

[Cite as *Heywood v. Heywood*, 2010-Ohio-3565.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

MICHELLE K. HEYWOOD,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-02-013
- vs -	:	<u>OPINION</u>
	:	8/2/2010
DAVID TODD HEYWOOD,	:	
Defendant-Appellant.	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 08DRA01015

Nichols, Speidel & Nichols, Donald W. White, 237 Main Street, Batavia, Ohio 45103,
for plaintiff-appellee

The Drew Law Firm Co., LPA, Michael D. McNeil, 2400 Fourth & Vine Tower, One
West Fourth Street, Cincinnati, Ohio 45202, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, David Heywood, appeals the decision of the
Clermont County Court of Common Pleas, Domestic Relations Division, setting child
support and allocating other costs and liabilities. We affirm the decision of the
domestic relations court.

{¶2} David and plaintiff-appellee, Michelle Heywood, were married in 1999 and had three children born issue of the marriage before their divorce in 2009. Prior to divorce proceedings, Michelle and David worked together at Kin Underground, a business owned by Michelle. Michelle acted as the financial officer, and David was in charge of sales and field operations. While David earned more than \$100,000 per year throughout the course of his employment at Kin Underground, Michelle did not draw a salary during the initial years of the business' existence. However, once the parties decided to send their children to private school, Michelle began to draw an annual salary equal to the cost of the children's private school tuition.

{¶3} Leading up to, and after the couple's divorce proceedings began, the parties' working relationship suffered. On multiple occasions, Michelle complained of David not giving her adequate information and business-related data she needed to create billing records. After several unsuccessful attempts to persuade David to turn over the information voluntarily, Michelle decreased his salary to \$70,000 a year and offered sales bonuses based on his gross annual sales. The bonus Michelle offered would have resulted in a gross salary equal to what David earned the previous year; with a chance of increase if he initiated more sales.

{¶4} Instead of accepting Michelle's compensation proposal, David left Kin Underground and became employed at Buckeye Utilities where he received a compensation program nearly identical to the one Michelle offered. Specifically, David accepted a package with an annual salary of \$70,000, health and life insurance, bonuses based on gross sales and production, as well as multiple perks including use of a company vehicle, cell phone, fuel card, and reimbursement for work-related expenses.

{15} After David left Kin Underground, the company's field employees followed him to Buckeye Utilities, and Kin Underground was forced out of business, and later sold its assets. Michelle took responsibility for dissolving Kin Underground and settling the company's debts. The liquidation of assets and other funds were placed in an escrow account worth \$78,422.50, from which the parties withdrew money to pay for home improvements so that their marital residence could be sold, as well as miscellaneous expenses associated with the divorce.

{16} After their separation, but before the final divorce decree, the parties entered into stipulations determining issues such as the grounds for divorce, the sale terms of the marital residence, filing status for tax purposes, and parental rights and responsibilities regarding their three young children. The parties, however, were unable to reach a joint decision regarding the final distribution of the escrow account, as well as issues regarding David's income for determining child support, how certain tax liabilities would be divided, and how the tuition expenses would be paid for the three children's private schooling.

{17} After a hearing, the magistrate determined that David's income was \$119,554 and declined to offset any of the tax liability David incurred as a result of filing separately. The magistrate also divided the escrow account, and then ordered David and Michelle to split the \$27,000 annual cost of enrolling their three children in private school.

{18} David filed objections to the magistrate's decision, arguing that the magistrate erred in determining his salary, failing to offset his tax liability, and in ordering him to pay half of the tuition. The domestic relations court overruled David's objections regarding his income and the tax liability, but sustained the tuition

objection. The trial court found that David and Michelle could no longer afford to pay \$27,000 a year to enroll their children in private school. However, the trial court ordered that the children be allowed to finish the school year and that the remaining tuition bill be paid from the escrow account. David now appeals the decision of the domestic relations court, raising the following assignments of error.

{¶19} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY FINDING HE WAS VOLUNTARILY UNDEREMPLOYED AND IMPUTING PAST INCOME TO HIM."

{¶11} David asserts that the trial court improperly calculated his child support obligation after incorrectly determining the amount of his salary. This argument lacks merit.

{¶12} A trial court's decision regarding child support obligations will not be reversed absent an abuse of discretion. *Dunn v. Dunn*, Clinton App. No. CA2004-08-020, 2005-Ohio-5477. An "abuse of discretion" is 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. "Although the standard of review for a trial court's child support determination is abuse of discretion, challenges to factual determinations upon which the child support order is based are reviewed using the 'some competent credible evidence' standard. Since a determination of gross income for support purposes is a factual finding, we must review the trial court's decision to determine whether it is supported by competent credible evidence." *Glassman v. Offenbergl*, Cuyahoga App. Nos. 85838, 85863, 87175, 2006-Ohio-3837, ¶20.

{¶13} While David claims that the magistrate imputed income after finding that he was voluntarily underemployed, this assertion is not supported by the record. Instead, both the magistrate and the trial court noted that its role in determining David's income was specific to accounting for bonuses and other fringe benefits of his current job. At no time, however, did the magistrate or trial court make a finding that David was voluntarily underemployed. The magistrate and trial court noted David's job-switch only to compare salaries, and to establish the basis for determining David's income for child support obligation purposes.

{¶14} During the divorce proceedings, David challenged Michelle's claim that he continues to earn more than \$100,000 a year. Because of the dispute, and the parties' inability to reach an agreement regarding David's income, the magistrate relied on financial records and documentary evidence to calculate David's earnings. David has consistently asserted that his income should have been determined by his \$70,000 base salary rather than an amount that includes speculative bonus amounts. However, according to R.C. 3119.01(C)(7), gross income is defined as " * * * 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 * * *." Therefore, the magistrate was correct in including David's bonuses in the annual gross income determination. In order to reach an accurate estimate of David's potential bonus earnings, the magistrate relied on David's past income at Kin Underground, and specifically his 2008 tax return.

{¶15} Although David argues that the magistrate failed to recognize that a portion of his 2008 income was a result of a nonrecurring distribution from Kin Underground, the magistrate heard evidence regarding David's income and how it

compared generally to the salary he received while he worked at Kin Underground. During the hearing, Michelle testified that David's weekly salary in 2008 was \$2,140. The magistrate interrupted Michelle's testimony and calculated that once David received 52 weeks of salary, his annual income was \$111,280. The magistrate then referenced the \$119,554 salary listed on the tax return and asked Michelle the source of the \$8,274 difference. Michelle explained that the difference between the weekly salary and total amount claimed represented David's portion of a collaborative payout for "miscellaneous expenses and that kind of stuff." This testimony and the magistrate's questions and calculations demonstrate that the magistrate did not ignore the source of David's additional income.

{¶16} While David's W-2 accounted for certain reimbursements, the magistrate heard evidence that the employment compensation package he accepted with Buckeye Utilities was virtually the same as what he would have received had he stayed with Kin Underground. David's own testimony demonstrates that he considered his salary at Buckeye Utilities approximately the same as it was with Kin Underground. Furthermore, Buckeye Utilities' written offer of employment was entered into evidence, and listed a \$70,000 base salary, health and life insurance benefits, and offered "bonus opportunities" up to \$45,000. Buckeye Utilities also offered fringe benefits including a cell phone, company vehicle, and a fuel card. The magistrate heard testimony that the fringe benefits were worth approximately \$18,000 annually.

{¶17} After reviewing Kin Underground's business records and comparing David's earnings to the offer from Buckeye Utilities, the magistrate determined that David would receive a gross salary similar to that which he received in 2008. Instead

of speculating, or including a high/low estimation of the potential bonuses with Buckeye Utilities, the magistrate relied on the total income David claimed on his 2008 tax return because that amount would be a concrete way of estimating David's future earnings with Buckeye Utilities. See R.C. 3119.05(A), (instructing a trial court to calculate gross income based on "paystubs, employer statements, receipts and expense vouchers related to self-generated income, tax returns, and all supporting documentation and schedules for the tax returns").

{¶18} Because the magistrate relied on the evidence deduced at the hearing including Kin Undergrounds' business records, Michelle's testimony, David's tax return, and the written offer of employment from Buckeye Utilities, the salary calculation was based on competent credible evidence and was not an abuse of discretion. David's first assignment of error is therefore overruled.

{¶19} Assignment of Error No. 2:

{¶20} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT BY IGNORING THE NEGATIVE TAX CONSEQUENCES SUFFERED BY DEFENDANT, AS WELL AS PLAINTIFF'S FAVORABLE TAX TREATMENT."

{¶21} In his second assignment of error, David asserts that the trial court erred by ignoring certain tax credits and liabilities when it divided marital assets. There is no merit to this argument.

{¶22} According to the stipulation entered before the parties' divorce, they agreed that Michelle would receive the mortgage interest deduction from the marital home beginning in 2008, and every year thereafter until it sold. The parties also agreed that any tax "incidents" caused by the closure of Kin Underground would be shared equally between the parties. The parties then asked the magistrate to

determine how the other tax exemptions and deductions would be divided.

{¶23} David asserts that the trial court failed to consider the tax consequences he incurred as a result of filing separately, while Michelle received the benefit of claiming the children, daycare costs, and mortgage interest as deductions on her single tax filing. David also argues that the trial court should have credited him because Michelle paid \$6,800 toward her 2008 personal income taxes from Kin Underground capital. In support of his assertion, David cites this court's decision in *Foppe v. Foppe*, Warren App. Nos. CA2008-10-128, CA2009-02-022, 2009-Ohio-6926, for the proposition that a trial court abuses its discretion by failing to consider tax issues when dividing marital property and liabilities.

{¶24} In *Foppe*, we stated that "according to R.C. 3105.171(F)(6), in making a division of marital property, and in determining whether to make and the amount of any distributive award, a trial court is required to consider the tax consequences of the property division upon the respective awards. Based on the mandatory language of the statute, the General Assembly has clearly placed a requirement on the trial court to consider the tax consequences of each party's property awards." *Id.* at ¶12.

{¶25} David now claims that *Foppe* is controlling and that the trial court's decision must be overturned due to the magistrate's failure to consider certain tax liabilities. However, *Foppe* is distinguishable from the case at bar because the trial court in *Foppe* expressly refused to consider tax consequences because it felt that the tax issue was too speculative. The trial court's refusal to consider how the tax liabilities would affect the marital distribution, therefore, constituted a violation of R.C. 3105.171(F)(6). Conversely, the magistrate in this case made multiple inquiries into the tax issues during the hearing, and asked specific questions of both David and

Michelle regarding the tax implications of Kin Underground's dissolution.

{¶26} David also disregards other legal principles within *Foppe* where we reiterated that the trial court has broad discretion in marital property distribution. "After considering the tax consequences of the award on both parties, a trial court may then exercise its discretion in deciding whether or not to amend the value of the award." *Id.* at ¶12. We also stated that "rigid rules to determine value cannot be established, as equity depends on the totality of the circumstances." *Id.* at ¶8.

{¶27} Specific to David's claim that he was unfairly punished because the parties filed separately, the magistrate heard evidence that David withdrew a large sum from his retirement account for a down payment on a home, and that the withdrawal resulted in a sizable tax liability. In order to avoid having this liability affect both parties, the magistrate approved of Michelle filing separately. The magistrate also noted that David was not entitled to deduct child care expenses because no evidence was offered to prove that he paid any child care expenses.

{¶28} Regarding David's claim that the magistrate refused to credit him \$6,800, we note that "the mere fact that a property division is unequal does not, standing alone, amount to an abuse of discretion." *Poptic v. Poptic*, Butler App. Nos. CA2002-09-215, CA2002-09-218, 2003-Ohio-7211, ¶49, citing *Cherry v. Cherry* (1981), 66 Ohio St.2d 398, paragraph two of the syllabus. The magistrate considered several issues regarding the tax consequences and how the overall marital assets and liabilities would be distributed.

{¶29} The magistrate heard evidence that David sold equipment that had once belonged to Kin Underground to his new employer, and that Michelle assumed personal responsibility for outstanding debt that remained after Kin Underground's

dissolution. Evidence was also presented that Michelle made a mortgage payment from the Kin Underground escrow account when David was unable to pay it according to the court order, and that she paid the attorney fees related to the divorce out of Kin Underground funds.

{¶30} While neither party received every dollar or tax credit they requested, the magistrate considered multiple issues and ordered an equitable division of property. We therefore cannot say that the trial court's decision to divide the tax credits and liabilities as it did was arbitrary, unreasonable, or unconscionable.

{¶31} David also challenges the trial court's decision to not reserve jurisdiction over future tax issues. However, David has failed to provide any legal authority to support his claim that the trial court's decision is erroneous. See *Poptic*, 2003-Ohio-7211, ¶51 (affirming trial court's decision to not reserve jurisdiction where "appellant has not supported this contention [that the trial court erred by not reserving jurisdiction] with any citations to appropriate authorities or statutes"). After reviewing the record and finding no abuse of discretion regarding the tax issues, we see no need for the trial court to have reserved jurisdiction where Kin Underground was dissolved and the marital assets and liabilities were distributed with finality.

{¶32} Having found that the trial court did not abuse its discretion, David's second assignment of error is overruled.

{¶33} Assignment of Error No. 3

{¶34} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT BY ORDERING PRIVATE SCHOOL TUITION PAID FROM THE PROCEEDS OF MARITAL PROPERTY INSTEAD OF FUNDS SPECIFICALLY EARMARKED FOR TUITION."

{¶35} In his final assignment of error, David claims that the trial court erred in ordering the private school tuition paid from marital property instead of the funds Michelle traditionally set aside for tuition payments. This argument lacks merit.

{¶36} David argued before the magistrate that the parties could no longer afford to send their children to private school. The magistrate, however, found that based on the parties' income, they could afford the tuition and that each parent should pay half of the children's education costs.

{¶37} David filed an objection to the magistrate's decision, and the trial court sustained the objection, finding that the parties could no longer afford \$27,000 per year to send their three children to private school. Because the ruling was filed in December, and approximately half way through the academic calendar, the trial court ordered that the children be allowed to finish their school year, and that the remaining tuition fees be paid from the Kin Underground escrow account. "A trial court's division of marital debt will be affirmed in the absence of an abuse of discretion." *Miller v. Miller*, Wayne App. No. 07CA0061, 2008-Ohio-4297, ¶74.

{¶38} David now argues that because Michelle drew a salary specifically to pay the tuition, the trial court should have ordered her to continue to pay the remaining tuition from her income rather than taking it from the escrowed account. Because the court ordered the tuition paid from marital property, David argues that Michelle received a windfall by being allowed to use her income to pay debts other than tuition.

{¶39} The parties agreed to send their children to private school, and it was an undisputed fact at the hearing that Michelle initially drew income from Kin Underground to pay the tuition costs. Before the divorce, David's income from Kin

Underground was used to support Michelle and the children. After the divorce proceedings began, David had his salary deposited into a separate account, and Michelle began using her income to support herself and the parties' children. With the help of David's child support payments, Michelle used her Kin Underground income to pay the mortgage payment on the marital home every other month pursuant to a temporary order of the court. Additionally, Michelle continued to make the tuition payments as they became due.

{¶40} David asserts that because Michelle has always diverted her income to pay the tuition, she should have paid the remaining tuition for the rest of the school year. However, David's argument fails to recognize that even though Michelle's income was designated for tuition, those funds remained part of the marital property the same way David's income did, and that the tuition has always been paid from marital assets.

{¶41} Regardless of the fact that Michelle designated her income for tuition payments, she drew the funds as a result of working and they are considered her income. By asserting that Michelle has somehow received a windfall from having access to her own income, David is essentially arguing that she is solely responsible for the tuition costs. However, the record indicates that both parties agreed to send their children to a private school. See *Luedtke v. Luedtke* (May 12, 2000), Montgomery App. No. 17901 (affirming trial court's order for divorced parents to share cost of private school tuition where both parties agreed to send their children to private school). The trial court's decision to order both parents to split the costs equally from the escrow account is therefore not unreasonable, arbitrary, or unconscionable, and David's third assignment of error is overruled.

{¶42} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.