

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ANTHONY PASCO

Plaintiff-Appellant

-VS-

MICHELE PASCO

Defendant-Appellee

: JUDGES:

:

:

:

:

:

:

:

:

:

:

:

:

:

Hon. W. Scott Gwin, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 2018 CAF 06 0047

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court
of Common Pleas, Domestic Relations
Division, Case No. 13 DRA 10 0494

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

March 25, 2019

APPEARANCES:

For Plaintiff-Appellant:

SAMUEL H. SHAMANSKY
DONALD L. REGENSBURGER
COLIN E. PETERS
523 South Third Street
Columbus, OH 43215

For Defendant-Appellee:

ANTHONY M. HEALD
125 N. Sandusky St.
Delaware, OH 43015

Delaney, J.

{¶1} Plaintiff-Appellant Anthony Pasco appeals the May 31, 2018 judgment entry of the Delaware County Court of Common Pleas, Domestic Relations Division.

FACTS AND PROCEDURAL HISTORY

{¶2} This case originated with Plaintiff-Appellant Anthony Pasco (“Husband”) filing a complaint for divorce against Defendant-Appellee Michele Pasco (“Wife”) on October 21, 2013 in the Delaware County Court of Common Pleas, Domestic Relations Division. Husband and Wife had two children as issue of the marriage: K.P. (DOB Feb. 22, 2008) and M.P. (DOB Aug. 22, 2009). At the time of Husband’s filing, Wife and children were residing in Illinois. Wife had filed a complaint for divorce in Illinois before Husband filed his complaint, but her action was terminated and the divorce proceeded in Ohio.

{¶3} On May 6, 2014, Husband filed a motion for R.C. 3105.171(A)(2) determination requesting the trial court find the end of the marriage was December 31, 2013.

{¶4} Husband filed a motion for appointment of Guardian Ad Litem. The trial court appointed the GAL on December 15, 2014.

{¶5} On January 20, 2015, Husband filed a proposed shared parenting plan and then a motion for shared parenting. Husband filed an amended proposed shared parenting plan on January 4, 2016.

{¶6} The matter was scheduled for trial, but the parties agreed to convert the February 25, 2015 trial to a status conference.

{¶7} The parties attended mediation in June 2015, which was unsuccessful. The matter was scheduled for trial on February 2, 2016.

{¶8} The GAL filed her report and recommendation on January 26, 2016. The GAL recommended that Husband be named the sole residential parent or the trial court grant Husband's shared parenting plan that allocated equal parenting time conditioned upon Wife relocating to Ohio. The GAL did not consider Husband moving to Illinois.

{¶9} The matter came on for trial before the magistrate on February 2, 2016 and March 15, 2016.

{¶10} On February 23, 2017, Husband filed a motion to reopen the case for further hearing. A hearing was held before the magistrate on May 18, 2017.

{¶11} The following evidence, relevant to Husband's appeal, was adduced at the hearing.

{¶12} Husband is from Ohio and Wife grew up in the Chicago, Illinois area. Wife's parents and siblings all resided in Chicago. Husband and Wife met in Chicago and they moved to Dallas, Texas before their marriage for Husband's employment. Husband and Wife were married in Texas on October 28, 2006. Wife was employed as a hair colorist in Chicago and then Dallas, earning approximately \$80,000. The parties lived in Dallas for three months until they moved to Columbus, Ohio for Husband's employment in 2007. The children were born shortly thereafter and Wife worked as a stay-at-home mother from 2008 to 2013.

{¶13} From 2006 to 2013, Husband was employed at Modern Medical, a family-owned business. In 2013, Husband was earning approximately \$190,000 as Senior Vice President of Sales. In 2013, however, the company was sold and the new ownership

bought out Husband's employment contract. Husband received a severance package in the amount of \$400,000. Husband used some of the funds to pay marital debt.

{¶14} In 2012, Husband began a romantic relationship with a coworker, K.F. It was at that time Husband and K.F. discussed ending his marriage with Wife. Wife learned of Husband's affair and Wife believed they could work things out. Husband and Wife discussed Husband ending the affair, but in June 2013, the parties separated. Husband encouraged Wife to move to Illinois with the children and Wife agreed. At the time, K.P. was ready to start kindergarten. Husband approved of Wife enrolling K.P. in school in Illinois.

{¶15} Wife and the children moved in with her parents when they left Ohio. In 2016, Wife purchased a home in Illinois within the children's school district. Wife's extended family was very involved with the children. K.P. and M.P. both attended a highly rated elementary school in Illinois. The children did well in school, socially and academically. The children were involved in extracurricular activities such as Scouts, dance, gymnastics, wrestling, and church camp. Husband approved of the children's activities. Wife communicated with Husband regarding the children's school and activities through email. Husband originally blocked Wife's cell phone because he stated she was badgering him. While the children had been enrolled in school since 2013, Husband enrolled in the school's online parent portal in December 2015.

{¶16} Husband owned a home in Alliance, Ohio, but Husband moved into K.F.'s home located in Delaware County that she shared with her three children. K.F.'s home was located in the Olentangy School District. Husband paid K.F. approximately \$1000 per month towards the mortgage and utilities. Husband's name was not on the mortgage

or title to the home. Husband was remodeling K.F.'s home to provide additional bedrooms for K.P. and M.P. Wife asked Husband to delay introducing the children to K.F. Husband told Wife that what happened during his time with the children was his determination. The children appeared to get along with K.F. and her children.

{¶17} Husband visited with the children approximately one weekend per month. Husband came to Illinois to stay, or he picked up the children and brought them to Ohio. Wife then came to Ohio and brought the children back to Illinois.

{¶18} After Husband's termination from Modern Medical, Husband found employment with a business named ProCare. He was employed with ProCare at the time of the trial in February 2016. He earned a base salary of \$85,000 and a commission of \$3,000 per quarter guaranteed for the first two quarters. The commission was based on a percentage of the gross sales. Husband was able to work out of his home, but the job required 50% travel within the Midwest.

{¶19} Husband's employment changed in June 2016. He found employment with a new company called Spreemo, Inc. as the Director of Corporate Sales. Husband testified his income base was \$110,000 per year, with a guaranteed bonus of \$24,000 for the first year. Husband did not produce any supporting evidence to demonstrate the bonus was not part of his recurring income.

{¶20} At the time of trial in 2016, Wife was employed with a company called Tu Bella that made wigs and hairpieces. Her 2015 W-2 indicated an income of \$21,044. In June 2016, Wife had left her employment with Tu Bella and started her own business called, "Alopecia Hair Solutions." Her 2016 tax return indicated an income of \$23,000.

{¶21} The magistrate issued a decision on January 9, 2018. The magistrate granted Husband a divorce on grounds of incompatibility. Wife was named the sole legal custodian and residential parent of the children. The duration of the marriage was determined to be from October 28, 2006 to February 2, 2016. Husband was ordered to pay spousal support and child support.

{¶22} Husband filed objections and supplemental objections to the magistrate's decision. Wife also filed objections. The trial court overruled the objections of Husband and Wife on May 31, 2018. The decree of the divorce was journalized on May 31, 2018. It is from this judgment Husband now appeals.

ASSIGNMENTS OF ERROR

{¶23} Husband raises three Assignments of Error:

{¶24} "I. THE MAGISTRATE'S DELAY IN HEARING AND DECIDING THIS MATTER MATERIALLY PREJUDICED APPELLANT AND DEPRIVED HIM OF DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶25} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOCATING PARENTAL RIGHTS AND RESPONSIBILITIES.

{¶26} "III. THE TRIAL COURT ABUSED ITS DISCRETION IN ITS DETERMINATION OF APPELLANT'S INCOME RELATIVE TO SUPPORT PAYMENTS."

ANALYSIS

I. Delay of Magistrate's Decision

{¶27} Husband contends in his first Assignment of Error that the magistrate denied him due process because of the delay in the issuance of the Magistrate's Decision.

Specifically, Husband argues the magistrate's delay resulted in the children becoming more settled in Illinois than Ohio. Further, the delay resulted in a potential risk to Husband's interest in his Social Security benefits. The trial court overruled Husband's objections to the magistrate's decision as to these issues and we agree with the trial court's determinations.

{¶28} The procedural history of the underlying case shows multiple delays of trial due to the filings of parties. Wife filed a complaint for divorce in Illinois but Husband filed his complaint for divorce in Ohio on October 21, 2013 and service on his case was perfected first. The Illinois case was dismissed and the matter proceeded in the Ohio. On March 13, 2014, Husband filed a supplement affidavit stated he had no objection to Wife continuing to be the primary caretaker of the children and designated as the temporary residential parent/legal custodian. Temporary orders were issued on March 27, 2014 naming Wife as temporary residential parent and legal custodian.

{¶29} A pretrial was set for May 21, 2014. At the pretrial, the matter was set for trial on November 12, 2014. Husband filed a motion for the appointment of a GAL. The November 12, 2014 trial was converted to a pretrial and the GAL was appointed via judgment entry on December 15, 2014. Husband filed a motion for shared parenting on January 22, 2015. The matter was set for trial on February 25, 2015. The February 25, 2015 trial was converted to a status conference. The matter was referred to mediation. Mediation was terminated on September 21, 2015 and again the matter was set for trial on February 2, 2016. The trial was finally held on February 2, 2016 and completed on March 24, 2016. The 59-page magistrate's decision was filed on January 9, 2018.

{¶30} It is Husband's contention that his children became settled in Illinois only due to the magistrate's delay in issuing his decision. The trial court found, however, the record clearly showed Husband encouraged Wife and children to move to Illinois in June 2013. The trial court found Husband lacked credibility when he argued that he thought Wife's move to Illinois was only temporary. The trial court pointed to the record where Husband's testified belief did not correspond with his actions at the time of the separation. In June 2013, the oldest child was ready to be enrolled in kindergarten. Husband had no objection to the child being enrolled in school in Illinois. Husband testified he agreed to the enrollment because the relationship with Wife was too volatile, but he wanted to work things out with Wife. The trial court stated:

However, Husband provided testimony that contradicted these claims. Husband became seriously involved with his current girlfriend, [K.F.], at the end of 2012. Husband admits that he and [K.F.] discussed how he could get rid of Wife so that he and [K.F.] could be together. He avowed that he and Wife did not have any serious attempts to reconcile ever since the separation. After Wife found out about the affair, but before the parties separated, Husband lied to Wife about no longer being involved with [K.F.]. Husband also testified that he and [K.F.] were not together during the early part of the separation, but then admitted to refusing activities with the parties' children because it conflicted with something he and [K.F.] were doing.

(Judgment Entry Objections to Magistrate's Decision and Decree of Divorce, May 31, 2018). Further in March 2014, Husband did not object to Wife being designated the temporary residential parent and legal custodian.

{¶31} Any delay by the magistrate in issuing his decision did not cause the children to become settled in Illinois. There is competent and credible evidence in the record to support the trial court's finding that the children became settled in Illinois because Husband agreed that Wife and children should move to Illinois in June 2013. The procedural history of the case shows the parties themselves delayed the matter from proceeding to trial until 2016.

{¶32} Husband next argues the magistrate's delay in issuing his decision resulted in Husband potentially suffering a risk to his Social Security benefits. When the complaint for divorce was filed, the parties had been married for approximately seven years. The magistrate determined the duration of the marriage was October 28, 2006 to February 2, 2016. The magistrate made a reference to Social Security benefits when discussing the issue of spousal support under R.C. 3105.18(C):

The parties have been married for less than 10 years as of the time of trial.

* * * The duration of the marriage – now over the 10 year mark allows the Defendant to access – as in the current state of law – the Plaintiff's social security benefits giving her a likely greater social security benefits if the case was completed prior to 2017.

(Magistrate's Decision, January 9, 2018).

{¶33} Husband argues that pursuant to 42 U.S.C. § 492, *et seq.*, 416(d), an individual is entitled to receive benefits on their former spouse's record if, *inter alia*, the

marriage lasted for at least ten years. Because of the magistrate's delay, Husband argued his Social Security benefits were at risk.

{¶34} The trial court rejected Husband's objection based on the speculative nature of the argument that a decision could have been issued before the parties were married for ten years. On February 2, 2016, the first day of the trial, the duration of the marriage was nine years, three months, and nineteen days. The last day of trial was March 15, 2016. Per Husband's argument, there were seven months and thirteen days in which to issue a magistrate's decision, obtain a trial transcript, file objections to the magistrate's decision, rule on said objections from Husband and/or Wife pursuant to Civ.R. 53, and issue a decree of divorce on or before October 28, 2016 to protect Husband's alleged Social Security benefits. We agree with the trial court's determination that Husband's argument that the magistrate's delay jeopardized his Social Security benefits was pure speculation.

{¶35} Husband's first Assignment of Error is overruled.

II. Allocation of Parental Rights and Responsibilities

{¶36} Husband argues in his second Assignment of Error the trial court erred when it allocated parental rights and responsibilities to Wife and gave Husband parenting time one weekend per month. We disagree the trial court erred.

{¶37} Our standard of review in assessing the disposition of child custody matters is that of abuse of discretion. *DiDonato v. DiDonato*, 5th Dist. Tuscarawas No. 2015 AP 07 0042, 2016-Ohio-1511, 63 N.E.3d 660, ¶ 44, citing *Miller v. Miller*, 37 Ohio St.3d 71, 523 N.E.2d 846 (1988). Furthermore, as an appellate court reviewing evidence in custody matters, we do not function as fact finders; we neither weigh the evidence nor judge the

credibility of the witnesses. Our role is to determine whether there is relevant, competent, and credible evidence upon which the fact finder could base his or her judgment. *Id.*, citing *Dinger v. Dinger*, 5th Dist. Stark No. 2001 CA 00039, 2001-Ohio-1386, 2001 WL 1141268.

{¶38} The trial court is “best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). Deferential review in a child custody determination is especially crucial “where there may be much evidence by the parties' demeanor and attitude that does not translate to the record well.” *Davis v. Flickinger*, 77 Ohio St.3d 415, 674 N.E.2d 1159 (1997). We are mindful that the knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record, and the reviewing court should be guided by the presumption that the trial court's findings were correct. See, *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988).

{¶39} R.C. 3109.04(F)(1) sets forth the following factors for the court to consider when determining the best interests of a child in allocating parental rights:

- (a) The wishes of the child's parents regarding the child's care;
- (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;

- (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;
- (d) The child's adjustment to the child's home, school, and community;
- (e) The mental and physical health of all persons involved in the situation;
- (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;
- (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;
- (h) Whether 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; * * *;
- (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;
- (j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶40} The magistrate's decision and trial court's judgment entry overruling Husband's objections reflect a thorough consideration of the evidence to find it was in the best interests of the children for Wife be named the legal custodian and residential parent of the children. The trial court first found Husband's credibility at issue upon its review of the circumstances under which Wife and the children moved to Illinois. We reviewed the

trial court's analysis of Husband's credibility in the first Assignment of Error and defer to the trial court's conclusion as to credibility.

{¶41} Next, Husband argues the magistrate and trial court should have afforded greater weight to the GAL's report and recommendation. The GAL recommended that Wife should move back to Ohio with the children, or Husband should be named the sole legal custodian and residential parent (knowing that Wife would move to Ohio to be with the children). The magistrate rejected the GAL's recommendation because it was not in accordance with the best interest factors or supported by the evidence. The trial court is not required to follow a GAL's recommendation; it has discretion to follow or reject it. See *Clyburn v. Gregg*, 4th Dist. Ross No. 11CA3211, 2011–Ohio–5239, ¶ 47; *Hammons v. Hammons*, 5th Dist. Delaware No. 13 CAF 07 0053, 2014–Ohio–221, ¶ 12. We find no abuse of discretion to reject the GAL's recommendation in this case. The GAL did not observe children with Husband, visit K.F.'s home where the children would be residing, or speak directly with the children's school officials. The GAL made no consideration of the option for Husband to move to Illinois, even though Husband recommended Wife and the children move to Illinois. The evidence showed Husband was not close to his extended family and his only connection to Columbus, Ohio was K.F. Further, since the beginning of the divorce proceedings, Husband changed his employment three times, but never explored employment options in Illinois.

{¶42} Finally, the magistrate and trial court likewise rejected Husband's motion for shared parenting after consideration of the factors in R.C. 3109.04(F)(1) and 3119.23. The trial court found shared parenting, under the totality of the circumstances, was not in the children's best interest. Husband and Wife lived in separate states. Husband and Wife

did not effectively communicate, with Husband at one time blocking Wife's cell phone number.

{¶43} Wife has been the primary caregiver for the children since their birth. Since 2013, the children have resided in Illinois with Wife and received support from Wife's extended family. The children were doing well in school and were involved in extracurricular activities. Wife purchased a home in Illinois, while Husband did not own any property in Columbus, Ohio. The trial court presented a thoughtful and considered analysis to find it was in the best interests of the children to remain in Illinois. We find the trial court's determination was supported by the competent and credible evidence and was not an abuse of discretion.

{¶44} Husband's second Assignment of Error is overruled.

III. Husband's Income

{¶45} Husband contends in his third Assignment of Error that the trial court erred in determining his income for support purposes.

{¶46} Support decisions are reviewed for abuse of discretion. *Booth v. Booth*, 44 Ohio St.3d 142, 144, 541 N.E.2d 1028 (1989). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶47} The magistrate found Husband's income, for child support and spousal support purposes, was \$134,000. The magistrate reviewed Husband's employment history. At the final trial, Husband was working for a company named, Spreemo, Inc. as the Director of Corporate Sales. The magistrate found Husband's base salary was \$110,000 and Husband received a bonus of \$24,000. The magistrate found Husband did

not provide evidentiary support that the \$24,000 was a one-time bonus and included it in Husband's annual income.

{¶48} The trial court reviewed the record and found Husband testified he earned a base salary of \$110,000. Husband did not produce a copy of his offer letter or letter of employment at trial. He further testified he was to receive a \$24,000 guaranteed bonus for the first-year of employment, but it was not guaranteed going forward because the company was new and figuring out its commission/bonus system.

{¶49} Husband states that pursuant to R.C. 3119.01(C)(8), nonrecurring or unsustainable income or cash flow items are not considered income for the purposes of child support. Nonrecurring income is income the parent receives in any year or for any numbers of years not to exceed three years that the parent does not expect to continue to receive on a regular basis. See R.C. 3119.01(C)(8). Accordingly, Husband argues the magistrate should not have considered the \$24,000 bonus as recurring income.

{¶50} In support of his argument, Husband attempted to submit employment and income related documents with his supplemental objections to the magistrate's decision, but the trial court would not consider the evidence pursuant to Civ.R. 53(D)(4)(d). As such, the only evidence before the trial court was Husband's testimony as to whether the \$24,000 bonus would be recurring. Husband testified the bonus was not recurring. The magistrate considered Husband's credibility and found, without supporting documentation, Husband's testimony as to his income was not credible.

{¶51} Husband refers this Court to *Walker v. Walker*, 5th Dist. Delaware No. 02CAF04019, 2002-Ohio-5293, where we found that a signing bonus and guaranteed incentive payments were nonrecurring funds that should not have been included in the

appellant's income. In *Walker*, the appellant provided evidentiary support in the form of letters from his employer detailing the appellant's signing bonus and guaranteed incentive payments to support his testimony as to his bonuses. *Id.* at ¶ 25. In the present case, Husband testified as to his income and bonus structure, but provided no further evidentiary support. The trial court is "best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). The trial court found the magistrate was in the best position to weigh the credibility of the witnesses and the magistrate found Husband was not credible without supporting documentation. The trial court found no error for the magistrate to set Husband's income at \$134,000. We find no abuse of discretion.

{¶52} Husband's third Assignment of Error is overruled.

CONCLUSION

{¶53} The judgment of the Delaware County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Delaney, J.,

Gwin, P.J. and

Baldwin, J., concur.