

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFFREY MORROW

Petitioner-Appellant

v.

SHERRI P. BECKER

Petitioner-Appellee

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Case No. 2012-1674
2012-1898

On Appeal from the Ninth District Court
of Appeals, Medina County

BRIEF OF APPELLEE SHERRI P. BECKER

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS.....	1
ARGUMENT	3
 Company Benefits, such as a company car, should be included as income for the purpose of child support calculation even if the benefits the party receives do not come from self employment, as a proprietor of a business, or as joint owner of a partnership or closely held corporation.	
CONCLUSION	9
PROOF OF SERVICE	10

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Blakemore v. Blakemore</i> (1983), 5 Ohio St. 3d 217, 450 N.E.2d 1140.....	8
<i>Burns v. United States</i> (1991), 501 U.S. 129.....	6
<i>Connecticut Nat'l Bank v. Germain</i> (1992), 503 U.S. 249.....	5
<i>Marker v. Grimm</i> (1992), 65 Ohio St. 3d 139, 601 N.E.2d 496.....	3
<i>McQuinn v. McQuinn</i> (1996), 110 Ohio App. 3d 296, 673 N.E.2d 1382.....	8
<i>Morrow v. Becker</i> (2012, 9 th Dist.) C.A. 11 CA0066-M, 2012 Ohio 3875.....	2, 5
<i>Pauly v. Pauly</i> (1997), 80 Ohio St. 3d 386, 686 N.E.2d 1108.....	8
<i>Rock v. Cabral</i> (1993), 67 Ohio St. 3d 108, 616 N.E.2d 218.....	3
<i>Spier v. Spier</i> , (2006, 7 th District) Ohio 1289.....	5
<i>Williams v. Williams</i> (1991), 74 Ohio App. 3d 838, 600 N.E.2d 739.....	8

CONSTITUTIONAL PROVISIONS: STATUTES

R.C. 3119.01.....	2, 3, 4, 5, 6, 7, 8
R.C. 3119.01(C)(5).....	4
R.C. 3119.01(C)(7).....	4, 5
R.C. 3119.01(C)(13).....	4
R.C. 3113.215.....	3, 6
R.C. 3113.215(D).....	3
R.C. 3113.215(E).....	3
R.C. 3113.215 (F).....	3
R.C. 3113.215(B)(1).....	3
R.C. 3113.215(B)(1)(a) and (b).....	3

STATEMENT OF FACTS

Ms. Becker and Mr. Morrow are the unmarried parents of two children. In late 2004, the two separated and Ms. Becker initiated an action to establish child support. Based on the relative incomes of the parties, Mr. Morrow was ordered to pay Two Thousand One Hundred Ninety Eight and 05/100 Dollars (\$2,198.05) per month for child support.

One of the sources of Mr. Morrow's income was from his employment at The Ohio College of Massotherapy, Inc. The Ohio College of Massotherapy, Inc. is a non-profit 501(c)3, began by Mr. Morrow's mother, whom he serves as the president. ¹ (July 27, 2010 hearing pp 8 line 1-4) In addition to drawing a salary, Mr. Morrow also received other significant benefits from the company including the company repeatedly purchasing a Lexus automobile for Mr. Morrow's benefit and making the monthly payments. (August 10, 2010 hearing pp 35, line 13-14) The company further paid Mr. Morrow's automobile insurance, his cell phone, and for his personal computer. (id pp 37, line 3-15) The undisputed total annual value of these benefits was Sixteen Thousand Seven Hundred Fifty Six and 00/100 Dollars (\$16,756.00).

In August of 2009, Mr. Morrow made a motion to reduce his child support due to an "economic collapse" of his business resulting in a reduction of his income. (Pp 13 line 10-15) Mr. Morrow testified that the reduction of his income was as a result of the decision of the board of directors. (Pp 16 line 5-13.) At the time of the decision, the board consisted of only himself, and his uncle Dominic Cangelosi (Pp 48 line 16-20) who resided in Burbank, California, and has never physically attended a board meeting (Pp49, line 21-24).

¹Mr. Morrow also derived income from a second business which was a "for profit" corporation named the Ohio College of Massotherapy online, where he serves as the CEO and President. (pp8 Line 4-6)

At the end of the hearing, the Court added the undisputed value of the benefits into the Mr. Morrow's gross income despite the claim that the benefits stemmed from a company to which he was not the owner. This issue was one of the numerous one timely appealed to the Ninth District Court of Appeals

On August 12, 2012, the Ninth District Court of Appeals upheld the decision of the trial court. The Court reasoned that the benefits should be classified as “other sources of income” under the definition of “gross income.” See *Morrow v. Becker* (2012, 9th Dist) 2012 Ohio 3875. The Court held that unless there was a finding that the “income” was nonrecurring or unsustainable, that it could be included under the “catch all” provision contained in *ORC 3119.01*. *Id.* Specifically the Court found that “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.” *Id.* The Court found that the trial court properly included the value of the benefits received from his employer for purposes of determining Mr. Morrow's “gross income.”

LAW AND ARGUMENT

Despite long and contentious litigation, with numerous issues raised over its course, the sole issue before this court is whether Company Benefits, such as a company car, can be included as income for the purpose of child support calculation if the benefits the party receives do not come from self employment, as a proprietor of a business, or as joint owner of a partnership or closely held corporation.

1. Including certain company benefits is consistent with the statutory definition of “Gross Income” under Ohio Revised Code Sect. 3119.01, even when the benefits the party receives do not come from self employment .

R.C. 3113.215 is a comprehensive enactment governing the procedures for awarding and calculating child support. Its provisions are mandatory in nature and must be followed literally and technically in all material respects. This is because the overriding concern of *R.C. 3113.215* is the best interest of the child for whom support is being awarded. *Marker v. Grimm (1992)*, 65 *Ohio St. 3d* 139, 141-142, 601 *N.E.2d* 496. The calculation of support must be made in accordance with the basic child support schedule set forth in *R.C. 3113.215(D)* and the applicable model worksheet in *R.C. 3113.215(E)* or *(F)*. *R.C. 3113.215(B)(1)*. If the court makes the proper calculations based upon the schedule and applicable worksheet, the amount shown on the worksheet is "rebuttably presumed" to be the correct amount of child support due. *R.C. 3113.215(B)(1)*; *Rock v. Cabral (1993)*, 67 *Ohio St. 3d* 108, 110, 616 *N.E.2d* 218. Any deviation from the child support guidelines, worksheet, or basic child support schedule must be made in full and strict compliance with the requirements of *R.C. 3113.215(B)(1)(a)* and *(b)*, and the deviation must be supported by the evidence and stated in the trial court's findings of fact. *Marker*, 65 *Ohio St. 3d* at syllabus.

The amount of child support to be paid by the obligor is based upon the obligor's "income." *R.C. 3119.01(C)(5)* defines "income" as, "for a parent who is employed to full capacity, the gross income of the parent." *R.C. 3119.01(C)(7)* defines "gross income" as follows:

“...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.”

Included in the definition of gross income is “self generating” income. Self generating income is also defined in *R.C. 3119.01* which states:

“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)*

Some Courts have looked at the “self generated income” section of the statute as evidence that the legislation did not intend company benefits from being included as gross income unless

it is a self employment situation. *See Spier v. Spier*, (2006, 7th District) 2006 Ohio 1289. The Court in *Spier* failed to cite any authority to come to this conclusion, rather the basis for this conclusion was simply on statutory construction. *Id.* In particular they seemed to rely on the canon of construction “*unius est exclusio alterius*” or “express inclusion of one thing implies exclusion of other.” The use of this canon in this case would be misplaced.

“Canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.” *Connecticut Nat’l Bank v. Germain* (1992), 503 U.S. 249, 253-54

In this case the clear language of 3119.01 states that “all other income” should be included in the definition of “gross income.” 3119.01(7). Clearly, an employer supplying a vehicle, paying for automobile insurance, and paying for a persons only telephone, will significantly reduce that employee's personal living expenses. *See Morrow v. Becker* (2012, 9th Dist) C.A. 11 CA0066-M. This increase in real purchase power, and increase of the ability of a person to live a higher lifestyle is a form of income which should be included in a child support calculation.

2. To Suggest that the General Assembly's failure to state the example of “automobile benefits” in the definition of gross income as meaning they did not intend on its inclusion under the “catch all” provision is misplaced.

It would be incorrect to assume that the General Assembly could or would address directly and explicitly all issues that may arise when creating a list of sources of “income” for the

definition of “gross income.” “As one court has aptly put it, ‘[n]ot every silence is pregnant.’ In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress’ silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective. In still other instances, silence may reflect the fact that Congress has not considered an issue at all. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.” *Burns v. United States* (1991), 501 U.S. 129, 136 (quoting *Illinois Dep’t of Public Aid v. Schweiker* (1983, 7th Cir.), 707 F.2d 273, 277).

The definition of “gross income” found in *ORC 3119.01* was made effective March 21, 2001. Despite being effective in 2001, a very similar definition was used prior to the effective date of 3119.01. See *ORC 3113.215 (repealed)*. In the prior definitions, just as in the current incarnation, the General Assembly included “all other income” in defining gross income. The use of a “catch all” ensured flexibility for future use. It is simply impossible for a General Assembly to list every possible source of income which they would like to include for the purposes of calculating child support. In addition to the many forms of income which existed when the statute was enacted, there would be potential sources of income that simply were not in existence at the time the legislation was enacted. For example, when the original definition of “gross income” was created, cellular phone use was not widespread, and companies providing money for them would be unheard of. This “source of income” is not something that the General Assembly would have envisioned, and thus they simply included a “catch-all” provision which will allow the statute to grow with the society around it.

3. If the legislation did not want benefits to be included, they would have included it in the exceptions.

ORC 3119.01 not only defined what “gross income” was, it also went on to specifically exclude items from the broad definition of gross income including:

(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*," (1980) 94 Stat. 501, 42 U.S.C.A. 670, as amended.

The same cannon of interpreting statutes the petitioner cites would be equally applicable in this to this subsection of the statute. The statute goes to great lengths to specifically spell out what items are not going to be included in the definition of “gross income.” Nowhere in the list of exceptions is there any mention to “other benefits provided by an employer.” If *unius est exclusio alterius* is taken to its logical conclusion, then the failure to include this in the list of exceptions, means that the General Assembly did not intend it to be not within the definition of gross income.

4. Including Company Benefits in the definition of gross income even if the benefits the party receives do not come from self employment corporation is consistent with the goals of the legislators and public policy.

The trial court possesses considerable discretion in child support matters. The decision of the trial court will be reversed only if it is the product of an abuse of discretion. *Pauly v. Pauly* (1997), 80 Ohio St. 3d 386, 390, 686 N.E.2d 1108. "Abuse of discretion" is described as "more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140.

The definition of "income" is generally intended to be both broad and flexible. See, e.g., *Williams v. Williams* (1991), 74 Ohio App. 3d 838, 843, 600 N.E.2d 739. An expansive definition is necessary "to ensure that the best interest of the children, the intended beneficiaries of child support awards, are protected." *McQuinn v. McQuinn* (1996), 110 Ohio App. 3d 296, 300-301, 673 N.E.2d 1382.

There are occasions when parents attempt to reduce their incomes, or hide income solely for the purpose of lowering their child support obligations. When parents do this, the inaccurate numbers artificially deflates the money the children would be otherwise entitled. Courts have particularly difficult time dealing with this when the abusing party is self employed and have direct control over their own rates of pay making it easy to artificially reduce "income."

To combat this, General Assembly allows the court to consider not only real income, but also potential income. See 3119.01. This prevents people from shirking their responsibilities by leaving rental income dormant, or not taking employment opportunity for the short term benefit of a reduced child support. These actions are not only frowned on by the courts, they hurt the children by unfairly reducing the support available to them.

The situation in this case is precisely the situation that the General Assembly is attempting to avoid. Mr. Morrow's control over his compensation package is limitless. As the CEO of the non-profit company, and sharing a board with his elderly, out of state uncle, Mr. Marrow has the ability to hide significant income without affecting his lifestyle. To do this he needs only make necessary expenses payable from his companies coffers and not his own pockets. While the payee may change, the lifestyle does not. The same public policies to ensure an accurate income for child support purpose exist here.

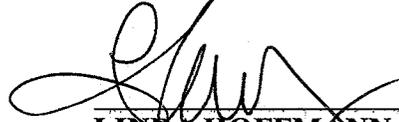
CONCLUSION

This case is one of statutory interpretation. When drafting the definition of “gross income,” the General Assembly created a list of things for the Court to look when calculating a child support obligation. This list was not exhaustive, so a “catch all” provision was included for all other “sources of income.” Mr. Morrow enjoyed an increase lifestyle by the benefits he received from his employer. The benefits in this case are just the type which would be appropriate to include under that provision. Failure to include this could lead to a loophole where as Mr. Morrow could simply reduce his income further and increase his benefits accordingly and further avoid child support. This ridiculous loophole was not what the General Assembly wrote, or would intend.

The trial court is in the best position to see the appropriate use of the “catch all” provision in the definition of the gross income. They can see which benefit it would be inequitable to include because of the small nature of the benefit, or its limited duration. By creating a bright line rule that no benefit will ever be included unless the person owns the business, would be tie the hands of the Domestic Relations Court's ability to protect the well being of the children, and

craft equitable remedies between two parties.

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