[Cite as *Haynes v. Haynes*, 2010-Ohio-5801.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
ELAINE M. HAYNES	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-01
BRENT A. HAYNES	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Coshocton County Court of Common Pleas, Case No. 2007DV0420
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 22, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
VAN BLANCHARD, II 402 Main Street Coshocton, OH 43812	MILES D. FRIES Gottlieb, Johnston, Beam & Dal Ponte 320 Main St., Box 190 Zanesville, OH 43702-0190

Gwin, J.

{¶1} Defendant-appellant Brent A. Haynes appeals a judgment of the Court of Common Pleas of Coshocton County, Ohio, which overruled his objections to a magistrate's decision. The court granted a divorce to appellant and plaintiff-appellee Elaine M. Haynes, named appellee as the residential parent of the parties' minor children, set spousal and child support, and divided the marital property. Appellant assigns four errors to the trial court:

{¶2} "I. IT IS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO FAIL TO IMPUTE INCOME TO A SPOUSE THAT IS VOLUNTARILY UNEMPLOYED IN DETERMINING WHETHER SPOUSAL SUPPORT IS REASONABLE AND APPROPRIATE AS WELL AS IN THE CALCULATION OF CHILD SUPPORT.

{¶3} "II. THE FAILURE TO CONSIDER THE FINANCIAL MISCONDUCT OF THE WIFE RESULTED IN AN INEQUITABLE DIVISION OF MARITAL PROPERTY.

{¶4} "III. THE INCLUSION OF THE SEPARATE PROPERTY OF THE HUSBAND IN THE MARITAL ESTATE WAS ERROR.

{¶5} "IV. THE TRIAL COURT ERRED IN FAILING TO FOLLOW THE PROCEDURE SET FORTH IN O.R.C. 3109.04 IN ALLOCATING PARENTAL RIGHTS AND RESPONSIBILITIES."

{¶6} The record indicates the parties were married for thirteen years and produced two children, who were minors at the time of the divorce. Both parties acknowledged they were incompatible, and requested the divorce.

{¶7} Our standard of reviewing decisions of a domestic relations court is generally the abuse of discretion standard, see *Booth v. Booth* (1989), 44 Ohio St. 3d

142. The Supreme Court made the abuse of discretion standard applicable to alimony orders in *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E.2d 1140; to property divisions in *Martin v. Martin* (1985), 18 Ohio St. 3d 292; to custody proceedings in *Miller v. Miller* (1988), 37 Ohio St. 3d 71; and to decisions calculating child support, in *Dunbar v. Dunbar*, 68 Ohio St 3d 369, 533-534, 1994 -Ohio- 509, 627 N.E.2d 532. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable, *Blakemore*, supra, at 219. When applying the abuse of discretion standard, this court may not substitute our judgment for that of the trial court, *Pons v. Ohio State Medical Board*, (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748.

I.

{¶8} In his first assignment of error, appellant argues the trial court should have imputed income to appellee because she was voluntarily unemployed.

{¶9} Appellee was employed at the Ohio Department of Transportation until 2004. In 2004, she left ODOT and worked part-time jobs during the children's school day. At the time of the final hearing, appellee was employed part-time earning $8.50 per hour. She testified she has not sought full-time employment because she enjoys her job and the schedule allows her flexibility to care for the children. The magistrate computed spousal support and child support based upon appellee's current income. Appellant asserts she had earned much more while employed full time at ODOT, and has no physical, mental or emotional condition that would preclude her full time employment.

{¶10} R.C. 3105.18 provides in pertinent part:

{¶11} "(C)(1) 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:

{¶12} "(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;

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

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

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

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

{¶17} "(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;

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

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

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

{¶21} "(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;

{¶22} "(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

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

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

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

{¶26} Appellant argues the trial court did not apply all the above factors in determining appellee's income and the appropriateness, amount, and duration of the spousal support order.

{¶27} In the magistrate's decision filed February 5, 2009, the magistrate listed the factors and either made findings of fact pertinent to each or stated the factor had limited applicability in the case. The magistrate reviewed both parties' budgets, and determined an amount it found appellant could afford to pay and which would be sufficient for appellee and children to enjoy a lifestyle similar to the lifestyle they enjoyed during the marriage.

{¶28} We have reviewed the record, and we find the trial court did not abuse its discretion in not imputing income to appellee, nor in setting the amount and duration of the spousal support.

{¶29} The first assignment of error is overruled.

II.

{¶30} In his second assignment of error, appellant argues the court should have divided the marital property differently because appellee committed financial misconduct. Appellant asserts after appellee quit her full-time job with ODOT, she cashed out her pension and spent the funds.

{¶31} Appellant quit working at ODOT in 2004, and the parties separated in June 2007. Appellee testified she placed the pension funds in an IRA account, but then withdrew and used these funds to satisfy debts and provide for the children and the household because appellant had refused to provide her with funds after she quit her job. The magistrate noted each withdrawal appellee made was subject to federal and state income tax. The magistrate found during the three years appellee was withdrawing and spending her IRA funds, appellant did nothing to prevent her from doing so, and enjoyed the benefits along with appellee and the children.

{¶32} The magistrate computed the marital debts and assets, and the exhibit attached to her decision shows she divided the property evenly. We find the trial court did not abuse its discretion in not finding appellee had committed financial misconduct.

{¶33} The second assignment of error is overruled.

III.

{¶34} In his third assignment of error, appellant argues the trial court included in its computation of the marital assets certain property that should have been awarded to him as separate property. Appellant owned the marital residence prior to the parties' marriage. The magistrate found at the time of the marriage, appellant had a mortgage against the property. The parties re-financed the loan twice during the marriage, put

some of the money into an addition to the home, and paid down the new mortgage to less than what appellant's mortgage had been prior to the marriage. The court found the pay down on the mortgages created marital equity. Appellee presented testimony the property was worth approximately $60,000 more than the mortgage balance, which is the amount the court determined to be marital equity.

{¶35} Appellant cites us to *David v. David,* Ashtabula App. No. 2007-A-0038, 2007-Ohio- 6942, as authority for the proposition the amount of the mortgage pay down is only one factor to be used in determining marital equity in real estate. The Eleventh District Court of Appeals found a trial court should also determine and consider the parties' total equity in the property even if one of the parties owned the property prior to the marriage.

{¶36} The record indicates the court did consider the total equity in the property, and determined the re-financing of the mortgage generated funds for the marriage. We find no error herein.

{¶37} The magistrate determined certain assets were appellant's separate property and did not include them in the property division. Appellant argues he owned life insurance, livestock, and commodities which the court treated as marital property. Appellant urges he owned the above property at the time of the marriage, and it should have been categorized as his separate property. The magistrate found although appellant characterized the farm property and animals as his separate property, he acknowledged he worked the farming operation during the marriage.

{¶38} This court cannot substitute its judgment for that of the trial court, and the Supreme Court has directed us not to conduct piece meal appeals of property divisions,

but rather to look to the total distribution to determine whether it is equitable. *Briganti v. Briganti* (1984), 9 Ohio St. 3d 220, 459 N.E. 2d 896.

{¶39} The third assignment of error is overruled.

IV.

{¶40} In his fourth assignment of error, appellant argues the trial court erred in not following the procedures set forth in R.C. 3109.04, in allocating parental rights and responsibilities. Appellant filed a motion for shared parenting and submitted a proposed shared-parenting plan, which provided for the children to spend approximately equal time with each party. Instead, the court designated the appellee as the residential parent.

{¶41} A court may not approve a shared-parenting proposal if it finds the proposal is not in the best interest of the children. R.C. 3109.04(D)(1)(b). If a trial court denies a proposed shared-parenting plan, it must make findings of fact and conclusions of law stating the reasons. R.C. 3109.04(D)(1). Appellant asserts the court did not follow the mandate of the statute and did not make conclusions of law outlining its reasons for rejecting appellant's shared parenting plan proposal. Further, the court did not find designating appellee as residential parent was in the best interest of the children.

{¶42} The magistrate interviewed one of the minor children in camera, and stated she considered the wishes and concerns of the child. The magistrate found the shared-parenting plan proposed by appellant is not currently in the best interest of the minor children, citing facts contained in the "finding of fact" portion of the decision. Those facts are: appellee has been the primary parent of the children since birth;

appellant works with a traveling maintenance crew which keeps him from home with out-of-town travel, and long hours of overtime; and appellant's cattle farming takes additional time away from the family.

{¶43} The magistrate also found appellee opposed the shared-parenting plan because she and appellant have limited contact and communication since their separation and in fact in the past had never operated in any manner like the proposed plan. Appellee testified during the time she and appellant lived together, they led relatively separate lives. They did not argue or fight, but had little communication and cooperation even with regard to the children. The magistrate found the most significant issues regarding the children had all been decided by appellee.

{¶44} The statute lists numerous factors, including the ability of the parents to cooperate in the plan, the child's interaction with the parent, and the wishes of the child. Although the magistrate did not make a finding that placing the children with appellee was in the best interest, she did determine a shared-parenting plan was not in the children's best interest. Our review of the record and the magistrate's decision leads us to conclude there are sufficient findings of fact and conclusions of law to satisfy the statute and to permit us to conduct a meaningful review.

{¶45} The fourth assignment of error is overruled.

{¶46} For the foregoing reasons, the judgment of the Court of Common Pleas of Coshocton County, Ohio, is affirmed.

By Gwin, J.,

Edwards, P.J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. JOHN W. WISE

WSG:clw 1005

[Cite as *Haynes v. Haynes*, 2010-Ohio-5801.]

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ELAINE M. HAYNES	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
BRENT A. HAYNES	:	
Defendant-Appellant	:	CASE NO. 2010-CA-01

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Coshocton County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. JOHN W. WISE