

[Cite as *Warehime v. Warehime*, 2010-Ohio-2803.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BETH A. WAREHIME	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
KENNETH R. WAREHIME	:	Case No. 10CA000004
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 08DR572

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 15, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

WILLIAM NICHOLSON
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Cambridge, OH 43725

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Farmer, J.

{¶1} On September 24, 1983, appellant, Kenneth Warehime, and appellee, Beth Warehime, were married. On October 20, 2008, appellee filed a complaint for divorce.

{¶2} A hearing before a magistrate was held on November 9, 2009. By decision filed November 12, 2009, the magistrate found an agreement entered into by the parties on June 11, 2009 was fair and equitable, and the only remaining issues were spousal support and attorney fees. The magistrate recommended that appellant pay appellee spousal support in the amount of \$1,200 per month for eight years, and continued the issue of attorney fees.

{¶3} Appellant filed objections to the magistrate's decision as to the award of spousal support. By entry filed December 30, 2009, the trial court denied the objection and adopted the magistrate's decision.

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

I

{¶5} "THE TRIAL COURT ERRED WHEN IT DID NOT MAKE A FINAL EQUITABLE DIVISION OF PROPERTY BEFORE AWARDING SPOUSAL SUPPORT."

II

{¶6} "THE COURT ERRED BY PERMITTING APPELLEE TO CLAIM CHILD AS TAX DEPENDENT EACH YEAR WITHOUT FIRST DETERMINING THE BEST INTERESTS OF THE CHILD."

I

{¶7} Appellant claims the trial court erred in awarding spousal support without first making an independent finding on the equitable distribution of the marital property. We disagree.

{¶8} The trial court is provided with broad discretion in deciding what is equitable upon the facts and circumstances of each case. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348. 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. In order to find an abuse of that 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.

{¶9} Appellant argues our standard of review should be de novo on the equitable distribution of the property vis-à-vis the decision to award spousal support. It is correct that our review as to the statutory mandates is an issue of law. However, in the matter sub judice, the trial court accepted the parties' agreed distribution and therefore affirmed the parties' own decisions.

{¶10} On June 11, 2009, the parties signed an agreement on the distribution of the marital property. November 9, 2009 T. at 8, 19, 22. Appellant now argues if he had known spousal support was going to be awarded, he would not have agreed to the property division.

{¶11} At the final hearing, appellant was unrepresented and was basically unprepared to discuss his employer's profit sharing plan, and he presented no evidence

as to his present income or the length of a possible lay-off. T. at 19-21. Appellant admitted his income plus profit sharing was approximately \$50,000. T. at 21-22. Appellee waived any right to any of appellant's potential retirement income in the June agreement. T. at 22.

{¶12} Within this framework, the trial court affirmed the parties' agreement as to the division of the marital property and ordered spousal support.

{¶13} Within the magistrate's November 12, 2009 decision, that was adopted by the trial court after reviewing appellant's objection, is a finding that the agreement was fair and equitable:

{¶14} "4. Parties entered into an agreement on June 11, 2009, which divided all assets and liabilities of the parties and resolved all issues of the minor child.

{¶15} "5. The Magistrate finds the agreement to be fair and equitable and in the best interest of the minor child."

{¶16} R.C. 3105.18 governs awards of spousal support and modification and states as follows:

{¶17} "(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:

{¶18} "(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 [3105.17.1] of the Revised Code;

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

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

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

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

{¶23} "(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;

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

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

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

{¶27} "(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;

{¶28} "(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;

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

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

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

{¶32} The findings of fact on the issue of spousal support were extensive and supported by the evidence. See, Findings of Fact Nos. 7-9. The marriage was of 26 years, appellee had waived her right to appellant's retirement benefits, neither party had any outstanding debt, appellee was a stay-at-home spouse and her efforts at employment had been futile, and appellee waived any interest in appellant's profit sharing which totaled \$12,000 for 2007 and \$10,000 for 2008. The conclusion was that appellant would not be harmed by an award of spousal support.

{¶33} We find these findings and conclusions are substantiated by the evidence. The spousal support award payment of \$1,200 per month can easily be covered by one-half of appellant's profit sharing amount.

{¶34} Upon review, we find the trial court did not abuse its discretion in ordering appellant to pay spousal support to appellee.

{¶35} Assignment of Error I is denied.

II

{¶36} Appellant claims the trial court erred in awarding appellee the child tax exemption without first determining if it was in the best interests of the child. We disagree.

{¶37} Civ.R. 53 governs magistrates. Subsection (D)(3)(b)(iv) states the following:

{¶38} "*(iv) Waiver of right to assign adoption by court as error on appeal. 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)."

{¶39} Appellant's objections to the magistrate's decision filed November 20, 2009 and response filed December 16, 2009 do not include the claimed error. Further, appellant agreed to the tax exemption to appellee in the parties' June agreement:

{¶40} "10. Beth A. Warehime shall claim the minor child herein as tax dependent each year beginning with the tax year 2009."

{¶41} Assignment of Error II is denied.

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

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ John W. Wise

JUDGES

SGF/sg 603

