agreed by the parties: Every _____ from _____ until _____, and every _____ from _____ until _____ and an overnight on alternating weekends from _____ day at _____ o'clock __.m. until _____ day at _____ o'clock __.m. (If the parties are unable to agree, then the days shall be every Tuesday and Thursday from 5:30 p.m. until 8:00 p.m., and the overnight shall be

on alternating weekends on Friday from 6:00 p.m. until Saturday at 6:00 p.m. unless otherwise ordered by the Court.) Parents shall adjust the parenting time schedule for children age twelve (12) months and older to provide for alternate holiday parenting time consistent with the holiday parenting time schedule hereinafter set forth.

C. For children age two (2) and older, alternate weekends from 6:00 p.m. Friday to 6:00 p.m. Sunday plus one (1) evening per week. (If the parties cannot agree, then the midweek parenting time shall be on Wednesday from 5:00 p.m. to 8:00 p.m.)

The alternating weekend schedule shall not change, even if interrupted by holiday, birthday, summer vacation or other parenting time.

II. **HOLIDAY PARENTING TIME**. This schedule applies to children age two (2) or older. See Section I for holiday parenting time with younger children.

Holiday	Even Year	Odd Year	Days & Times
Martin Luther King Day	Father	Mother	9:00 a.m. - 6:00 p.m.[1]
President's Day	Mother	Father	9:00 a.m. - 6:00 p.m.[1]
Easter Sunday	Father	Mother	6:00 p.m.Easter Saturday to 6:00 p.m. Easter Sunday

Holiday	Even Year	Odd Year	Days & Times
Spring Break: Option 1: Option 2:	 Shared equally by parties Alternate from year to year		6:00 p.m. day school ends to 6:00 p.m. day before school Reconvenes

Spring Break Parenting Time does *not* apply for children not in school.

Memorial Day	Mother	Father	Friday preceeding Memorial Day at 6:00 p.m. to Memorial Day Monday at 6:00 p.m.

[1]Provided this is a day off from school.

4th of July	Father	Mother	July 4 at 9:00 a.m. to July 5 at 9:00 a.m.
Labor Day	Mother	Father	Friday preceeding Labor Day At 6:00 p.m. to Monday at 6:00 p.m.
Halloween	Father	Mother	4 hours in the day/night designated for trick-or-treating
Thanksgiving Option 1: [Share time equally]	Father	Mother	Wednesday at 6:00 p.m. to Friday at 6:00 p.m. and
	Mother	Father	Friday at 6:00 p.m. to Sunday at 6:00 p.m.
Thanksgiving Option 2: [Alternate annually]	Father	Mother	Wednesday at 6:00 p.m. to Sunday at 6:00 p.m.
Christmas Eve	Father	Mother	12/23 at 9:00 p.m. to 12/24 at 9:00 p.m.
Christmas Day	Mother	Father	12/24 at 9:00 p.m. to 12/25 at 9:00 p.m.
New Year's Day (Determined by year of January 1st)	Mother	Father	12/31 at 6:00 p.m. to 1/1 at 6:00 p.m.
Winter break [does not alter holiday parenting time)			6:00 p.m. day school ends to 6:00 p.m. day before school reconvenes

Option 1: Shared equally by parties with the mother taking the first half in even years and the father taking the first half in odd years.
Option 2: Alternate from year to year

Winter break parenting time does not apply to children not yet in school. The parties must select holiday options in the judgment entry and in the event an option is not specified and the parties do not agree, then Option 1 shall be in effect. Holiday parenting time preempts regular weekend/midweek parenting time. Spring and Winter breaks are defined by the school calendar in the district where the residential parent resides and preempts regular weekend/midweek

visitation. Spring and Winter breaks begin at 6:00 p.m. the day school ends and terminate at 6:00 p.m. the day before school reconvenes.

III. DAYS OF SPECIAL MEANING.

A. Religious or ethnic holidays shall alternate between the parties yearly. Visits shall be from 9:00 a.m. until 6:00 p.m., or as otherwise agreed, consistant with the children's school schedule.

B. Mother's Day and Mother's birthday shall be spent with Mother, consistent with the children's school schedule. Father's day and Father's birthday shall be spent with Father, consistent with the children's school schedule. Visits shall be from 9:00 a.m. until 6:00 p.m. consistent with the children's school schedule.

C. Children's birthdays shall alternate from year to year between Mother and Father, Mother having even-numbered years and Father having odd-numbered years. If the birthday occurs on a non-parenting time weekday or weekend, it shall be an additional day of parenting time. The parenting time must take into consideration school and work hours, if applicable. All children of the parties shall be included in birthday parenting time. Other siblings, who are not children of both parties, may be included as the parties may agree. The parties should take into consideration whether such siblings are familiar with and/or have a relationship with the parenting time parent. In absence of agreement, the birthday visitation shall be from 5:00 p.m. to 8:00 p.m. on a weekday or 9:00 a.m. to 6:00 p.m. on a weekend.

D. If a parent is available to spend time with the children on other scheduled school closings, parenting time shall occur, taking into consideration the work schedule of the other parent as well as the usual child care arrangements. If both parents are available, such days shall alternate between the parties. The hours shall be from 9:00 a.m. to 6:00 p.m.

IV. SUMMER VACATION.

A. For children age five (5) and over, one-half the school summer recess. School summer recess is defined as beginning the Friday after the last day the children attend school at 6:00 p.m., through the Friday one full week before school reconvenes. If the children are not yet of school age, summer recess will be based upon the public school calendar of the district in which the residential parent resides. The residential parent shall inform the non-residential parent by March

15th of each year of the specific dates summer vacation begins and ends. The non-residential parent shall give written notice of summer parenting time dates at least forty-five (45) days in advance and summer parenting time shall not be exercised during the last week before school reconvenes unless agreed by the parties in writing or ordered by the Court. The parties should discuss any special plans or activities the children may have during the summer, such as sports, camp, overnight camps, lessons, etc. Parents should make all reasonable efforts to accommodate the children's activities in scheduling the summer parenting time.

In the event the parties cannot agree on dates the mother shall have the first half of the summer in odd numbered years and the father shall have the first half in even numbered years. Each parent shall be entitled to take the children on vacation away from his or her residence for a period of up to fourteen (14) days upon fourteen (14) days advance written notice to the other parent, accompanied by a written agenda indicating the vacation destination, phone numbers where he or she can be reached, times of arrival and departure and method of travel.

B. For children age 2 or 3 or 4 (under age 5): Four (4) weeks during the summer recess period to be taken in installments of two (2) weeks at a time, and separated by at least two (2) weeks at home with the residential parent. If a child in this age group has older siblings, the parenting time shall be scheduled to coincide with the older siblings' parenting time as much as possible.

Each parent shall be entitled to take the children on vacation away from his or her residence for a period of up to fourteen (14) days upon fourteen (14) days advance written notice to the other parent, accompanied by a written agenda indicating the vacation destination, phone numbers where he or she can be reached, times of arrival and departure and method of travel.

C. For children under age two (2), extended summer parenting time shall be only by written agreement of the parties or special order of Court. In considering parenting time for children in this age group, parents should consider the child's maturity, emotional attachment to each parent and attachment to any older siblings who will have extended parenting time.

D. During all summer parenting time (except the fourteen (14) day away-from-home vacations for children two (2) and over), children should continue to spend alternate weekends with each parent on the same schedule as the rest of the year. Also, the residential parent is entitled to the same midweek parenting time granted to the nonresidential parent.

V. TELEPHONE CALLS.

Each parent has the right to talk over the telephone with the children as often as the parents agree. If the parents do not agree, then the nonresidential parent should normally have telephone privileges at least twice per week. In addition, a parent may call a child once during a scheduled or agreed parenting time period that is missed. Also, the residential parent has the right to call a child when on vacation with the other parent as the parties can agree; if no agreement, then the residential parent has telephone privileges up to twice per week. Phone calls should be made during the normal hours a child is awake, and if the child is unavailable for conversation, each parent shall take the responsibility of seeing that the child timely returns the call. Also, any time a child is with one parent, he or she shall be permitted to call the other parent. Any long distance calls made by a child to a parent shall be collect unless the other parent agrees otherwise.

VI. PROMPTNESS.

Each parent shall be prompt for the pick up and return of the children at parenting time. The residential parent shall prepare the children both emotionally and physically for the parenting time. The residential parent has no duty to wait for the nonresidential parent to pick up the children longer than thirty (30) minutes, unless the nonresidential parent notifies the residential parent that she/he will be late, and the residential parent agrees to remain available after the thirty (30) minute waiting period. A parent who is more than thirty (30) minutes late loses the parenting time period. The nonresidential parent will not return the children before the end of the stated parenting time period, unless the parties agree in advance. The residential parent or a responsible adult well known to the children shall be present when the children are returned.

VII. CANCELLATION.

The nonresidential parent must give notice of intent NOT to have parenting time at least twenty-four (24) hours in advance, unless a last minute emergency occurs. A parent who does not exercise parenting time forfeits the time. A parent who repeatedly fails to keep his or her commitment to parenting time or repeatedly violates the court's schedule, may have rights of parenting time modified, and may be subject to other legal remedies as well, upon motion by the residential parent.

VIII. ILLNESS.

If a child is too ill for parenting time, the residential parent should notify the visiting parent at least twenty-four (24) hours in advance, if possible. A child who is confined to bed rest

pursuant to a doctor's instructions, or who has a fever of 100 degrees Fahrenheit or greater and other signs of illness is presumed too ill for parenting time. If a child has a less severe illness or medical condition, the parents shall consider the nature of the illness (whether it may be contagious, or the child is physically uncomfortable, etc.), the care necessary, the ability to provide the care, exposure of the illness to others, parenting time plans, and any other important matters. If the parents agree that the child should go for the parenting time period, then the residential parent shall provide the parenting time parent with all appropriate medications and/or medical instructions, which shall be administered or followed by the parenting time parent. The parenting time parent must care for the child as directed, and notify the other parent if the child's condition worsens, or does not improve as might reasonably be expected.

IX. SUPPORT OF PARENTING TIME.

If a child indicates strong opposition to being with the other parent, it is the responsibility of each parent to appropriately deal with the situation, by calmly talking to the child as to the child's reasons, and to work with the other parent to do what is in the child's best interests, and particularly, to avoid confrontation or unpleasant scenes. If the matter is not settled, either parent may seek the immediate assistance of a mental health professional or file a motion. As uncomfortable as this issue may be for a parent, this issue should not go unresolved. It is the absolute affirmative duty of the residential parent to make certain that his or her child goes for the parenting time period.

X. CLOTHING.

The residential parent is responsible for providing sufficient appropriate clean clothing for every parenting time period with the nonresidential parent, based on the lifestyle of the residential parent and child. If the planned parenting time activities require special or unusual clothing needs, the non-residential parent must notify the residential parent at least two (2) days in advance of the parenting time period. If the child does not have the type of clothing requested, the residential parent is under no obligation to comply with the request and shall promptly notify the non-residential parent. All clothing sent by the residential parent must be returned immediately after the visitation period. Clothing provided by the nonresidential parent and worn home by a child shall be cleaned and returned at the next visit.

XI. CHILDREN'S POSSESSIONS

The children shall be entitled to take clothing and items of personal property to each parent's household. Gifts given to a child shall not be restricted to one household unless special circumstances make it unreasonable to move the item between households. Normally, special circumstances would be deemed to apply to computer hardware (but not software), video game

systems (but not individual game software) and large items that cannot be easily transported. Each parent shall use due diligence to ensure that items brought from the other household are returned with the children in good condition.

XII. SCHOOLWORK.

A parent must provide time for the children to study and complete homework assignments, papers or other school assigned projects, even if the completion of this work interferes with the parent's plans with the children. If school work is assigned by the school prior to the parenting time, the residential parent must inform the other parent of the work to be done, and it must be completed during the parenting time period.

XIII. ADDRESS AND TELEPHONE NUMBERS.

Each parent must, unless the Court orders otherwise, keep the other informed of his or her current address and telephone number, and an alternate telephone number in the event of an emergency. A post office box address or other address that is used for mail, but is not the actual residence, does *not* satisfy this requirement. If mail is only received at a post office box address, that address must also be provided.

XIV. CHILDREN'S ACTIVITIES.

Scheduled periods of parenting time shall not be delayed or denied because a child has other scheduled activities (with friends, work, lessons, sports, etc.). It is the responsibility of the parents to discuss activities important to the children in advance, including time, dates, and transportation needs, so that the children are not deprived of activities and maintaining friendships. The parent who has the children during the time of scheduled activities is responsible for transportation, attendance and/or other arrangements. If the activities are regularly scheduled, they should be agreed upon in advance and written into the judgment entry or decree. Both parents are encouraged to attend all their children's activities.

XV. NOTICE OF RELOCATION.

Pursuant to the determination made under O.R.C. §3109.051(G)(1), the non-residential parent shall be sent a copy of any notice of relocation filed with the Court.

XVI. ACCESS TO SCHOOL AND MEDICAL RECORDS, DAY CARE RECORDS, AND STUDENT ACTIVITIES.

Pursuant to O.R.C. §§3109.051(H), (I) AND (J), the non-residential parent is entitled to access under the same terms and conditions under which access is provided to the residential parent to any record related to the children, and any student activity related to the children, or any public school, private school, or day care that is, or in the future may be, attended by the children.

The Supreme Court of Ohio

FILED
JAN 23 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Jeffrey Morrow

v.

Sherri Becker

Case No. 2012-1674

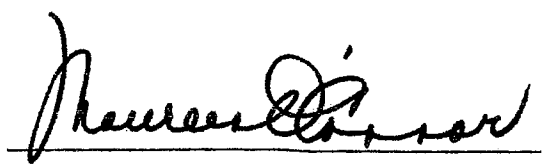
ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court accepts the appeal on Proposition of Law No. I.

It is ordered that the clerk shall issue an order for the transmittal of the record from the Court of Appeals for Medina County.

It is further ordered by the court, sua sponte, that this cause is consolidated with Supreme Court Case No. 2012-1898, *Jeffrey Morrow v. Sherri Becker*, and that the briefing in Case Nos. 2012-1674 and 2012-1898 shall be consolidated. The parties shall file two originals of each of the briefs permitted under S.Ct.Prac.R. 16.02-16.04 and include both case numbers on the cover page of the briefs. The parties shall otherwise comply with the requirements of S.Ct.Prac.R. 16.01-16.04.

(Medina County Court of Appeals; No. 11CA0066-M)



Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

FILED
JAN 23 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Jeffrey Morrow

v.

Sherri Becker

Case No. 2012-1898

ENTRY

This cause is pending before the court on the certification of a conflict by the Court of Appeals for Medina County. On review of the order certifying a conflict, it is determined that a conflict exists. The parties are to brief the issue stated at page 1 of the court of appeals' Judgment Entry filed November 5, 2012, as follows:

"Whether company benefits, such as a company car, can be included as income for the purpose of child support calculations if the benefits the party receives do not come from self-employment, as proprietor of a business, or as a joint owner of a partnership or closely held corporation.""

It is ordered by the court that the clerk shall issue an order for the transmittal of the record from the Court of Appeals for Medina County.

It is ordered by the court, sua sponte, that this cause is consolidated with Supreme Court Case No. 2012-1674, *Jeffrey Morrow v. Sherri Becker*, and that the briefing in Case Nos. 2012-1898 and 2012-1674 shall be consolidated. The parties shall file two originals of each of the briefs permitted under S.Ct.Prac.R. 16.02-16.04 and include both case numbers on the cover page of the briefs. The parties shall otherwise comply with the requirements of S.Ct.Prac.R. 16.01-16.04.

(Medina County Court of Appeals; No. 11CA0066-M)

Maureen O'Connor
Chief Justice

3119.01 Calculation of child support obligation definitions.

(A) As used in the Revised Code, "child support enforcement agency" means a child support enforcement agency designated under former section 2301.35 of the Revised Code prior to October 1, 1997, or a private or government entity designated as a child support enforcement agency under section 307.981 of the Revised Code.

(B) As used in this chapter and Chapters 3121., 3123., and 3125. of the Revised Code:

(1) "Administrative child support order" means any order issued by a child support enforcement agency for the support of a child pursuant to section 3109.19 or 3111.81 of the Revised Code or former section 3111.211 of the Revised Code, section 3111.21 of the Revised Code as that section existed prior to January 1, 1998, or section 3111.20 or 3111.22 of the Revised Code as those sections existed prior to March 22, 2001.

(2) "Child support order" means either a court child support order or an administrative child support order.

(3) "Obligee" means the person who is entitled to receive the support payments under a support order.

(4) "Obligor" means the person who is required to pay support under a support order.

(5) "Support order" means either an administrative child support order or a court support order.

(C) As used in this chapter:

(1) "Combined gross income" means the combined gross income of both parents.

(2) "Court child support order" means any order issued by a court for the support of a child pursuant to Chapter 3115. of the Revised Code, section 2151.23, 2151.231, 2151.232, 2151.33, 2151.36, 2151.361, 2151.49, 3105.21, 3109.05, 3109.19, 3111.13, 3113.04, 3113.07, 3113.31, 3119.65, or 3119.70 of the Revised Code, or division (B) of former section 3113.21 of the Revised Code.

(3) "Court support order" means either a court child support order or an order for the support of a spouse or former spouse issued pursuant to Chapter 3115. of the Revised Code, section 3105.18, 3105.65, or 3113.31 of the Revised Code, or division (B) of former section 3113.21 of the Revised Code.

(4) "Extraordinary medical expenses" means any uninsured medical expenses incurred for a child during a calendar year that exceed one hundred dollars.

(5) "Income" means either of the following:

(a) For a parent who is employed to full capacity, the gross income of the parent;

(b) For a parent who is unemployed or underemployed, the sum of the gross income of the parent and any potential income of the parent.

(6) "Insurer" means any person authorized under Title XXXIX of the Revised Code to engage in the business of insurance in this state, any health insuring corporation, and any legal entity that is self-insured and provides benefits to its employees or members.

(7) "Gross income" means, except as excluded in division (C)(7) of this section, 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 to the extent described in division (D) of section 3119.05 of the Revised Code; commissions; royalties; tips; rents; dividends; severance pay; pensions; interest; trust income; annuities; social security benefits, including retirement, disability, and survivor benefits that are not means-tested; workers' compensation benefits; unemployment insurance benefits; disability insurance benefits; benefits that are not means-tested and that are received by and in the possession of the veteran who is the beneficiary for any service-connected disability under a program or law administered by the United States department of veterans' affairs or veterans' administration; spousal support actually received; and all other sources of income. "Gross income" includes income of members of any branch of the United States armed services or national guard, including, amounts representing base pay, basic allowance for quarters, basic allowance for subsistence, supplemental subsistence allowance, cost of living adjustment, specialty pay, variable housing allowance, and pay for training or other types of required drills; self-generated income; and potential cash flow from any source.

"Gross income" does not include any of the following:

(a) Benefits received from means-tested government administered programs, including Ohio works first; prevention, retention, and contingency; means-tested veterans' benefits; supplemental security income; supplemental nutrition assistance program; disability financial assistance; or other assistance for which eligibility is determined on the basis of income or assets;

(b) Benefits for any service-connected disability under a program or law administered by the United States department of veterans' affairs or veterans' administration that are not means-tested, that have not been distributed to the veteran who is the beneficiary of the benefits, and that are in the possession of the United States department of veterans' affairs or veterans' administration;

(c) Child support received for children who were not born or adopted during the marriage at issue;

(d) Amounts paid for mandatory deductions from wages such as union dues but not taxes, social security, or retirement in lieu of social security;

(e) Nonrecurring or unsustainable income or cash flow items;

(f) Adoption assistance and foster care maintenance payments made pursuant to Title IV-E of the "Social Security Act," 94 Stat. 501, 42 U.S.C.A. 670 (1980), as amended.

(8) "Nonrecurring or unsustainable income or cash flow item" means an income or cash flow item the parent receives in any year or for any number of years not to exceed three years that the parent does not expect to continue to receive on a regular basis. "Nonrecurring or unsustainable income or cash flow item" does not include a lottery prize award that is not paid in a lump sum or any other item of income or cash flow that the parent receives or expects to receive for each year for a period of more than three years or that the parent receives and invests or otherwise uses to produce income or cash flow for a period of more than three years.

(9)

(a) "Ordinary and necessary expenses incurred in generating gross receipts" means actual cash items expended by the parent or the parent's business and includes depreciation expenses of business equipment as shown on the books of a business entity.

(b) Except as specifically included in "ordinary and necessary expenses incurred in generating gross receipts" by division (C)(9)(a) of this section, "ordinary and necessary expenses incurred in generating gross receipts" does not include depreciation expenses and other noncash items that are allowed as deductions on any federal tax return of the parent or the parent's business.

(10) "Personal earnings" means compensation paid or payable for personal services, however denominated, and includes wages, salary, commissions, bonuses, draws against commissions, profit sharing, vacation pay, or any other compensation.

(11) "Potential income" means both of the following for a parent who the court pursuant to a court support order, or a child support enforcement agency pursuant to an administrative child support order, determines is voluntarily unemployed or voluntarily underemployed:

(a) Imputed income that the court or agency determines the parent would have earned if fully employed as determined from the following criteria:

(i) The parent's prior employment experience;

(ii) The parent's education;

(iii) The parent's physical and mental disabilities, if any;

(iv) The availability of employment in the geographic area in which the parent resides;

(v) The prevailing wage and salary levels in the geographic area in which the parent resides;

(vi) The parent's special skills and training;

(vii) Whether there is evidence that the parent has the ability to earn the imputed income;

(viii) The age and special needs of the child for whom child support is being calculated under this section;

(ix) The parent's increased earning capacity because of experience;

(x)The parent's decreased earning capacity because of a felony conviction;

(xi) Any other relevant factor.

(b) Imputed income from any nonincome-producing assets of a parent, as determined from the local passbook savings rate or another appropriate rate as determined by the court or agency, not to exceed the rate of interest specified in division (A) of section 1343.03 of the Revised Code, if the income is significant.

(12) "Schedule" means the basic child support schedule set forth in section 3119.021 of the Revised Code.

(13) "Self-generated income" means gross receipts received by a parent from self-employment, proprietorship of a business, joint ownership of a partnership or closely held corporation, and rents minus ordinary and necessary expenses incurred by the parent in generating the gross receipts. "Self-generated income" includes expense reimbursements or in-kind payments received by a parent from self-employment, the operation of a business, or rents, including company cars, free housing, reimbursed meals, and other benefits, if the reimbursements are significant and reduce personal living

expenses.

(14) "Split parental rights and responsibilities" means a situation in which there is more than one child who is the subject of an allocation of parental rights and responsibilities and each parent is the residential parent and legal custodian of at least one of those children.

(15) "Worksheet" means the applicable worksheet that is used to calculate a parent's child support obligation as set forth in sections 3119.022 and 3119.023 of the Revised Code.

Amended by 129th General Assembly File No. 131, SB 337, § 1, eff. 9/28/2012.

Amended by 128th General Assembly File No. 9, HB 1, § 101.01, eff. 10/16/2009.

Effective Date: 06-26-2003