

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TAMMY L. ISAACS	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
TIMOTHY H. ISAACS	:	Case No. 2008AP110071
	:	
Defendant-Appellee	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 2007TC030119

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 8, 2009

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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Farmer, P.J.

{¶1} On January 11, 1997, appellant, Tammy Isaacs, and appellee, Timothy Isaacs, were married. Two children were born as issue of the marriage.

{¶2} On June 11, 2002, the parties were granted a legal separation. Thereafter, the parties reconciled. On March 15, 2007, appellant filed a complaint for divorce.

{¶3} A hearing before a magistrate was held on February 6, 2008. By decision filed May 8, 2008, the magistrate named appellant the residential parent and legal custodian of the children, ordered appellee to pay child support in the amount of \$989.47 per month, and divided the parties' debt. Both parties filed objections. A hearing before the trial court was held on August 18, 2008. By judgment entry filed October 28, 2008, the trial court adopted in part and modified in part the magistrate's decision. The trial court named appellee residential parent and legal custodian of the children, ordered appellant to pay child support in the amount of \$160.72 per month, ordered no spousal support to appellant, and kept the division of debt intact.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE JUDGE ERRED IN OVERRULING THE MAGISTRATE'S DECISION TO AWARD CUSTODY TO TAMMY ISAACS."

II

{¶6} "THE ALLOCATION OF THE DEBTS OF THE PARTIES WAS NOT EQUITABLE BASED ON THE VAST DISPARITY IN THE INCOMES OF THE PARTIES."

III

{¶7} "THE COURT ERRED IN REFUSING TO ORDER SPOUSAL SUPPORT."

IV

{¶8} "THE COURT ERRED IN FAILING TO AWARD THE PLAINTIFF THE TAX EXEMPTIONS FOR THE CHILDREN."

V

{¶9} "THE COURT ERRED IN FAILING TO PRESERVE THE TEMPORARY CHILD SUPPORT ARREARAGE WHICH DEFENDANT OWED TO PLAINTIFF."

VI

{¶10} "THE COURT ERRED IN FAILING TO DIVIDE ASSETS OF THE PARTIES WHICH WERE BROUGHT TO ITS ATTENTION, SPECIFICALLY THE DEFENDANT'S PENSION AND LIFE INSURANCE POLICIES OF THE PARTIES."

I, IV

{¶11} Appellant claims the trial court erred in awarding custody of the minor children to appellee contrary to the magistrate's recommendation to give appellant custody. Appellant also claims the award of the tax exemption to appellee was in error. We disagree.

{¶12} Child custody determinations lie in the trial court's sound discretion. *Masters v. Masters*, 69 Ohio St.3d 83, 1994-Ohio-483. In order to find an abuse of

discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶13} Appellant argues the trial court's decision is not supported by the evidence, and is a de facto award of custody to the paternal grandmother. Appellee is an over-the-road truck driver and is gone five days a week, thereby leaving the children in the care of his mother. Appellant further argues the presence of Paul Renner in her home did not negatively impact the children despite the fact that the children witnessed a domestic violence incident between appellant and Mr. Renner.

{¶14} In its judgment entry filed October 28, 2008, the trial court found that appellee should be the residential parent after reviewing the record and the prior orders of the magistrate. The trial court based its decision on the following factual findings:

{¶15} "16. Tammy Isaacs was convicted of assaulting Timothy Isaac's mother within the last two years. Tammy Isaac's current boyfriend, Paul Renner assaulted Tammy, also within the last two years. Tammy obtained a Civil Protection Order against Mr. Renner, which she subsequently dismissed. She and Paul Renner are residing together with a total of five children. They are residing in a three bedroom home.

{¶16} "17. The Magistrate's Order filed on September 12, 2007 provides the following regarding the incident between Tammy Isaacs and Paul Renner:

{¶17} " 'This matter arises from a Domestic Violence allegation against Tammy Isaacs' boyfriend, Paul Renner. The incident occurred April 25, 2007. Tammy Isaacs and Paul Renner argued and Tammy attempted to telephone Tim Isaacs for assistance.

Paul Renner smacked Timmy Isaacs (sic) hand with a wooden board causing injury. There was also repeated shoving and name calling. Paul plead (sic) to assault by a plea agreement in June 2007. At hearing on June 25, 2007, Tammy minimized the severity of the incident and attempted to recant or contradict the report she made to the police on the night of the incident. The Magistrate spoke with the children who confirmed the incident, as described, in the police report. The children did not express fear of Paul Renner except when he's angry.'

{¶18} " 'The children report ongoing disparagement of both parents by the other. The family relationships are toxic and the Magistrate is not sure if placement in either home is in the best interest of the children. Tim Isaacs does not visit regularly; however, Tammy Isaacs interferes with his companionship.'

{¶19} "18. The Magistrate's Order filed on September 5, 2008 provides the following regarding the Child Interview held on 08/19/2008 and the situation in the home of Timothy Isaacs:

{¶20} " 'Tammy Isaacs alleges that the children have been emotionally abused at Timothy Isaacs (sic) home. This matter was referred to the Tuscarawas County Department of Jobs and Family Services, which conducted an investigation and interviewed the children and did not find that there was a basis to suspend Timothy Isaac's companionship. Likewise, the Magistrate conducted a child interview and based on that information believes that some minor inappropriate behaviors have occurred at Timothy Isaacs (sic) home, but that the children have not been abused and are no (sic) in any danger of being abused at Timothy Isaacs (sic) home; therefore, companionship

should continue to take place as previously **Ordered** by the Court. There should be no further interruption of Timothy Isaacs' companionship.'

{¶21} "19. The Magistrate issued a **No-Contact Order** between Paul Renner and the children, which Tammy Isaacs admits she has violated.

{¶22} "20. Paul Renner has paddled the children with a board." See, Judgment Entry filed October 28, 2008 at Findings of Fact Nos. 16-20.

{¶23} Basically appellant does not dispute these findings, but argues the record also demonstrates negatives relative to appellee i.e., appellee failed to complete the parenting course, there was a resolved issue of abuse in appellee's home, and the de facto award of custody to the paternal grandmother.

{¶24} R.C. 3109.04 governs the award of parental rights and responsibilities. In allocating parental rights and responsibilities, the trial court "shall take into account that which would be in the best interest of the children." R.C. 3109.04(B)(1). Subsection (F)(1) states the following:

{¶25} "In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

{¶26} "(a) The wishes of the child's parents regarding the child's care;

{¶27} "(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

{¶28} "(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

{¶29} "(d) The child's adjustment to the child's home, school, and community;

{¶30} "(e) The mental and physical health of all persons involved in the situation;

{¶31} "(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶32} "(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

{¶33} "(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the

commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

{¶34} "(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

{¶35} "(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

{¶36} We note the trial court's decision does not specifically elaborate on the best interests of the children. The record reveals the visitation schedule in place at the time of the hearing was honored by both parties, with appellant as the primary custodian. February 6, 2008 T. at 14-15. The children do relatively well, passing in school and attending counseling to deal with the divorce. Id. at 21-22.

{¶37} Appellant testified the children are "very upset and angry" after some of their visitations with appellee. Id. at 24. She stated appellee "constantly terrorizes the kids, alienates the kids." Id.

{¶38} Appellee argues Paul Renner's presence in appellant's life has impacted the children. The children witnessed Mr. Renner assaulting appellant, were hit with a wooden board by Mr. Renner resulting in bruising, and are afraid of him. Id. at 28-30, 54, 56.

{¶39} The balancing of these two scenarios involves use of judicial discretion. The trial court was faced with two negative issues and chose a parent. The fact that the third party in the children's lives would be Mr. Renner or the paternal grandmother is a

judgment call. Upon review, we find such a judgment call was not an abuse of discretion.

{¶40} In addition, generally, under the Internal Revenue Code, the residential parent presumptively receives the tax dependency exemption. *Singer v. Dickerson* (1992), 63 Ohio St.3d 408.

{¶41} Assignments of Error I and IV are denied.

II

{¶42} Appellant claims the trial court erred in dividing the debt given the disparity of the parties' income. We disagree.

{¶43} A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9.

{¶44} As noted in the Child Support Computation Worksheet attached to the trial court's judgment entry, appellant's income is \$14,248.00 as opposed to appellee's income of \$72,000.00. In allocating the debt, the trial court concluded the following:

{¶45} "6. Each party shall retain all property in their possession. Additionally, each party shall pay one-half of the Beneficial, Sears, Direct Merchant, Capital One, Radio Shack, J.C. Penny, HSBC, American General, Citi-Financial, Shop NBC, and Rex T.V. debts unless otherwise disposed of in ¶6 or ¶7 of these Orders. Each Party's one-half share shall be determined as one-half of the balance on each account as of

02/06/2008. Each party shall provide the other with account statements reflecting the balance on that date within 30 days of this Decision.

{¶46} "7. Timothy Isaacs shall be solely responsible for any debt secured by the trailer and shall hold Tammy Isaacs harmless thereon."

{¶47} In 2002, the parties entered into a legal separation agreement. Subsequent to the agreement, the parties reconciled and lived together for some time with debt being assumed by both parties. February 6, 2008 T. at 17-18. Thereafter, they split again and appellant initiated the divorce proceeding.

{¶48} Because of the reconciliation and cohabitation, we find the trial court did not err in including the subsequent debt incurred by the parties following the legal separation.

{¶49} Both parties testified as to their current debt. Appellant's totaled \$17,700.00, \$1,700.00 for a Sear's debt and \$16,000.00 for a Beneficial loan. February 6, 2008 T. at 40-41. The Beneficial loan was used to pay down credit cards held in appellant's name. Id. at 41. Appellee's debts totaled over \$24,800.00. Id. at 64-66.

{¶50} Upon reconciliation, the parties purchased a mobile home. In determining the debt, the trial court split the debt equally, but relieved appellant of the debt on the mobile home (payment of \$350.00 per month). Id. at 79. Appellant paid outstanding bills for repairs to the mobile home, over \$1,000.00, due to appellee's abandonment of the mobile home. Id. at 36.

{¶51} It is undisputed that the outstanding bills were marital debt. Appellant argues because of her income, it is unfair for her to pay one-half. During the hearing,

appellee argued he was way over his head in debt and was contemplating bankruptcy. Id. at 50. There is no proof of any such filing at the time of the divorce.

{¶52} Faced with obvious mounting marital debt and little in assets, we find the trial court was correct in the equitable division of the debt. The trial court relieved appellant of any debt in the mobile home. We find no abuse of discretion by the trial court in assigning the marital debt equally.

{¶53} Assignment of Error II is denied.

III

{¶54} Appellant claims the trial court erred in not awarding her spousal support. We disagree.

{¶55} A review of a trial court's decision relative to spousal support is governed by an abuse of discretion standard. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348; *Blakemore*. We cannot substitute our judgment for that of the trial court unless, when considering the totality of the circumstances, the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128.

{¶56} R.C. 3105.18(C)(1) governs awards of spousal support and states the following:

{¶57} "In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

{¶58} "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

{¶59} "(b) The relative earning abilities of the parties;

{¶60} "(c) The ages and the physical, mental and emotional conditions of the parties;

{¶61} "(d) The retirement benefits of the parties;

{¶62} "(e) The duration of the marriage;

{¶63} "(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

{¶64} "(g) The standard of living of the parties established during the marriage;

{¶65} "(h) The relative extent of education of the parties;

{¶66} "(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

{¶67} "(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;

{¶68} "(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience, and employment, is in fact, sought;

{¶69} "(l) The tax consequences, for each party, of an award of spousal support;

{¶70} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶71} "(n) Any other factors that the court expressly finds to be relevant and equitable."

{¶72} In the previous 2002 legal separation agreement, appellant waived spousal support. In fact, there is scant testimony as to the parties' living expenses or standard of living save their annual salaries.

{¶73} In her financial disclosure statement filed on March 15, 2007, appellant listed a \$322.00 food stamp stipend and \$1,957.50 in monthly expenses that included the children's care and support.

{¶74} We note appellee became the residential parent thereby reducing appellant's living expenses.

{¶75} We find no abuse of discretion in denying spousal support.

{¶76} Furthermore, in her May 19, 2008 pro se objections to the magistrate's decision, appellant only objected to the failure to award four months of spousal support in arrears. Civ.R. 53(E)(3)(b)(iv) states the following:

{¶77} "Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)."

{¶78} According to the clear language of Civ.R. 53(E)(3)(b)(iv), a failure to file objections to a magistrate's decision constitutes a waiver of any alleged error. See, *Stamatakis, et al. v. Robinson* (January 27, 1997), Stark App. No.1996CA00303.

{¶79} By failing to object to a future spousal support award, we find the issue has been waived.

{¶80} Assignment of Error III is denied.

V

{¶81} Appellant claims the trial court erred in not awarding the temporary child support arrearage. We disagree.

{¶82} Appellant failed to file an objection to the magistrate's decision on this issue. Pursuant to Civ.R. 53(E)(3)(b)(iv), we find this issue was also waived.

{¶83} Assignment of Error V is denied.

VI

{¶84} Appellant claims the trial court erred in failing to determine that appellee's pension was marital property and erred in not dividing it. We disagree.

{¶85} The very first mention of appellee's pension is in appellant's objections. The trial court specifically declined to consider new evidence at the objection hearing.

{¶86} During the objection hearing, appellant admitted that pension evidence was overlooked and not presented. August 18, 2008 T. 14-15.

{¶87} Pursuant to Civ.R. 53(D)(4)(d), the trial court was not required to entertain additional evidence:

{¶88} "*Action on objections*. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the

court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the 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."

{¶89} We find the trial court did not abuse its discretion in refusing to hear additional evidence.

{¶90} Assignment of Error VI is denied.

{¶91} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES

