[Cite as *Ellis v. Ellis*, 2009-Ohio-4964.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

GEORGE G. ELLIS, Jr.,	)	
	)	CASE NO. 08 MA 133
PLAINTIFF-APPELLANT,	)	
	)	
- VS -	)	OPINION
	)	
SUZANNE ELLIS,	)	
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Domestic Relations Division, Case No. 02 DR 503.
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellant:	Attorney Jonathan Rich Attorney Robert Fertel Zashin & Rich Co., LPA 55 Public Square, 4th Floor Cleveland, OH 44113
For Defendant-Appellant:	Attorney Joyce Barrett Attorney James Reddy, Jr. 800 Standard Bldg. Cleveland, OH 44113

JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 15, 2009

[Cite as *Ellis v. Ellis*, 2009-Ohio-4964.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Plaintiff-Appellant, George G. Ellis, Jr., appeals the decision of the Mahoning County Court of Common Pleas, Domestic Relations Division that modified George's child support obligation to his former wife, Defendant-Appellee, Suzanne B. Ellis. On appeal, George first argues that the trial court erred by utilizing his 2006 gross income, and not his 2007 gross income, for child support modification purposes. Second, George argues that the trial court improperly considered the termination of spousal support when making the child support modification, in essence awarding de facto spousal support. Upon review, George's arguments are meritless.

{¶2} With regard to the first assignment of error, the trial court did not abuse its discretion by using George's 2006 income when calculating the modified child support obligation. George failed to provide any documentation about his 2007 income during the hearing before the magistrate, yet admitted he had such documentation available at that time. Moreover, George stipulated to the use of his 2006 income, both at trial and in his proposed findings of fact and conclusions of law.

{¶3} With regard to the second assignment of error, the trial court properly considered the termination of spousal support when making its modified child support calculation. Spousal support is considered income for the obligee, and therefore termination of spousal support does factor into the child support calculus. Further, contrary to George's contentions, the trial court was not attempting to replace spousal support with child support in this case. Since it is undisputed that the parties' combined income exceeds $150,000.00 per year, the trial court had the discretion to award an amount of child support that adequately addressed the qualitative needs and standard of living of the children and the parents. R.C. 3119.04(B). Based on the record, we conclude that the trial court's modified child support order is reasonable. Accordingly, the trial court's decision is affirmed.

Facts

{¶4} George and Suzanne were married on December 7, 1991, in Youngstown,

Ohio. Five children were born as issue of the marriage. On October 20, 2003, the parties' marriage was terminated by an agreed judgment entry of divorce. At the time of the divorce, George, a physician, had an annual employment income of $247,000.00. Suzanne did not work outside the home, but for purposes of computing George's child support obligation, Suzanne's annual employment income was imputed at $20,800.00 per year.

{¶5} The divorce decree incorporated a shared parenting plan for the parties' five minor children. The parenting schedule varied every other week. During "week one" the children resided with George for three hours on Tuesday evenings and from Friday afternoons until Sunday evenings. During "week two" the children resided with George from Wednesdays evenings until Friday mornings. George was entitled to two weeks with the children during the summers, along with alternating holidays. During all other times, the children resided with Suzanne.

{¶6} The decree ordered George to pay $2,189.28 per month, including processing fee, as child support to Suzanne. The court calculated the child support award using the $150,000.00 equivalent. The record reveals that the court also used the $150,000.00 equivalent to calculate the Civ.R. 75 temporary child support order while the divorce was pending. In the final divorce decree, George was also ordered to pay Suzanne spousal support in the amount of $5,000.00 per month, effective October 1, 2003, for a period of forty-two months. The trial court did not retain jurisdiction over the amount or term of spousal support.

{¶7} On February 16, 2007, the Child Support Enforcement Agency (CSEA) filed a motion to modify child support on behalf of Suzanne. In a judgment entry dated June 7, 2007, the trial court terminated George's spousal support obligation, per the divorce decree, effective April 30, 2007.

{¶8} On July 30, 2007, the motion to modify was called for hearing before the magistrate. It was noted that Suzanne had retained private counsel and CSEA was permitted to withdraw. Suzanne testified she had not been employed for the past thirteen years and that she had stopped working after the birth of her twins because it was too

difficult to manage parenting and work. She stated she had formerly worked as an intensive care unit registered nurse; had kept her continuing education current; and had recently obtained her bachelor's degree in nursing. George called Dr. Todd Bolotin, as an expert witness. Dr. Bolotin is an emergency room physician who is also president of his own nurse staffing company. Dr. Bolotin gave his opinion about employment opportunities in nursing that would be available to Suzanne in the Mahoning Valley. Suzanne testified that it would be difficult for her to juggle her parenting duties with employment. George testified about the shared parenting schedule and his work schedule.

{¶9} On December 3, 2007, the hearing on the motion to modify resumed. The magistrate indicated, and counsel agreed, that there should be two worksheets done for the modified child support obligation, the first covering the period beginning when the motion to modify was filed until spousal support terminated, and the second for the post-spousal support period. Suzanne then testified she had accepted employment as an emergency room nurse at St. Elizabeth's Boardman, starting September 25, 2007. The parties presented a letter from Suzanne's employer as a joint exhibit, which stated Suzanne would be working sixteen hours per week at a rate of $25.69 per hour. The parties agreed her annual salary based on that rate would amount to $21,375.00 per year.

{¶10} There was initially some disagreement about which year's income should be used for child support modification purposes. Counsel for Suzanne argued that George's 2006 income should be used and that the court should impute Suzanne's annual wages from her new position. Counsel for George countered that the court should look to George's 2007 income because it had allegedly decreased significantly from 2006. However, Suzanne's counsel pointed out that George's 2007 income could not be verified because he had not yet filed his tax return for tax year 2007. George admitted that he would not file this return for several months, likely in April 2008. Eventually, the parties stipulated that George's 2006 income would be used and that Suzanne's income would be imputed annually as $21,375.00. The parties then admitted George's and Suzanne's

2006 tax returns as joint exhibits.

{¶11} Suzanne testified that the parties' five children primarily reside with her. She explained the shared parenting schedule, which was similar to the one contained in the final decree. Suzanne testified about her new employment, stating that she had contracted to work 16 hours per week, but that during an orientation period she was working upwards of 30 hours per week. She stated it was very difficult to maintain her household during that orientation period. She testified she now works 16 hours per week because this allows her to minimize the need for childcare. She testified that her children are aged 6, 11, 13 (twins) and 14. Suzanne stated that she spends about $200.00 per month on childcare for them while she works.

{¶12} Suzanne testified that the children participate in a variety of activities including piano, golf, tennis, and swimming. One of the girls also participates in the school yearbook and another participates in Key Club. In addition, the children often visit friends and go to parties. Suzanne stated that she is primarily responsible for transporting the children to their various activities.

{¶13} Next Suzanne testified about her expenses, and how her finances had been strained since the termination of spousal support. She testified she had incurred approximately $85,000.00 in credit card debt, forty percent of which stemmed from calendar year 2007. She also stated she had been forced to put her house up for sale. An affidavit itemizing her expenses was entered as an exhibit and she testified to the information contained therein. She estimated her monthly expenses at $9,537.64, plus attorney fees and costs for her higher education.

{¶14} On cross, Suzanne testified that her unit was not hiring for more than sixteen hours per week, and that moreover it would be impossible for her to work more hours due to her parenting responsibilities. She also stated it would be a problem for her older children to babysit the younger ones. George also questioned the propriety of some of Suzanne's expenses. Suzanne further stated she spends easily $15,000.00 per year for clothing for the children. She testified that the children expect designer items and that she must purchase them to compete with their father.

{¶15} On December 20, 2007, the hearing continued. The parties' 2006 tax returns were admitted as joint exhibits. Suzanne submitted a proposed child support worksheet as an exhibit. George then testified. He stated his income in 2006 was high in comparison to other years since the divorce. He stated he no longer had a physical therapy contract with the hospital, and that he no longer received income from lectures he was doing for the drug companies. He estimated his 2007 income was down by $85,000.00 from the previous year.

{¶16} George also testified that he incurs a lot of expenses associated with the children, beyond his child support obligation. For example, he stated he spends money on school trips, school supplies, allowances, lunch money, sporting goods, gifts for parties, and clothing. When asked about the children's lifestyle, George noted that they do not lack for anything and that they "have a good, healthy lifestyle." George later admitted on cross that he is able to run some expenses through his corporation, namely health insurance, cell phone bills and his Hummer. He also testified that he owns a home and pays $2,300.00 per month for the mortgage. Further, he stated that in the past year he used personal funds to purchase a Saab convertible for use as a summer vehicle.

{¶17} On cross, George also testified that his income from physical therapy ceased because he could not reach a contractual agreement with the hospital. He admitted he is involved in a lawsuit with the hospital regarding payment for physical therapy services. George denied that he voluntarily stopped the speaking engagements with the drug companies. Notably, he also admitted he did not bring to court any documentation to substantiate his alleged 2007 income reduction. He admitted, however, that he had such documentation at his office.

{¶18} On January 16, 2008, Suzanne submitted proposed findings of fact and conclusions of law. She proposed modified child support obligations for two time periods. For both of these periods, Suzanne argued that the court should award more than the $150,000.00 equivalent in child support. First, she proposed that George should be obligated to pay $5,750.00 per month, plus 2% processing fee for the period beginning February 16, 2007 (when she filed her motion to modify) and ending April 30, 2007 (when

her spousal support terminated). Second, Suzanne proposed that from May 1, 2007 going forward George should be obligated to pay $6,750.00 per month, plus a 2% processing fee.

{¶19} On February 1, 2008, George submitted his proposed findings of fact and conclusions of law. George proposed for the first time period at issue that the court should continue to order the same amount of child support that it did as part of the final divorce decree, i.e., $2,146.35 per month plus processing fee, which was calculated using the $150,000.00 equivalent. For the second period, George urged the court to continue to use the $150,000.00 equivalent. In an attached worksheet, George listed as his gross income a figure that was slightly higher than his gross income from his 2006 tax returns. Based on that, he advocated that his modified child support obligation for the post-spousal support period should be $2,556.17 per month, plus a 2% processing fee.

{¶20} The magistrate issued his decision on March 11, 2008. For the period of February 16, 2007 to April 30, 2007, the magistrate used George's 2006 income from his tax return, $334,382.00, and Suzanne's spousal support income of $60,000.00. After the adjustments mandated by the worksheet, this meant the parties' combined annual income for child support purposes (Line 15) was $330,481.00. The magistrate then applied R.C. 3119.04(B), since the parties income was over $150,000.00. He found that it would be unjust, inappropriate and not in the best interests of the children to award support based on the $150,000.00 equivalent. He found this amount would be inadequate based on the children's qualitative needs and standard of living. He then applied the "extrapolation" method, as approved by this court in *Cho v. Cho*, 7th Dist. No. 03MA73, 2003-Ohio-7111. This meant he multiplied the parties' combined income by 20.62%, which is the percentage used in R.C. 3119.021 to calculate a support obligation where the parties have a combined income of $150,000.00 and five children. This method resulted in a monthly child support obligation of $4,694.33 plus processing fee.

{¶21} For the period of May 1, 2007 going forward (the post-spousal support period), the magistrate used George's 2006 income from his tax return, $334,382.00, and Suzanne's employment income, $21,375.00. After the adjustments mandated by the

worksheet, this meant the parties' combined annual income for child support purposes (Line 15) was $351,856.00. Again the magistrate found it would be unjust, inappropriate and not in the best interests of the children to award support based on the $150,000.00 equivalent. He then applied the extrapolation method, which resulted in a support obligation of $5,739.17 per month, plus processing fee. The magistrate also added an additional $1,010.83 per month to that figure, which resulted in a total monthly support obligation of $6,750.00. The magistrate made a number of findings of fact to support his decision to add that additional support, including: the standard of living of the parties and the children, Suzanne's expenses, and George's ability to have a number of his expenses paid through his corporation. The magistrate noted that the modified child support orders created an arrearage of $51,687.85 and ordered George to pay that arrearage amount, along with a 2% processing fee, to the CSEA within sixty days.

{¶22} On March 25, 2008, George filed objections to the magistrate's decision. He argued that the magistrate's child support award was excessive and failed to consider *his* qualitative needs and standard of living. He also alleged that the magistrate was impermissibly replacing spousal support with child support. George further argued that the court should use his 2007 income to calculate the modified support award, and attached the following exhibits thereto: his affidavit, a letter from his accountant, and his 2007 W-2s. Finally, George requested that he have additional time to pay any arrearage amounts. That same day, George also filed a motion to modify child support. Suzanne filed a brief in opposition to George's objections.

{¶23} In a decision dated June 4, 2008, the trial court overruled George's objections but granted George additional time, i.e., ninety days from the judgment entry, to satisfy the arrearage.

{¶24} This appeal followed. George then filed with the trial court a motion for stay of execution of that part of the judgment requiring him to pay child support arrearages totaling $51,687.85 in a lump sum payment within ninety days, which the trial court denied. George then moved this court for a stay, which we granted on condition that George post a cash bond in the amount of $55,000.00. George also filed a notice of

additional authorities, pursuant to App.R. 21(H), prior to oral argument.

Standard of Review

{¶25} Both of George's assignments of error challenge the trial court's decision regarding child support. "It is well established that a trial court's decision regarding child support obligations falls within the discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion." *Pauly v. Pauly* (1997), 80 Ohio St.3d 386, 390, 686 N.E.2d 1108, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. 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, 5 OBR 481, 450 N.E.2d 1140. Nevertheless, a trial court's discretion is not unfettered and the mandatory statutory child-support requirements must be followed in all material respects. *Sapinsley v. Sapinsley*, 171 Ohio App.3d 74, 2007-Ohio-1320, 869 N.E.2d 702, at ¶8; see, also, *Marker v. Grimm* (1992), 65 Ohio St.3d 139, 601 N.E.2d 496, paragraph two of the syllabus.

Use of George's 2006 Gross Income

{¶26} In his first of two assignments of error George asserts:

{¶27} "The trial court erred in utilizing Appellant's 2006 gross income in calculating Appellant's modified child support obligations."

{¶28} When computing child support payments, the trial court must first determine the parties' annual gross income. Gross income includes, "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 * * * and all other sources of income." R.C. 3119.01(C)(7). Gross income does not include, "[n]onrecurring or unsustainable income or cash flow items." R.C. 3119.01(C)(7)(e). A nonrecurring or unsustainable income or cash flow item is, "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." R.C. 3119.01(C)(8).

{¶29} In addition, "[w]hen a court computes the amount of child support required to be paid under a court child support order or a child support enforcement agency

computes the amount of child support to be paid pursuant to an administrative child support order, all of the following apply:

{¶30} "(A) The parents' current and past income and personal earnings shall be verified by electronic means or with suitable documents, including, but not limited to, paystubs, employer statements, receipts and expense vouchers related to self-generated income, tax returns, and all supporting documentation and schedules for the tax returns." R.C. 3119.05.

{¶31} In this case, the trial court used George's 2006 income to compute his modified child support obligation. George advocates that instead, the trial court should have used his 2007 income. He makes five separate arguments as to why the trial court abused its discretion by failing to do so. Each of these arguments will be discussed in turn.

{¶32} First George argues that since the motion to modify child support was pending for a long period of time, specifically, from February 16, 2007 to June 4, 2008, that it was *only* equitable and in the best interests of the children to consider the parties' incomes during the pendency of the motion. He cites *Allen v. Allen,* 2d Dist. No. 2004 CA 32, 2005-Ohio-431, for this proposition.

{¶33} However, the *Allen* court did not hold that it is *only* equitable and in the best interests of the children to consider the litigants' incomes during the pendency of the motion, when such motion is pending for an extended period of time. In *Allen*, the court held that it was *not unreasonable* for the trial court to make multiple support calculations, rather than a single support calculation based on income at the time the motion was filed, where the father's income had increased significantly during the two years that the motion was pending. Id. at ¶25.

{¶34} Regardless, the trial court in this case did not abuse its discretion by failing to consider George's change in income during the pendency of the motion because George did not present documentation to substantiate his alleged reduction in income at trial. Instead, he waited to present this documentation, namely, his 2007 W-2 forms, as an attachment to the objections he filed to the magistrate's decision. George asserts that

the trial court abused its discretion by failing to consider those attachments. However, this second argument is also meritless.

{¶35} The trial court decided not to consider the additional evidence, since by George's own admission at trial, he could have presented it to the magistrate, but did not. The trial court cited *In re S.S.*, 9th Dist. No. 04CA0032, 2004-Ohio-5371, for the proposition that the time to present evidence is at the hearing before the magistrate, not at a later date. George argues that the trial court's reliance on *In re S.S.* is misplaced because that case involved a motion for a new trial for newly discovered evidence, not objections to a magistrate's decision in a R.C. 3119.05(A) child support case.

{¶36} Although perhaps *In re S.S* was not the most pertinent case upon which the trial court could have relied, the trial court's overall conclusion was correct. Pursuant to Civ.R. 53(D)(4)(d), upon ruling on objections to a magistrate's decision, the trial court "may hear additional evidence *but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate*." Civ.R. 53(D)(4)(d) (emphasis added.)

{¶37} Applying Civ.R. 53(D)(4)(d), the court in *Hudson Presbyterian Church v. Eastminster Presbytery*, 9th Dist. No. 24279, 2009-Ohio-446, held that the trial court did not abuse its discretion by failing to consider evidence the appellant provided after the magistrate issued his decision, where that evidence was available at trial. Id. at ¶17-18. See, also, *In re Estate of Haas*, 10th Dist. No. 07AP-512, 2007-Ohio-7011, at ¶27-29.

{¶38} In this case, at the hearing before the magistrate George testified that his 2007 income had decreased by approximately $85,000.00. However, he admitted that although he had documentation to support his assertion, he did not bring it to present at the hearing:

{¶39} "Q. And you don't have any documentation to support the fact [that] your estimate of [a] $75,000.00 [sic] reduction as a result (inaudible)?

{¶40} "A. I have documentation at my office.

{¶41} "Q. But nothing with you today?

{¶42} "A. I didn't bring any papers."

{¶43} Based on the above admissions, George cannot demonstrate that he "could not, with reasonable diligence, have produced [his 2007 income documentation] for consideration by the magistrate." Civ.R. 53(D)(4)(d). Accordingly, the trial court did not abuse its discretion by failing to consider the 2007 income documentation George attached to his objections to the magistrate's decision.

{¶44} Third, George argues that the language of R.C. 3119.05(A), as he interprets it, places a duty on the trial court to verify the parents' gross incomes when determining child support. He compares the language of the former statute, R.C. 3113.215(B)(5)(a), with the language of the current statute, R.C. 3119.05(A), and engages in an exercise in statutory construction to reach this conclusion. From there, George argues that by failing to verify his 2007 income, as purportedly required by R.C. 3119.05(A), the trial court's resulting child support order (which used his 2006 income) was arbitrary and an abuse of discretion.

{¶45} George's argument here asks this court to interpret a statute. "Since statutory interpretation is a question of law, our review is de novo. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 8. De novo review is independent and without deference to the trial court's judgment. *Wilson v. AC & S, Inc*., 169 Ohio App.3d 720, 2006-Ohio-6704, 864 N.E.2d 682, ¶ 61." *In re J.L.,* 176 Ohio App.3d 186, 2008-Ohio-1488, 891 N.E.2d 778, ¶33.

{¶46} R.C. 3113.215(B)(5)(a), the former statute, provides:

{¶47} "(5) When a court computes the amount of child support required to be paid under a child support order or a child support enforcement agency computes the amount of child support to be paid pursuant to an administrative child support order issued pursuant to section 3111.20, 3111.21, or 3111.22 of the Revised Code, all of the following apply:

{¶48} "(a) *The parents shall verify* current and past income and personal earnings with suitable documents, including, but not limited to, paystubs, employer statements, receipts and expense vouchers related to self-generated income, tax returns, and all supporting documentation and schedules for the tax returns." Former R.C.

3113.215(B)(5)(a) (emphasis added).

{¶49} R.C. 3119.05, the current statute, and the one applicable to this case, provides:

{¶50} "When a court computes the amount of child support required to be paid under a court child support order or a child support enforcement agency computes the amount of child support to be paid pursuant to an administrative child support order, all of the following apply:

{¶51} "*The parents' current and past income and personal earnings shall be verified* by electronic means or with suitable documents, including, but not limited to, paystubs, employer statements, receipts and expense vouchers related to self-generated income, tax returns, and all supporting documentation and schedules for the tax returns." R.C. 3119.05 (emphasis added).

{¶52} George argues that by amending the language of the statute to read "shall be verified" as opposed to "the parents shall verify," the legislature intended to impose a duty on the trial court, instead of the parents, to verify the parents' gross incomes. In essence, George argues that R.C. 3119.05 requires the trial court to act as a quasi-advocate and procure the parties' income documentation. George cites several cases, which he contends support his interpretation of R.C. 3119.05. In response, Suzanne argues that the amended statute continues to impose a duty on the parents to verify their incomes. She does not cite any case law, but rather appears to rely on the plain language of the statute.

{¶53} Suzanne is correct. The plain language of the statute does not place a duty on the trial court to verify income. Moreover, none of the cases cited by George on this issue hold that the trial court has such a duty. For example, in *Jajola v. Jajola*, 8th Dist. No. 83141, 2004-Ohio-370; *Pendleton v. Pendleton,* 3d Dist. No. 5-06-38, 2007-Ohio-3834; and *Basham v. Basham,* 3d Dist. No. 1-02-37, 2002-Ohio-4694 the trial courts' child support determinations were reversed because the courts relied on testimonial evidence, instead of documents, to determine a party's gross income. In the instant case, the trial court did the opposite: it properly relied on the documents presented at trial, not

testimony, to determine George's income.

{¶54} George cites several other cases in his notice of additional authorities in an attempt to support his interpretation of R.C. 3119.05, namely, *Godbey-Martin v. Godbey*, 6th Dist. No. L-08-1046, 2009-Ohio-662 and *Arbogast v. Arbogast*, 9th Dist. No. 07CA0087-M, 2008-Ohio-6872. However, these cases are likewise factually distinguishable from the present case.

{¶55} In sum, none of the cases George cites support his contention that R.C. 3119.05(A) places a duty on the trial court to verify the parents' incomes. Moreover, although this court has not directly spoken about the issue, the Third District has. In the case of *In re Kohlhorst*, 3d District No. 2-06-09, 2006-Ohio-6481, that court discussed R.C. 3119.05(A), and found "the statute clearly imposes the duty on the parents to verify their income, including self-generated income." Id. at ¶10.

{¶56} Thus, George is incorrect in his conclusion that R.C. 3119.05 somehow shifts the duty to verify income from the parents to the trial court. It therefore follows that his argument that the trial court abused its discretion by failing to verify his 2007 income is meritless.

{¶57} Fourth, George argues that the magistrate and the trial court should have relied solely on his trial testimony about his 2007 income reduction, since Suzanne failed to present any evidence to contradict that testimony. However, Suzanne *did* challenge George's assertions that his income had decreased in 2007. On cross-examination, as quoted above, Suzanne asked George if he had brought documents to present to prove his decrease in income, and George admitted he had not. R.C. 3119.05(A) requires the use of documentation or electronic means, and not mere testimony to verify income.

{¶58} The situation in the present case is analogous to that in *Ostmann v. Ostmann,* 168 Ohio App.3d 59, 858 N.E.2d 831, 2006-Ohio-3617. In *Ostmann*, the trial court calculated the father's gross income by averaging the amounts from his 2000, 2001, and 2002 tax returns that were provided at trial during November 2003. The gross income listed on those tax returns included income from bonuses. At trial, the father's accountant testified that a decision had been made in March 2003 that there would be no

bonuses for the 2003 fiscal year, and that there would likely be no bonuses for the 2004 fiscal year. The father alleged on appeal that the trial court "ignored" the accountant's testimony and improperly calculated his income based on the figures on his tax returns for the three previous years. The Ninth District disagreed, noting:

{¶59} "[T]he statute specifically requires that a parent's income be verified electronically or by suitable documents, including pay stubs and tax returns. R.C. 3119.05(A). * * * Because in November 2003, Howard had not yet filed his personal tax return, the trial court was required by statute to review the tax returns from 2000, 2001, and 2002. Further, Howard's contention that the trial court 'ignored' [the accountant's] testimony concerning the lack of a 2003 bonus is hyperbole. This court finds that per statute, the trial court was restrained to review documents, not testimony, to establish Howard's income." *Ostmann* at ¶53.

{¶60} Similarly, in the instant case George testified about his reduction in income, but failed to produce supporting documentation. Accordingly, the trial court properly calculated the modification using George's 2006 income, notwithstanding George's testimony about the purported reduction in 2007. As the court in *Ostmann* pointed out, pursuant to R.C. 3119.05(A) a trial court is restrained to review documents, not testimony, to establish income. Id.

{¶61} Finally, George asserts that the reason his income in 2007 decreased was that he no longer had income from a provider agreement or speaking fees that he had in previous years. He therefore posits that the income from those sources should be considered "non-recurring or unsustainable income," which the trial court was required to exclude when calculating his gross income pursuant to R.C. 3119.01(C)(8). However, the problem with this argument is that George failed to produce documents at trial to substantiate his claim of an income reduction. As such, the trial court did not abuse its discretion by using his verified 2006 income, which included income from those sources. Again, the only documentation that George produced at trial related to his 2005 and 2006 income.

{¶62} In addition, Suzanne argues that George actually stipulated to the use of his

2006 income for modification purposes. She is correct. At the start of the December 3, 2007 hearing, there was initially some disagreement about which year's income should be used for child support modification purposes. Counsel for Suzanne argued that George's 2006 income should be used and that the court should impute Suzanne's annual wages from her new position. Counsel for George argued that the court should look to George's 2007 income because it had allegedly decreased significantly from 2006. However, Suzanne's counsel pointed out that George's 2007 income could not be verified because he had not yet filed his tax return for tax year 2007. George admitted that he would not file this return for several months, likely in April 2008. Eventually, the parties did stipulate that George's 2006 income would be used and that Suzanne's income from her new job would be used and would be imputed annually as $21,375.00. The parties then admitted George's and Suzanne's 2006 tax returns as joint exhibits. Moreover, in his proposed findings of fact and conclusions of law, George used a figure that was actually slightly *higher* than his 2006 income as shown on his tax return for that year.

{¶63} In sum, all of George's arguments relating to his first assignment of error are meritless. The trial court did not abuse its discretion by using George's 2006 income when calculating the modified child support obligation. George failed to provide any documentation about his 2007 income during the hearing before the magistrate, yet admitted he had documentation of the same available at the time. Moreover, George stipulated to the use of his 2006 income at trial and in his proposed findings of fact and conclusions of law.

{¶64} Accordingly, George's first assignment of error is meritless.

Consideration of the Spousal Support Termination

{¶65} In his second of two assignments of error, George asserts:

{¶66} "The trial court erred in considering the termination of spousal support in calculating Appellant's modified child support obligation so as to constitute a de facto modification of spousal support."

{¶67} As a threshold issue, Suzanne argues that George failed to make this objection to the trial court. She is incorrect. Although George did not use the specific

term "de facto spousal support," he did argue in his objections that the magistrate was attempting to replace spousal support with child support.

{¶68} Turning then to the merits of the second assignment of error, George is incorrect that the trial court impermissibly considered the termination of spousal support when calculating the modified child support obligation.

{¶69} The termination of spousal support does factor into the child support calculation, because "[i]n computing the child support obligation, the trial court must deduct spousal support from the income of the obligor and include it as income on the obligee's side of the worksheet." *Wright v. Wright*, 8th Dist. No. 91026, 2009-Ohio-128, at ¶30, citing, *Collins v. Collins*, 5th Dist. No. 2008-CA-00028, 2008-Ohio-4993; see, also, R.C. 3119.022.

{¶70} Admittedly, a court must take care not to award child support as a substitute for spousal support when the latter terminates. See, e.g., *Wright* at ¶30; *Siebert v. Tavarez*, 8th Dist. No. 88310, 2007-Ohio-2643, at ¶36-37. In this case, however, both the trial court and the magistrate were mindful of this issue. The trial court stated specifically:

{¶71} "Upon review of the Magistrate's Decision, the Magistrate specifically addressed this concern at paragraph 17 of his Conclusions of Law, by stating the following:

{¶72} 'In reaching the above determination of the proper level of child support, the Court is cognizant of the proper termination of spousal support on April 30, 2007 and is not intending by this recalculation to substitute or extend the same. The Court is simply taking into account the financial reality of the post-spousal support circumstances of the children as well as the Defendant.'"

{¶73} In his notice of additional authorities, George cites *Kauza v. Kauza*, 12th Dist. No. CA2008-02-014, 2008-Ohio-5668, in support of his argument that the trial court erred by considering the termination of spousal support. However, *Kauza* is factually distinguishable, and moreover, actually stands for the opposite proposition. See Id. at ¶15 (stating that "[s]pousal support is taken into account when determining the income of the parties[.]")

{¶74} Further, the trial court was not attempting to replace the spousal support with child support. Since this case undisputedly involves a situation where the parents' combine gross incomes exceeded $150,000.00, the trial court was not constrained by the child support worksheets in calculating support. *Cho v. Cho,* 7th Dist. No. 03MA73, 2003-Ohio-7111, at ¶12.

{¶75} Instead, R.C. 3119.04(B) applies, which states:

{¶76} "If the combined gross income of both parents is greater than one hundred fifty thousand dollars per year, the court, with respect to a court child support order, or the child support enforcement agency, with respect to an administrative child support order, 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. The court or agency shall compute a basic combined child support obligation that is no less than the obligation that would have been computed under the basic child support schedule and applicable worksheet for a combined gross income of one hundred fifty thousand dollars, unless the court or agency determines that it would be unjust or inappropriate and would not be in the best interest of the child, obligor, or obligee to order that amount. If the court or agency makes such a determination, it shall enter in the journal the figure, determination, and findings." R.C. 3119.04(B).

{¶77} This section has been construed to mean that the court must: "(1) set the child support amount based on the qualitative needs and standard of living of the children and parents; (2) ensure that the amount set is not less than the $150,000-equivalent, unless awarding the $150,000-equivalent would be inappropriate (i.e., would be too much); and (3) if it decides the $150,000-equivalent is inappropriate or unjust (i.e., awards less), then journalize the justification for that decision." *Siebert* at ¶30, quoting *Zeitler v. Zeitler*, 9th Dist. No. 04CA008444, 2004-Ohio-5551, at ¶8. See, also, *Cho*, supra.

{¶78} In this case, the court properly applied R.C. 3119.04(B). The court found, and in fact it was undisputed, that the combined income of the parents exceeded the guideline limits of $150,000.00. More specifically, the trial court found the parties'

combined gross income to be $330,481.00 for the first period, and $351,856.00 for the second (post-spousal support) period. The trial court then concluded it would not be in the best interests of the children to order a child support obligation based on a combined gross income of $150,000.00. If the parties' combined gross incomes were $150,000.00, then their basic child support obligation for the five children would have been $30,931.00 per year or 20.62% of their combined incomes. R.C. 3119.021.

{¶79} Using the extrapolation method, the court proceeded to calculate the child support for the first period to be $56,332.00 or 20.62% of their combined incomes. This resulted in a monthly support obligation of $4,694.33 per month, plus processing fee. For the second time period at issue, i.e. when the spousal support terminated going forward, the court calculated the child support to be $81,000.00 per year, or 20.62% of the parties' combined incomes. The court chose to add an additional $12,130.00 to that figure, which resulted in a monthly support obligation of $6,750.00, plus processing fee.

{¶80} We conclude that the trial court did not abuse its discretion in making these awards. The court properly considered the qualitative needs and standard of living of the parties and the children. Namely, the court considered the fact that the five children participate in many expensive extracurricular activities, and customarily wear designer clothing. In fact, both parties agreed that the children enjoy a high standard of living. George admitted that the children do not lack for anything. The court also considered the high standard of living enjoyed by the parents. Suzanne's testified about her monthly expenses and presented an affidavit showing the same. George failed to present much evidence about his expenses, but the court considered the fact that George has the ability to run certain expenses, i.e., cars, cell phones and country club dues, through his corporation.

{¶81} George argues, however, that that the trial court erred by considering Suzanne's monthly expenses and ordering a child support amount "that enabled her to meet her expenses." However, pursuant to R.C. 3119.04(B) the trial court may consider the "qualitative needs" of the parties, which would include their respective expenses. R.C. 3119.04(B).

{¶82} George further contends that the child support award was improper because a parent's child support duty extends to only the child's "necessities." However, the case upon which he relies for that proposition, *Ohlemacher v. Ohlemacher,* 9th Dist. No. 04CA008488, 2005-Ohio-474, made that statement in the context of a discussion about general common law principles surrounding child support. Id. at ¶34. Moreover, *Ohlemacher* applied statutory child support provisions which have since been repealed.

{¶83} In sum, the trial court properly considered the termination of spousal support when making its modified child support calculation. Further, the court followed R.C. 3119.04(B) and looked at the qualitative needs and standard of living of the children and the parents. Based on the evidence presented at trial we cannot conclude that the trial court's decision constituted an abuse of discretion. Accordingly, George's second assignment of error is meritless.

Conclusion

{¶84} Both of George's assignments of error are meritless. With regard to the first assignment of error, the trial court did not abuse its discretion by using George's 2006 income when calculating the modified child support obligation. George failed to provide any documentation about his 2007 income during the hearing before the magistrate, yet admitted he had such documentation available at that time. Moreover, George stipulated to the use of his 2006 income, both at trial and in his proposed findings of fact and conclusions of law.

{¶85} With regard to the second assignment of error, the trial court did not abuse its discretion by considering the termination of spousal support when making its modified child support calculation. Spousal support is considered income for the obligee, termination of spousal support does factor into the child support calculus. Further, we cannot conclude that the trial court was attempting to replace spousal support with child support. Since it is undisputed that the parties' combined incomes exceeds $150,000.00 per year, the trial court had the discretion to award an amount of child support that adequately addressed the qualitative needs and standard of living of the children and the parents. R.C. 3119.04(B). Based on a review of the record, the trial court's modified

child support order was reasonable.

{¶86} Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.