[Cite as *Williamson v. Cooke*, 2009-Ohio-6842.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

JoAnna Williamson (fka Williamson-Cooke),	:	
Plaintiff-Appellee,	:	No. 09AP-222
v.	:	(C.P.C. No. 01DR08-3503)
Reginald A. Cooke,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 24, 2009

Babbitt & Weis LLP, *Gerald J. Babbitt*, for appellee.

Regina L. Hillburn, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations

KLATT, J.

{¶1} Defendant-appellant, Reginald A. Cooke, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, modifying his parenting time with his son. For the following reasons, we affirm.

{¶2} Cooke and plaintiff-appellee, JoAnna Williamson, divorced in 2002. During their marriage, the parties had one child, Joseph W. Cooke, born March 18, 1996. In the decree of divorce, the trial court designated Williamson as the sole residential parent and legal custodian for Joseph. The trial court granted Cooke parenting time consistent with the guideline schedule contained in Loc.R. 27 of the Franklin County Court of Common Pleas, Division of Domestic Relations ("Loc.R. 27"). However, deviating from the strictures of Loc.R. 27, the trial court prohibited Cooke from traveling out of town with Joseph without the presence of a second, competent adult approved by Joseph's guardian ad litem. Additionally, although Cooke received a generous amount of parenting time, the trial court structured Cooke's visitations so that he never had custody of Joseph for more than three days at a time. After setting forth the parameters of Cooke's parenting time, the trial court stated that, "upon [Cooke] completing the recommendations of [psychologist] John A. Tarpey and/or [Cooke's] relocation of his current residence[,] * * * parenting time shall be determined according to the best interest of the child." (R. at 138.)

{¶3} On March 30, 2006, Cooke filed a motion for reallocation of parental rights and responsibilities with the trial court. In that motion, Cooke indicated that he had complied with Tarpey's recommendations and moved from his previous residence. Because he had fulfilled the conditions imposed in the divorce decree, Cooke asked the trial court to remove the travel and time restrictions on his parenting time. On October 13, 2006, Cooke filed a second, virtually identical motion for reallocation of parental rights and responsibilities.

{¶4} Cooke next filed a flurry of motions on July 11, 2007. Among other relief, Cooke sought an order requiring Joseph to submit to psychological testing to determine if he had autism. Cooke also moved for an order finding Williamson in contempt for depriving him of his parenting time.

{¶5} On July 12, 2007, Williamson filed a motion to modify the parenting time schedule. In her motion, Williamson stated that she intended to move to Chapel Hill, North Carolina. Williamson requested that the trial court revise the parenting time schedule to accommodate her relocation.

{¶6} Cooke responded to Williamson's motion with another motion for reallocation of parental rights and responsibilities. Different from his previous two motions for reallocation of parental rights and responsibilities, this July 20, 2007 motion asked the trial court to designate Cooke as Joseph's sole residential parent and legal custodian.

{¶7} Because Williamson needed to move to North Carolina before the trial court could hold a hearing on her motion, the trial court decided to issue an interim parenting time order to govern the period between Williamson's move and the hearing. The trial court instructed both parties and Joseph's guardian ad litem to submit proposals for the interim parenting time order. Finding the guardian ad litem's recommendations in Joseph's best interest, the trial court adopted them. In its September 24, 2007 interim parenting time order, the trial court specified that:

> 1. [Cooke] shall have parenting time with the parties' minor child * * * on a schedule consistent with the long distance model schedule set forth in Franklin County Local Rule 27, with the exceptions that there shall be no overnights, parenting time should consist of day visits of not less than five (5) hours per day for no more than three (3) consecutive days.

> 2. [Williamson] shall provide [Cooke] with advance notice of her intent to visit the Columbus area and afford [Cooke] at least one (1) day visit with Joseph for every seven (7) days she and/or Joseph are in Columbus.
>
> 3. [Cooke] shall have two (2) consecutive day visits with Joseph per month should he visit [Williamson's] new residential area with at least seventy-two (72) hours advance notice to [Williamson].
>
> 4. [Cooke] shall have unlimited but reasonable telephone, email and webcam access to Joseph. This access shall not be less than Tuesdays and Sundays for a reasonable time between 5:00 p.m. and 8:00 p.m. Abuse of this access will result in access being reduced, diminished or forbidden.
>
> 5. [Cooke] shall be provided with all of Joseph's educational, medical, dental, optical and mental health information promptly.
>
> 6. [Williamson] shall bring Joseph to Columbus, or see to it that he is brought to Columbus, at least once between August 29, 2007 and the trial date, at her expense.

(R. at 708.)

{¶8} On November 1, 2007, Cooke moved for an oral hearing pursuant to Civ.R. 75(N)(2) "to modify temporary orders."[1] (R. at 716.) Soon thereafter, Cooke moved for a modification of his child support obligation.

{¶9} After a year of delay, the trial court conducted a hearing on the parties' outstanding motions on December 22, 2008. Immediately prior to the hearing, Cooke dismissed "his pending Motion to Reallocate Parental Rights and Responsibilities, without

[1] Civ.R. 75(N) allows the trial court to issue a temporary order allocating parental rights and responsibilities during the pendency of an action for divorce, annulment, or legal separation. If a party objects in writing to such an order, the trial court must hold a hearing to determine whether to modify the order. Civ.R. 75(N)(2). Here, the trial court did not issue the interim parenting time order pursuant to Civ.R. 75(N). Because the parties had already finalized their divorce, Civ.R. 75(N) did not apply. Thus, in this context, Civ.R. 75(N)(2) did not entitle Cooke to any relief and the trial court could have denied Cooke's motion outright. However, the trial court interpreted Cooke's November 1, 2007 motion as a request to modify the interim parenting time order. We will do the same.

prejudice." (R. at 757.) While Cooke had three motions for reallocation of parental rights and responsibilities pending, the trial court understood Cooke's dismissal to encompass only his July 20, 2007 motion requesting that he assume full custody of Joseph.

{¶10} At the hearing, both parties' attorneys orally withdrew various other earlier-filed motions. After significant confusion regarding which motions were still pending and needed to be heard,[2] the trial court and Cooke's attorney engaged in the following discussion:

> The Court: So today is going forward – would you go forward on the motion requesting that the child be assessed with respect to autism and the like?
>
> Ms. Hillman: Yes.
>
> The Court: And for modification of child support?
>
> Ms. Hillman: No, I'm dismissing that motion.
>
> The Court: So the only thing left is testing for the autism.
>
> Ms. Hillman: And the motion to modify the interim order on parenting time. That's not the same as the custody motion, this is to modify it to a different schedule ordered by the Court on [an] interim basis.
>
> The Court: So testing for autism, modify the interim order respecting the –
>
> Ms. Hillman: Regarding the time and travel conditions on my client. And those are the main things we have to deal with.

[2] In our recitation of the proceedings prior to the hearing, we have omitted mention of numerous motions, mostly filed by Cooke, that are irrelevant to the instant appeal.

(Dec. 22, 2008 Tr. 7-8.) Thus, the hearing proceeded on two issues: (1) whether to require Joseph to submit to testing for autism, and (2) the scope and parameters of Cooke's parenting time.

{¶11} Only Cooke and the guardian ad litem testified during the hearing. Cooke protested that the interim parenting time order left him only with "telephone parenting rights." (Dec. 22, 2008 Tr. 17.) Cooke testified that he spoke with Joseph on the telephone approximately four times a week, but rarely saw him. With regard to his mental health, Cooke stated that his psychologist had determined that he did not suffer from a psychological impairment and that nothing prevented him from taking a child out of town or parenting for over three days at a time.

{¶12} On cross examination, Cooke acknowledged that he had enjoyed parenting time with Joseph on the multiple occasions when Williamson and Joseph had visited Columbus. Additionally, Cooke admitted that he had not installed a webcam to communicate with Joseph, and he had never traveled to North Carolina to spend time with Joseph.

{¶13} In her testimony, the guardian ad litem recommended that the trial court adopt the interim parenting time order as the final order. The guardian ad litem stated that Joseph had indicated that his relationship with his father had improved since his move, and Joseph attributed the improvement to the distance between them and the decreased frequency of visits. According to the guardian ad litem:

> What Joseph expresses is that the longer amount, the longer he is with his dad, the less kind his dad becomes, quite honestly. So he is hesitant to extend the amount of time, because he frankly doesn't believe that it would be particularly pleasant. He doesn't believe his dad really hears him. * * *

(Dec. 22, 2008 Tr. 68-69.) Additionally, the guardian ad litem opined that adoption of the long-distance parenting time schedule contained in Loc.R. 27 would not be in Joseph's best interest.

{¶14} At the conclusion of the hearing, the trial court denied Cooke's request to expand his parenting time. Although the trial court invited Cooke to work with the guardian ad litem to increase the amount of contact with Joseph, the court ordered that all future visitation proceed according to the interim (now final) parenting time order. On February 3, 2009, the trial court reduced its ruling to judgment.[3]

{¶15} Cooke now appeals from the February 3, 2009 judgment, and he assigns the following errors:

> [1.] THE TRIAL COURT ABUSED ITS DISCRETION BY RULING THAT APPELLANT HAD NOT MET CONDITIONS FOR LIFTING OF THE DIVORCE DECREE PARENTING RESTRICTIONS.
>
> [2.] THE COURT COMMITTED AN ABUSE OF DISCRETION IN REGARDS TO DISMISSING THE OCTOBER 13, 2006 [MOTION] BECAUSE THE MOTION TO [sic] BURDEN OF PROOF HAD SHIFTED TO THE APPELLEE AT THE CLOSE OF APPELLANT'S CASE.
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> [3.] THE COURT COMMITTED AN ABUSE OF DISCRETION IN REGARDS TO THE JULY 12, 2007 MOTION TO RELOCATE BY NOT REQUIRING APPELLEE TO MEET HER BURDEN OF PROOF.
>
> [4.] THE COURT COMMITTED AN ABUSE OF DISCRETION IN REGARDS TO APPELLEE'S JULY 12, 2007 MOTION BY ISSUING A PARENTING ORDER WHICH IS INCONSISTENT WITH THE PARTIES' HISTORY.

[3] When orally ruling on the motions before it at the conclusion of the hearing, the trial court also denied Cooke's motion for the testing of Joseph for autism. This ruling, however, is not part of the February 3, 2009 judgment, nor is it a subject of this appeal.

> [5.] THE COURT COMMITTED ERROR IN RULING THAT APPELLANT HAD WITHDREW [SIC] HIS JULY 11, 2007 MOTION OF CONTEMP[T] [AGAINST] APPELLEE.

{¶16} Because they are interrelated, we will discuss Cooke's first four assignments of error together. By these assignments of error, Cook argues that the trial court erred in adopting a parenting time schedule that significantly limits his access to Joseph. We disagree.

{¶17} R.C. 3109.051 governs modification of a parenting time schedule. *Braatz v. Braatz*, 85 Ohio St.3d 40, 1999-Ohio-203, paragraph one of the syllabus. When revising a parenting time schedule, a trial court must establish a schedule that is in the best interest of the child, and in doing so, it must consider the factors set forth in R.C. 3109.051. Id. at paragraph two of the syllabus. These factors include: the prior interaction and relationship of the child with the child's parents; the geographical location of the residence of each parent and the distance between those residences; the child's and parents' available time; the age of the child; the child's adjustment to home, school, and community; the health and safety of the child; the mental and physical health of all parties; each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights; and any other factor in the best interest of the child. R.C. 3109.051(D). The party seeking the modification of the parenting time schedule bears the burden of proving that the requested change is in the child's best interest. *O'Brien v. O'Brien*, 10th Dist. No. 07AP-313, 2007-Ohio-5448, ¶16; *Hoppel v. Hoppel*, 7th Dist. No. 03 CO 56, 2004-Ohio-1574, ¶29.

{¶18} In order to further a child's best interest, a trial court has the discretion to limit parenting time rights. *Moore v. Moore*, 5th Dist. No. 04CA111, 2005-Ohio-4151, ¶7;

Hoppel at ¶15; *Anderson v. Anderson*, 7th Dist. No. 01 AP 755, 2002-Ohio-1156, ¶18. Trial courts may restrict the time and place of visitation, determine the conditions under which parenting time will take place, and deny parenting time rights altogether if parenting time would not be in the best interest of the child. *Moore* at ¶7; *In re Bailey*, 1st Dist. No. C-040014, 2005-Ohio-3039, ¶25; *Hoppel* at ¶15; *Anderson* at ¶18. Because trial courts have such broad discretion, reviewing courts will only reverse a decision on parenting time rights if the trial court abused its discretion. *Karales v. Karales*, 10th Dist. No. 05AP-856, 2006-Ohio-2963, ¶5; *Flynn v. Flynn*, 10th Dist. No. 03AP-612, 2004-Ohio-3881, ¶15; *In re Ross*, 154 Ohio App.3d 1, 2003-Ohio-4419, ¶5. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In applying the abuse of discretion standard of review, a reviewing court must refrain from merely substituting its judgment for that of the trial court. *Flynn* at ¶15.

{¶19} In the case at bar, both Cooke and Williamson sought modification of the parenting time schedule incorporated in the divorce decree. Cooke requested that the trial court expand his parenting time rights, while Williamson wanted the trial court to constrict those rights to accommodate her and Joseph's move to North Carolina. Consequently, each party bore the burden of proving that the changes they requested were in Joseph's best interest.

{¶20} Ultimately, the trial court rejected Cooke's assertion that an increase in his parenting time rights was in Joseph's best interest. Rather, the trial court relied upon the guardian ad litem's testimony that the interim parenting time schedule, which diminished the time Cooke spent with Joseph, actually served Joseph's interests the best. Given the

guardian ad litem's testimony regarding Joseph's success and happiness under the interim parenting time schedule, we find that the trial court did not abuse its discretion in ordering that Cooke's parenting time proceed according to that schedule.

{¶21} In so holding, we recognize that the modified parenting time schedule substantially restricts Cooke's in-person parenting time. Nevertheless, the trial court found the modified parenting time schedule to be in Joseph's best interest. We will not second guess that decision.

{¶22} In addition to challenging the parameters of the parenting time schedule, Cooke also argues that the trial court could not modify the schedule without first determining that a change in circumstances had occurred. We find this argument unavailing. Pursuant to R.C. 3109.04(E)(1)(a), a trial court "shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree * * *." However, R.C. 3109.04, which governs whether a court may modify custody, does not pertain to the modification of parenting time rights. *Braatz* at 44-45. "Custody" refers to the right to ultimate legal and physical control over a child, while "parenting time rights" grant a parent the power of temporary physical control for the purpose of visitation. *Braatz* at 44. Because only parenting time rights are at issue in this case, R.C. 3109.051—not R.C. 3109.04—applies. See *Flynn v. Flynn*, 10th Dist. No. 02AP-801, 2003-Ohio-990, ¶11 ("[T]he appropriate and applicable standard for considering questions of modification of visitation is set forth in R.C. 3109.051, not R.C.

3109.04."). Unlike R.C. 3109.04, R.C. 3109.051 does not require a showing of a change in circumstances. See *Campana v. Campana*, 7th Dist. No. 08 MA 88, 2009-Ohio-796, ¶29 (holding that "a modification of visitation is only subject to the best interests test and is not subject to the changed circumstances test of R.C. 3109.04(E)(1)(a)").

{¶23} Accordingly, we conclude that the trial court did not err in its resolution of the parties' dispute over Cooke's parenting time rights. We therefore overrule Cooke's first, second, third, and fourth assignments of error.

{¶24} By Cooke's fifth assignment of error, he argues that the trial court erred in ruling that he withdrew his July 11, 2007 motion for contempt. We disagree.

{¶25} In its February 3, 2009 judgment, the trial court stated that, prior to the December 22, 2008 hearing, Cooke withdrew all pending motions except for his November 1, 2007 motion to modify the interim parenting time order. Although Cooke's attorney never explicitly withdrew the July 11, 2007 motion for contempt, she failed to bring this motion to the trial court's attention during the hearing. By not pursuing this motion at the hearing intended to resolve all pending motions, Cooke abandoned the motion, implicitly withdrawing it from the trial court's consideration. Accordingly, we overrule Cooke's fifth assignment of error.

{¶26} For the foregoing reasons, we overrule Cooke's five assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

FRENCH, P.J. & BRYANT, J., concur.