

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Joseph W. Wild, IV

Court of Appeals No. E-16-070

Appellee

Trial Court No. 2014-DR-068

v.

Tiffany M. Wild

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2017

* * * * *

Thomas R. Sprunk, for appellee.

Loretta Riddle, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Tiffany Wild (“mother”), appeals the judgment of the Erie County Court of Common Pleas, Domestic Relations Division, granting the parties a divorce, and naming appellee, Joseph Wild, IV (“father”), the residential parent and legal custodian of the parties’ two minor children. For the reasons that follow, we affirm.

I. Facts and Procedural Background

{¶ 2} Mother and father were married on May 26, 2007. They have two children together. By August 2010, the parties had separated, and in April 2014, the parties filed a claim and counterclaim for divorce. During the course of the proceedings, the parties stipulated to the division of property and marital assets, leaving only the issue of custody of the children.

{¶ 3} On February 17, 2015, a hearing was held before the magistrate for purposes of determining custody. The guardian ad litem testified first, and her report was entered into evidence by stipulation. The guardian ad litem testified that the children had been residing with mother and had visitations with father prior to the divorce proceedings. However, the guardian ad litem testified that mother had halted visitations in 2012 for a few months, and then again from August 2013 until June 2014. The visitations were resumed when temporary orders were entered in the divorce proceedings. The guardian ad litem testified that she was informed by mother that visitation was halted because of a report that mother made to children's services that the children were exhibiting certain sexual behaviors upon returning from father's house. Children's services conducted an investigation and ultimately determined that the report was unfounded. While the visits were halted, father attempted to have lunch with the children at their school. However, mother notified the school that there was a civil protection order in place—naming only mother, not the children—and the school, out of an abundance of caution, opted to disallow father from visiting his children during lunchtime.

{¶ 4} As to mother's home, the guardian ad litem testified that the house was small, and was being occupied by mother's mother, stepfather, and two teenage sisters, mother, the two children at issue, and mother's newborn child. The guardian ad litem stated that on her first visit to the house, the two children had bunk beds in a back bedroom, but throughout the course of the proceedings, the guardian ad litem learned that those beds had been removed and that for a period of time the children were sleeping on the couch or on the floor. That issue was quickly remedied.

{¶ 5} The guardian ad litem also testified that during the 2013-2014 school year, the children were excessively absent, missing 15 and 17 days of school respectively, which prompted involvement from a truancy officer to make sure that the children were not missing any additional days.

{¶ 6} Next, the guardian ad litem testified to other men that were involved in mother's life. The guardian ad litem testified that R.W. was the father of mother's newborn child. She was under the impression that mother and R.W. were not still a couple, but that they were working together regarding parenting time for the baby. While mother and R.W. were a couple, R.W. would sometimes assist with transporting the children to visitations. The guardian ad litem testified that R.W. had an extensive criminal background involving fights and substance abuse. The guardian ad litem testified that mother had also had a relationship with L.T. During their relationship, L.T. would sometimes babysit the children. The guardian ad litem testified that children's services became involved with L.T. based on a situation where L.T. showered with the

two children. Children's services concluded that there was not any abuse going on, but that L.T. exhibited poor judgment in trying to get the two children ready for bed quickly by getting into the shower with them. L.T. entered the shower with his underwear on, and did not touch the children.

{¶ 7} As to father, the guardian ad litem testified that father was living some of the time with his girlfriend, M.D., and M.D.'s two children. Father and M.D. also have a newborn child together. The guardian ad litem testified that all of the children get along well and that M.D. seems to legitimately have the children's best interests in mind. On examination from the court, the guardian ad litem clarified that father lived part of the time with M.D., and the other part of the time he lived with his parents. He would typically stay with his parents on school nights when he had the children.

{¶ 8} Finally, the guardian ad litem testified on direct examination that she believed that father would cooperate with visitation if he had custody, and that she was concerned that mother would continue to disrupt visitations if she maintained custody. In conclusion, the guardian ad litem recommended that father be named the residential parent and legal custodian, with mother to have visitation as agreed upon or under the schedule provided by the standard guidelines. On cross-examination, the guardian ad litem testified that she hoped at some point the parties would be able to do shared parenting, but that there is not a lot of trust between the parties and progress towards that goal has been very slow.

{¶ 9} Father next called Officer Cameron Greenawalt of the Sandusky Police Department. Greenawalt testified that on April 5, 2014, he stopped a vehicle in which mother was a passenger. Mother consented to him performing a search of her person, during which he found marijuana in mother's coat pocket. Mother told him that she had forgotten that the marijuana was in her pocket. Mother was six months pregnant at the time.

{¶ 10} Tara Ohlemacher testified next for father. Ohlemacher is the executive director of Kinship where the parties have been exchanging the children for visitations. Ohlemacher testified that the children do not have any issues during the exchanges and that they are excited to see both parents. In describing her interaction with each parent, Ohlemacher testified that father was always very cooperative and kind, even when he was upset that he was not going to be able to see his children. In contrast, Ohlemacher testified that mother would become argumentative and demanding at times. Ohlemacher also testified that beginning in October 2014, she instituted a bag check because something was found in one of the children's bags. On examination from the court, Ohlemacher clarified that father alleged that he found marijuana in one of the bags that had come from mother's house.

{¶ 11} Finally, father testified on his own behalf. Father described that after the parties separated, he would see his children regularly, with each party watching the children while the other was at work. However, in April 2011, mother filed for a protection order, alleging that father threatened her friends, and threatened violence and

suicide. The protection order included the children and was in effect for three years, through April 7, 2014. On June 7, 2011, the parties agreed that the protection order would be amended to allow father to have visitation with his children. Father testified that fairly consistently throughout the process his visitation times would be changed, or cancelled without notice, and he would be denied any make-up time. Then, in August 2013, father was informed that mother would no longer be bringing the children for visitation. This lasted until temporary orders from the court were entered in the divorce proceedings in June 2014. Father testified that during this time, he attempted to have lunch with his children at their school. He was able to have lunch with them once a week for one month before mother contacted the school and told the school about the protection order. Father was then prohibited from having lunch with his children until after the protection order expired in April 2014.

{¶ 12} Regarding the protection order, father testified that he never violated its terms. However, he testified that mother attempted to get him to violate the protection order by calling him repeatedly at work, harassing his employees, and by having her friends and family attempt to contact him through Facebook. Father testified that mother was charged with telecommunications harassment as a result of her actions. Upon the expiration of the protection order, mother sought to extend the order on the grounds that father had violated its terms. The magistrate denied mother's motion, finding it to be disingenuous and untrue.

{¶ 13} Father then testified that he is willing to abide by court orders. He also believes that mother would comply with court orders at first, but only while someone was monitoring her; after that, she would no longer comply.

{¶ 14} On examination from the court, father testified that mother abused prescription pain medicine and marijuana while they were still living together. After mother moved out, father testified that one time he went to her apartment and observed drug paraphernalia on a plate under her couch. Father testified that mother's drug history heightened his concern when he found the marijuana in the bag of clothes that came from her house.

{¶ 15} The last witness to testify was mother. Mother explained or clarified many of the issues raised through the earlier testimony. As to the children missing days during the 2013-2014 school year, mother testified that on many of those days the children attended, but were tardy because one of the children was not feeling well. She testified that the school's policy was that if the child was not at school by 8:30 a.m., he or she was marked absent. As to her relationships with R.W. and L.T., mother testified that the children have limited interaction with R.W. only when mother drops off R.W.'s child, and have no interaction with L.T. whom mother does not see anymore. As to the incident of marijuana possession described by Officer Greenawalt, mother testified that of course she was not smoking while she was pregnant. Regarding the need for bag checks through Kinship, mother testified that the marijuana was not hers, and she agreed that the bag checks were a good idea to protect both sides from retaliation. Lastly, mother testified

that she used to infrequently use marijuana with father while they were living together. Father testified on rebuttal that he has not smoked marijuana with mother since approximately 2004.

{¶ 16} Mother also testified regarding the times that visitation was cancelled. She testified that in the summer of 2012, the children returned from father's house, and were excessively masturbating and acting out. When mother asked the children what was going on, they explained that some issues had happened at father's house. Mother then contacted children's services, who advised her to not allow the children to see father during the investigation. When the investigation was concluded and nothing was found, mother resumed the children's visitations with father. Then, the following summer, the children returned from father's house exhibiting the same behaviors from the year before. Mother testified that she took the children to a doctor, who determined that there was some scarring present, but could not determine from where it had come. Another investigation was initiated, and mother was again advised not to let father see the children until the investigation was concluded. In October 2013, mother was informed that nothing was found, and the case was closed.

{¶ 17} Mother also testified that the children have been going to counseling. The older child's counseling has been completed, but the younger child's counseling is ongoing. Mother testified that recently she and father jointly attended a counseling session, and that the parties have begun to communicate via email about the children.

Mother further testified that she believes that it would now be possible for one parent to take the children to an activity and allow the other parent to attend.

{¶ 18} Mother next described the places that she has lived since she and father separated. For the first year, she had her own apartment. Then she moved in with her mother for a month or two, then lived with L.T. for two years. After that, she rented her own house for a little while, and then moved back in with her mother and stepfather in January 2014.

{¶ 19} Mother testified that she is not currently working, but plans to obtain employment soon now that her newest child is six months old. Mother stated that she wants to find a job that would allow her to have as much time at home with the children as possible. When she does have to work, mother testified that her mother, stepfather, and two sisters would primarily be the ones caring for the children.

{¶ 20} Finally, mother testified that the children enjoy their school, and mother wants to maintain that consistency for them. Mother also testified that she believes she should remain the residential parent and legal custodian because she has always had the children, and the children are doing well. Mother is optimistic that her relationship with father will continue to improve to where they have a liberal visitation policy, but until then she believes the standard visitation order works well.

{¶ 21} Following the presentation of evidence, the magistrate took the matter under advisement. Subsequently, on July 16, 2015, father moved to modify the temporary orders of custody. Father stated that it would be in the children's best interest

for him to be awarded custody prior to the start of the 2015-2016 school year, where they would attend Huron City Schools. Mother opposed this motion.

{¶ 22} Then, on September 4, 2015, the guardian ad litem also filed a motion to modify the temporary orders of custody. In her motion, the guardian ad litem stated that mother was involved in three separate domestic violence incidents with R.W. on February 1, March 9, and July 27, 2015. The July 27, 2015 incidence of domestic violence resulted in charges being filed against R.W., and a civil protection order being issued for mother. In addition, the July 27, 2015 incident led to an investigation of neglect of the children by Erie County Department of Job and Family Services. The guardian ad litem's motion also detailed that on September 2, 2015, the Erie County Sheriff's Department responded to mother's residence for a welfare check when the children returned home from school and could not get into the house for two hours. The children were knocking on the door, and could hear mother's infant son inside the house, but no one answered. The sheriff's deputy forcefully knocked on the door, and mother, who was sleeping, came to the door. Mother was charged with child endangering, and the case was pending at the time of the guardian ad litem's motion. Finally, the guardian ad litem stated that R.W. continues to frequent mother's residence, and the children have reported being instructed not to talk to children's services because if they did, they would no longer be able to see their little brother.

{¶ 23} The magistrate took no action on father's or the guardian ad litem's motions to modify the temporary orders of custody. Instead, he issued his decision on

custody in the divorce case on February 12, 2016. In his detailed and thorough decision, the magistrate summarized:

Overall, [mother] has demonstrated a significant degree of instability regarding her housing situation (five (5) different moves in the last six year period), made poor choices by exposing the two (2) minor children to adult males with questionable morals and integrity who also engaged in lewd and criminal behavior (specifically two (2) past boyfriends in the last six year period, [L.T.] and [R.W.]), has had questionable involvement with illegal drugs over the last five (5) years, and lastly has engaged in behaviors deliberately designed to circumvent the valid Orders issued by this Court with respect to allocating parenting time/visitation to [father]. Conversely, [father] has maintained stable, suitable housing for the children for a lengthy period of time, has not exposed the children to unrelated adult males/females with questionable morals and integrity, has maintained regular and consistent employment, and lastly has worked to find solutions to the problems associated with parenting time/visitation instead of acting in a defiant obstructionist manner like [mother].

The magistrate then applied his findings to the factors under R.C. 3109.04(F)(1)(a)-(j) to determine the best interests of the children. The magistrate concluded that it was in the best interests of the children for father to be designated the residential parent and legal custodian. On February 18, 2016, based on the magistrate's decision and the guardian ad

litem's motion to modify the temporary orders of custody, the trial court entered an interim order designating father as the residential parent and legal custodian of the children, effective February 16, 2016.

{¶ 24} On April 8, 2016, mother objected to the magistrate's decision. In her objection, mother argued that the magistrate's decision is without merit and based on stale evidence because it was not entered until one year after the hearing was held. In addition, mother objected to several findings of fact made by the magistrate, including that she kept the children from visiting father as a tool to exert her control, and that she downplayed the issues surrounding her involvement with L.T. and R.W.

{¶ 25} While mother's objection was pending, on May 9, 2016, the guardian ad litem moved to temporarily suspend mother's overnight visitation with the children. The guardian ad litem alleged that mother had been evicted, and had since been living with a friend. The guardian ad litem stated that beds, adequate clothing, and hygiene care were not available for the children. She further stated that she attempted to walk through the residence five times, but had been unable to gain entry to ensure that the residence is appropriate for the children. Mother opposed the guardian ad litem's motion, asserting that the allegations were baseless and untrue. In addition, mother moved to remove the guardian ad litem, arguing that guardian ad litem took it upon herself to suspend mother's overnight visitation on May 6-8, and May 20-22, 2016. Furthermore, mother asserted in an affidavit that the guardian ad litem has a relationship with father's girlfriend, M.D., and that M.D.'s children and the guardian ad litem's children are in sports or band

together. On May 31, 2016, the trial court granted the guardian ad litem's motion to temporarily suspend overnight visitations, and denied mother's motion to have the guardian ad litem removed. The court ordered that mother's parenting time be limited to "day visits" only until mother has appropriate housing, necessities, and other related living conditions for the children.

{¶ 26} Thereafter, on September 15, 2016, the trial court overruled mother's objections and affirmed the magistrate's decision, designating father as the residential parent and legal custodian.

II. Assignments of Error

{¶ 27} Mother has timely appealed the trial court's September 15, 2016 judgment entry, and now asserts three assignments of error for our review:

1. Plain error occurs and a decision on the best interest of the children is prejudice (sic) when there is nearly a year delay (360 days) from the hearing on the issue and the magistrate's decision and seven months until a final judgment entry. Moreover, a magistrate's decision (and final judgment entry accepting said decision) reflecting essentially how critical and necessary it is for the legal custody of children to be changed from mother (who has been the primary care giver their entire lives) to father, is without merit and decided on stale evidence when the decision to do so took 360 days to make and thus is not in the best interest of the children.
2. The trial court's decision is against the weight of the evidence.

3. A trial court errs, abuses its discretion, prejudices defendant and violates a defendant's constitutional right when the court allows a GAL to usurp her authority and act in the position of the judge.

III. Analysis

{¶ 28} For ease of discussion, we will begin with mother's second assignment of error, in which mother argues that the trial court's decision is against the manifest weight of the evidence.

{¶ 29} R.C. 3109.04(A) provides that in any divorce proceeding, the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage. R.C. 3109.04(B)(1) then requires that in making that allocation, the court shall consider the best interest of the children. In considering the best interest of the children, R.C. 3109.04(F)(1) requires a court to consider all relevant factors, including, but not limited to:

- (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 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 * * *;

(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.

{¶ 30} “The discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. 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.” *Pater v. Pater*, 63 Ohio St.3d 393, 396, 588 N.E.2d 794 (1992), quoting *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). A reviewing court will not overturn a custody determination unless the trial court abused its discretion. *Id.* An abuse of discretion connotes that the trial court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 31} In support of her assignment of error, mother argues that the magistrate’s decision is not supported by the evidence. Specifically, mother argues that the uncontroverted testimony at the hearing was that the children are doing remarkably well, have friends, are involved in extra-curricular activities, and are having “phenomenal success” at school. Because mother has been the residential parent, she concludes that the children’s success must be attributable to her efforts. In addition, she argues that contrary to the magistrate’s conclusion, she has not downplayed her prior relationship with L.T., noting that she separated from him once she became aware of the shower incident between him and the children. Mother likewise minimizes her relationship with R.W., maintaining that R.W.’s criminal history is not of a nature that is a factor under R.C. 3109.04(F), that there was no evidence that any of the crimes occurred around the children, and some, if not all, of the charges occurred while mother was separated from R.W. Finally, mother argues that the magistrate subjected her to a higher level of

scrutiny by requiring her to support her statements with documented proof, but not requiring the same of father.

{¶ 32} We conclude that the trial court did not act unreasonably, arbitrarily, or unconscionably. In this case, the trial court undertook a detailed analysis of the evidence in light of the relevant factors under R.C. 3109.04(F). Of note, the trial court found that the guardian ad litem recommended custody to father; that the guardian ad litem and Ohlemacher testified that father was kind and cooperative whereas mother was difficult and demanding; that father's romantic partner, M.D., is supportive and appears to have the children's best interests at heart in contrast to mother's romantic partners, one of whom exhibited poor judgment in showering with the children, and the other of whom has an extensive criminal history consisting of violence and drug abuse; that while under mother's care, the children were excessively absent from school during the 2013-2014 school year such that a truancy officer became involved; and that based on the parties' prior actions, father is more likely to honor and facilitate court-approved parenting time and visitation rights. Our review of the record from the hearing supports the trial court's findings, and we hold that the trial court did not abuse its discretion in designating father as the residential parent and legal custodian.

{¶ 33} Accordingly, mother's second assignment of error is not well-taken.

{¶ 34} Turning to mother's first assignment of error, mother argues that the court committed plain error to her prejudice when it took one year for the magistrate to issue his decision after the hearing. Mother asserts that the delay demonstrates a lack of

credibility in the magistrate's decision, because if changing custody was truly in the children's best interest, then a prompt decision would also have been in the children's best interest. In addition, mother argues that the delay resulted in the decision being based on stale information, citing as her only example that the decision does not take into consideration that the children have spent another year in the school district where they have friends and are involved in activities.

{¶ 35} In support of her assignment of error mother cites *Hastings v. Hastings*, 6th Dist. Erie No. E-00-016, 2000 Ohio App. LEXIS 6054 (Dec. 22, 2000). In *Hastings*, we rejected the appellant's argument that a five-year delay in ruling on his objections to the referee's report constituted prejudicial error. In so doing, we noted that the evidence from the hearing was properly preserved for review by a full transcript of the hearing, which was prepared and included in the record. *Id.* at *13-14. Similarly, in this case, the record from the February 17, 2015 hearing was preserved by a full transcript, complete with the exhibits entered into evidence. Thus, we hold that mother was not prejudiced by the delay.

{¶ 36} As to mother's claim that the magistrate's decision was based on stale evidence, we note that the magistrate's decision on custody was based on the facts presented at the hearing, and those facts support the magistrate's decision as discussed in mother's second assignment of error. Therefore, we find no error in the trial court's decision based on the facts presented from the hearing.

{¶ 37} This is not to say that we condone the lengthy delay between the hearing and the magistrate’s decision. Certainly, the judicial system works best when decisions are rendered in a timely fashion, and particularly where children’s lives are concerned, the court should make every effort not to delay. In this case, the delay is even more troubling given the allegations made by the guardian ad litem in her September 4, 2015 motion to modify the temporary orders of custody, which suggests that the children were at a risk of harm in mother’s custody. Nevertheless, we hold that the delay itself is not grounds for reversal of the trial court’s custody determination.

{¶ 38} Accordingly, mother’s first assignment of error is not well-taken.

{¶ 39} In her third and final assignment of error, mother argues that the trial court abused its discretion when it allowed the guardian ad litem to usurp her authority and suspend mother’s overnight visitations. However, the record reflects that the guardian ad litem did not unilaterally alter mother’s visitations. On May 9, 2016, the first business day after the missed weekend visitation, the guardian ad litem filed a motion with the court seeking to temporarily suspend mother’s overnight visitation because the guardian ad litem could not ensure that the children had beds, clothing, or adequate hygiene necessities. Pursuant to Sup.R. 48(D)(6), “A guardian ad litem who is an attorney may file pleadings, motions and other documents as appropriate under the applicable rules of procedure,” and under Sup.R. 48(D)(16), “[I]f necessary, an attorney guardian ad litem may request timely court reviews and judicial intervention in writing with notice to parties or affected agencies.” The trial court, upon considering the guardian ad litem’s

motion, agreed, and entered its order on May 31, 2016, temporarily suspending mother's overnight visitation until the children's living arrangements could be confirmed. Based upon the information before the court, we cannot hold that the trial court's decision was an abuse of discretion.

{¶ 40} Accordingly, mother's third assignment of error is not well-taken.

IV. Conclusion

{¶ 41} For the foregoing reasons, we find that substantial justice has been done the party complaining, and the judgment of the Erie County Court of Common Pleas, Domestic Relations Division, is affirmed. Mother is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Christine E. Mayle, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.supremecourt.ohio.gov/ROD/docs/.</p>
