[Cite as *Hardesty v. Hardesty*, 2006-Ohio-5648.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

CARI A. HARDESTY,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NOS. 2004-G-2582 and 2005-G-2614**
DOUGLAS R. HARDESTY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 03 DC 715.

Judgment: Affirmed.

John W. Bosco, Paramount Building, 31805 Vine Street, Willowick, OH 44095 (For Plaintiff-Appellant).

Paul A. Newman, 214 East Park Street, Chardon, OH 44024 (For Defendant-Appellee).

James W. Reardon, 100 Parker Court, Chardon, OH 44024 (Guardian ad litem).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant Cari A. Hardesty ("Cari") timely appeals a judgment entry of divorce from the Geauga County Court of Common Pleas, Domestic Relations Division. Cari's appeal is based on allegations that the shared parenting plan adopted by the trial court was not in the best interest of the minor child and did not accurately reflect the verbal agreement of the parties. Cari also alleges that the trial court failed to account

for a significant marital asset due to its nondisclosure. Since the inception of this appeal, Cari has filed a second appeal known as 2005-G-2614 arising from the same trial court. On May 13, 2005, this court sua sponte consolidated both appeals for the purpose of disposition. For the reasons that follow, we affirm the decisions of the trial court in both appeals.

2004-G-2582

{¶2} Cari and Appellee Douglas R. Hardesty ("Douglas") were married on May 17, 1986. Cari and Douglas have one child together, Ian Douglas Hardesty, d.o.b. 6-9-95. On July 24, 2003, Cari filed for divorce in the Geauga County Court of Common Pleas. Douglas counterclaimed for divorce on July 30, 2003. On November 3, 2003, Cari filed a motion for shared parenting "with shared parenting plan affixed." No shared parenting plan was attached to the motion. On November 6, 2003, Douglas filed a motion for shared parenting with a shared parenting plan attached. A contested divorce hearing was held before a magistrate on February 11, 2004. Essentially, the only issues tried at this hearing related to the grounds for divorce and the division of marital property. The parties read an understanding into the record in regards to parenting rights for Ian. The magistrate issued a decision on April 7, 2004. Both parties filed objections. The trial court adopted the decision of the magistrate and entered a judgment entry of divorce and a shared parenting decree on June 10, 2004. It is from these entries that Cari now appeals.

{¶3} Cari asserts the following three assignments of error:

{¶4} "[1.] THE TRIAL COURT ERRED BY ORDERING A SHARED PARENTING PLAN THAT WAS CONTRARY TO THE TERMS AGREED TO IN THE ORAL IN-COURT SETTLEMENT BETWEEN THE PARTIES AT THE FINAL HEARING.

{¶5} [2.] THE TRIAL COURT ERRED BY ORDERING A SHARED PARENTING PLAN WITHOUT CONSIDERING THE BEST INTERESTS OF THE MINOR CHILD OF THE PARTIES.

{¶6} [3.] THE TRIAL COURT ERRED BY ORDERING A DIVISION OF PROPERTY IN A DIVORCE DECREE WHEN THERE WAS A LACK OF FULL DISCLOSURE OF ALL THE MARITAL ASSETS OF THE PARTIES."

{¶7} We will address Cari's assignments of error in order.

{¶8} In Cari's first assignment of error, she asserts that the shared parenting plan incorporated in the shared parenting decree and attached to the judgment entry of divorce was contrary to the verbal agreement of the parties. In general, oral settlement agreements made in the presence of the court are valid and binding contracts. *Spercel v. Sterling Industries, Inc.* (1972), 31 Ohio St.2d 36. In addition, in-court agreements are enforceable even in the absence of a written agreement and even in the absence of signatures. *Holland v. Holland* (1970), 25 Ohio App.2d 98, paragraph two of the syllabus. Cari alleges that the incorporated shared parenting plan as written does not accurately reflect the verbal agreement of the parties. Specifically, Cari alleges that she verbally agreed to a shared parenting plan that would equally divide Ian's time with both parents. She argues that the written shared parenting plan provides more time between Ian and Douglas than between she and Ian. According to Cari's calculations, Douglas

was awarded seventy-two percent and Cari was awarded twenty-eight percent of time with Ian.

{¶9} Cari points our attention to a similar case wherein the mother disputed the shared parenting plan and the Sixth District Court of Appeals reversed the decision of the trial court. *Marquitta v. Anthony*, 6th Dist. No. L-02-1042, 2002-Ohio-7108. However, the facts in *Marquitta* are different than those in the present case. In *Marquitta*, the mother objected to the parenting arrangement at the hearing. After this objection, the trial court failed to hold an evidentiary hearing. It is the combination of these two factors which warranted the reversal. *Marquitta* at ¶16-17. In this case, there was no objection. Furthermore, it is not a requirement that the parties' entire agreement be read into the record provided the ultimate adopted agreement accurately reflects the parties' understanding as of the day of the agreement. *DeMatteo v. DeMatteo* (Aug. 15, 1996), 3rd Dist. No. 14-96-13, 1996 Ohio App. LEXIS 3624.

{¶10} The record discloses the following discourse between the trial court and Atty. Newman (Douglas' legal counsel): "With regard to custody, Mr. Newman, or shared parenting, what is the agreement with regard to that?" Atty. Newman responds: "The parties have agreed that for school purposes Doug Hardesty shall be the residential parent, and when the child is with either of the parents, that parent will also be the residential parent for the child during that period of possession. They have entered into a visitation schedule with respect to the child Ian that has been set forth in a separate document that the Guardian Ad Litem has. I have a copy and also Mr. Gilson has a copy which sets forth what the schedule is." The court acknowledged the presence of this schedule: "Right. And you worked on it all morning, and I'm aware that

those documents exist and, in fact, isn't it true that the Guardian Ad Litem is going to be preparing a Shared Parenting Plan that will reflect that?" Atty. Newman acknowledged the court was correct and the guardian ad litem was to prepare the shared parenting plan. There is no objection by Cari's attorney. There is nothing in the record to suggest that Cari was uncomfortable or confused about the schedule distributed to the parties. In fact, Atty. Gilson was questioned by the court as to whether he had anything to add to the agreement as recited and he declined. Therefore, based on the record, Cari either directly or through her legal counsel, had a copy of the visitation calendar contained within the shared parenting plan and failed to object to the same. In fact, Cari acquiesced to the agreement and indicated her satisfaction with the parenting time.

{¶11} Upon the direct examination of Cari, Atty. Gilson inquires of Cari whether she believes the agreement read into the record as stated above is "***fair, just and equitable to both you and Doug and Ian." Cari responds, "So that Ian has 50 percent of each of our times, yes." Cari then goes on to admit that she is happy with that schedule and that she agrees to abide by its terms and conditions. At no point in time did Cari indicate that the written schedule provided to her that morning was not acceptable or did not adequately divide to a fifty-percent ratio. At no point in time did Cari indicate confusion over which schedule the parties were agreeing to follow. If Cari had doubts regarding the parenting agreement for the parties' minor child and the allocation of their time, she failed to make those known. Furthermore, at every point in the divorce process Cari was represented by legal counsel. It appears that rather than confusion, Cari is merely experiencing remorse and dissatisfaction with the agreement. It is clear from the discourse described above between legal counsel, Cari and the magistrate,

that each side possessed a copy of the visitation schedule that was ultimately adopted. Cari has never asserted the claim that the schedule in her possession on the day of the hearing was not the schedule ultimately adopted through the shared parenting plan.

{¶12} Even after the hearing, Cari declined to object. The magistrate's decision was rendered April 7, 2004. On April 23, 2004 the guardian ad litem served the shared parenting plan on both parties and the court. Cari filed an extension of time to file a response to the guardian ad litem's shared parenting plan and then failed to follow through with this concern. Douglas filed an exception to the shared parenting plan provision pertaining to the allocation of educational expenses for the minor child. Cari filed nothing. The notice of hearing issued by the trial court was spurred by Douglas's filing; not Cari's. Therefore, had the matter been heard as scheduled, the only matter ripe for review would have been those matters related to the educational expenses as raised by Douglas. Absent Douglas's limited exception to the shared parenting terms, there is nothing in the record to suggest that Cari preserved any objections to the shared parenting plan as submitted.

{¶13} In review of the shared parenting plan and specifically the weekly schedule incorporated therein, it appears that the agreement is as close to a fifty-fifty division as physically possible without splitting the child. Cari's characterization that she only receives twenty-eight percent of the time with her son is not supported by the record. In fact, an analysis of actual time available with the child during school session shows that Cari receives forty-seven percent of the time with Ian. Cari would receive approximately ninety-eight waking non-school hours with Ian while Douglas would receive approximately one-hundred-ten waking non-school hours with Ian. Of course,

this does not take into consideration extracurricular activities and after-school activities or work schedules.

{¶14} Douglas argues that Cari should be barred from bringing this appeal because she failed to object to the judgment entry pursuant to Local Rule 8 in the trial court. Local Rule 8 states that "[A]ny party thus receiving the proposed judgment or order shall within five (5) days thereafter serve upon the designated party and mail or deliver to the judge a statement of his approval or disapproval." In fact, Cari did oppose the judgment by filing the motion for relief from judgment pursuant to Rule 60(B). An examination of the record indicates that Cari's previous legal counsel did file a request for an extension of time to file a response to the proposed shared parenting plan and then was subsequently replaced as counsel. In any event, we are not convinced that Cari should automatically lose her right to appeal because of a local rule requirement regarding proposed judgment entries. However, Cari's failure to object to any portion of the shared parenting plan until this appeal does provide additional support to our contention that Cari originally agreed to the terms of the companionship contained within the shared parenting plan and only later had second thoughts.

{¶15} Trial courts are granted broad discretion in matters concerning child custody and a trial court's decision will not be disturbed absent an abuse of discretion. *Masters v. Masters* (1994), 69 Ohio St.3d 83, 85. The term "abuse of discretion" implies that the trial court acted in a manner which was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In the instant case, we cannot say that the trial court abused its discretion by adopting the shared parenting plan. The parties acknowledged their oral agreement in open court.

According to the record, each party and his/her legal counsel received a copy of a parenting schedule prior to that acknowledgement. No one objected to the parenting schedule and both parties agreed that it was in their child's best interest and agreed to abide by its terms and conditions.

{¶16} Cari's first assignment of error is without merit.

{¶17} In Cari's second assignment of error, she alleges that the shared parenting plan adopted by the trial court is not in the best interest of the minor child. Cari alleges that the "court made no finding that the shared parenting plan was in the best interest of the minor child." First, Cari is correct that no reference to the best interest of the minor child was made in the trial court's judgment entry of divorce. However, the trial court did acknowledge and consider the best interest of the minor child in its shared parenting decree. Specifically the trial court states in the shared parenting decree: "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Shared Parenting Plan is in the best interests of the minor child and that same be and hereby is approved and incorporated as if fully rewritten."

{¶18} Ohio Revised Code 3109.04(D)(1)(a)(i) governs shared parenting and the approval of shared parenting plans and states: "If both parents jointly make the request in their pleadings or jointly file the motion and also jointly file the plan, the court shall review the parents' plan to determine if it is in the best interest of the children. If the court determines that the plan is in the best interest of the children, the court shall approve it." Unlike R.C. 3109.04(D)(1)(a)(ii) and (iii), there is no statutory requirement in this section for the court to set forth findings of fact in regards to its' best interest determination and decision to adopt the shared parenting plan.

{¶19} In this case, Cari and Douglas both filed requests for shared parenting although as previously indicated, Cari failed to attach a shared parenting plan to her request. Nevertheless, the parties agreed to the terms contained within the shared parenting plan as submitted by the guardian ad litem. Therefore, the trial court was correct to treat the submitted shared parenting plan as one filed by both parents because it did embody the agreement of the parties. As such, R.C. 3109.04(D)(1)(a)(i) was the applicable section and no findings of fact to support the best interest determination were required.

{¶20} Cari's second assignment of error is without merit.

{¶21} Cari's third assignment of error questions the division of property order when all marital assets were not disclosed by the parties. Specifically, Cari alleges that Douglas failed to disclose his Parker Hannifan pension as a marital asset. Secondly, Cari alleges the existence of "some stock options" owned by Douglas which may not have been properly considered in the marital property division.

{¶22} According to the record, the magistrate inquired of Cari whether or not she made a full disclosure of all assets. Cari indicated she had made a full disclosure. The court questioned whether she believed that Douglas had also made a full disclosure of all assets. Cari answered that with the exception of the value assigned to one Merrill Lynch account, she did believe that Douglas had disclosed all his assets. Douglas also indicated on direct examination by his attorney that he had made a full disclosure of all assets and that he believed Cari had likewise made a full disclosure.

{¶23} The record discloses that neither party identified a pension asset although both parties work at Parker Hannifan in the same division and presumably both parties have pensions. There was no testimony at all in regards to pensions for either party.

{¶24} The record also discloses that the parties began negotiating a property settlement contemplated with the end of their marriage in July 2002 via their respective legal counsel. In July of the following year, Cari filed her complaint for divorce. The parties were divorced on June 10, 2004, nearly two years after their initial negotiations. At no point throughout these two years is there evidence of any formal discovery taking place.

{¶25} Cari compares this case to *Miller v. Miller*, 11th Dist. Nos. 2003-P-0008 & 2003-P-0066, 2003-Ohio-6687. In *Miller*, this court upheld a trial court's decision to vacate the judgment entry of divorce where the ex-husband fraudulently concealed his interest in a brokerage account and his date of vestment in his pension. *Miller*, supra, at ¶11. However, we cautioned in *Miller* that we were only considering the trial court's decision relative to the Rule 60(B) motion. "We do not consider the merits of the underlying claim as this issue is not properly before the court." Miller at ¶11. Therefore, we do not find *Miller* convincing as controlling precedent.

{¶26} Likewise Cari's reliance on *Emmert v. Aronson* (March 5, 1997), 9th Dist. No. 17878, 1997 Ohio App. LEXIS 744, is not convincing as authority for the proposition that a non-disclosed asset is reversible error. In *Aronson*, the court held that it was unclear whether the trial court accounted for a certain marital asset. *Aronson,* supra, at 6. In the instant case, it is apparent that the court did not account for the pensions of either party as neither party disclosed those assets. Therefore, the trial court's

declaration that "All property in the name or possession of either party that is not covered by this decision shall be awarded to that party as separate property" included the pensions due to omission of the parties – not the court.

{¶27} This court can only review the trial court's decision under the same restraints in which the trial court was placed. The trial court had no knowledge of Douglas' pension. Likewise, the trial court had no knowledge of Cari's pension. The trial court's failure to address assets of which it had no knowledge therefore was not in error. The appropriate procedural mechanism for Cari would have been to file a motion to vacate the judgment entry, which she eventually did file and which will be addressed forthwith in appeal no. 2005-G-2614.

{¶28} Cari's third assignment of error is without merit.

{¶29} For the reasons stated above, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed.

2005-G-2614

{¶30} On October 4, 2004, Cari filed a Civil Rule 60(B) motion for relief from judgment from the trial court's June 10, 2004 decision. Since an appeal was pending in this court described above as 2004-G-2582, Cari requested this court remand this matter to the trial court for a ruling on the Rule 60(B) motion.[1] On October 29, 2004, this court granted the trial court thirty days to rule on the Rule 60(B) motion.[2] On

1. Cari actually filed a motion for restoration of jurisdiction for Rule 60(B) motion which was interpreted by this court as a request to remand to the trial court for a ruling on said motion.

2. There are two judgment entries from this court remanding this matter to the trial court for purposes of ruling on the 60(B) motion. On November 3, 2004, this court also granted Cari's motion and remanded this matter to the trial court for thirty days to rule on the pending motion.

November 22, 2004, at the request of the trial court, this court extended the trial court's time to rule until January 24, 2005. On December 14, 2004 the parties, by stipulation, agreed that the 60(B) motion would be heard on the briefs and submitted evidence without an oral evidentiary hearing.

{¶31} In Cari's Rule 60(B) motion, she argued that the judgment entry of divorce should be vacated for two reasons. First, she argued that due to mistake or inadvertence or fraud or misrepresentation, the terms of the shared parenting plan as written were not the same terms to which the parties verbally agreed. Second, she argued that due to mistake or inadvertence or misrepresentation or fraudulent concealment, all marital assets were not disclosed; specifically Douglas' pension. The trial court overruled Cari's motion. This appeal followed.

{¶32} Cari asserts two assignments of error:

{¶33} "[1.] THE TRIAL COURT ERRED IN NOT VACATING THE JUDGMENT WHICH INCORPORATED A SETTLEMENT AGREEMENT THAT CONTAINED OMISSIONS OF MARITAL PROPERTY.

{¶34} [2.] THE TRIAL COURT ABUSED ITS DISCRETION IN NOT VACATING THE JUDGMENT BECAUSE THE PARENTING AGREEMENT WAS NOT THE AGREEMENT THE PARTIES HAD ENTERED."

{¶35} Civil Rule 60(B) states in part: "On motions and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reason: (1) mistake, inadvertence, surprise or excusable neglect***. The motion shall be made within a reasonable time, and for reasons (1),(2) and (3) not more than one year after the judgment, order or proceeding was entered or

taken." In order to prevail on a motion for relief from judgment pursuant to this section, the movant must demonstrate "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time***." *GTE Automatic Electric, Inc. v. ARC Industries, Inc.,* (1976) 47 Ohio St.2d 146, at paragraph two of the syllabus.

{¶36} A trial court's decision on a Rule 60(B) motion will not be overturned on appeal absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion means the underlying decision was unconscionable, unreasonable or arbitrary. *Blakemore,* supra. An abuse of discretion involves an abuse of choice where the "***result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." *Yanky v. Yanky*, 8th Dist. No. 83020, 2004-Ohio-489, at ¶13. It is according to this standard of review that we will consider Cari's two assignments of error.

{¶37} In Cari's first assignment of error, she asserts that the trial court erred in failing to vacate the judgment entry of divorce due to an omission of marital property. The specific missing asset is Douglas' pension from Parker Hannifan. The record discloses that both parties worked at Parker Hannifan. Both parties had similar fringe benefits packages, including pensions. The record also discloses that Douglas earned a higher salary rate than Cari and therefore held a pension with a presumably higher value.

{¶38} Cari initially compares this appeal and the underlying facts to *Franchini v. Franchini,* 11th Dist. No. 2002-G-2467, 2003-Ohio-6233. This reliance is misplaced. In *Franchini,* this court held that the trial court erred by failing to hold an evidentiary hearing when there were material issues of fact surrounding a settlement agreement. Id. In the case at hand, the parties stipulated on December 14, 2004, that Cari's Rule 60(B) Motion could be decided on the submitted briefs without the necessity for a hearing. The parties themselves acknowledged, approved and acquiesced to a decision without an oral evidentiary hearing. To ignore that stipulation and request this court reverse due to the failure to conduct an oral hearing now is contrary to the obvious intent of the parties. Furthermore, in certain circumstances, it is appropriate for a court to rule on a Rule 60(B) motion based on the written materials in lieu of an oral evidentiary hearing. *In the Matter of: McLoughlin*, 10th Dist. No. 05AP-621, 2006-Ohio-1530 at ¶19.

{¶39} Cari alleges that due to the failure to specifically value and allocate Douglas' pension, the court erred in its property division. The record reveals that during the contested divorce hearing, the magistrate inquired of Cari whether or not she made a full disclosure of all assets. Cari answered affirmatively. The magistrate also inquired whether she believed that Douglas had made a full disclosure of all assets. Cari indicated that with the exception of the value of one Merrill Lynch account that she did believe Douglas had made a full disclosure. Likewise, Douglas responded affirmatively to the inquiry regarding a full disclosure of his assets. Douglas also answered affirmatively to the inquiry of whether or not he believed Cari had made a full disclosure of all assets.

{¶40} A non-disclosed asset in and of itself is not sufficient to vacate a judgment. *McLoughlin* at ¶32. Courts are obligated to scrutinize a concealment of assets more closely in a dissolution setting wherein mutuality is an essential element. *In Re Whitman*, (1998) 81 Ohio St.3d 239, 240; see, also, *In the Matter of: Hobbs* (June 11, 1992), 10th Dist. No. 91AP-1478, 1992 Ohio App. LEXIS 3037; *Kelly v. Nelson*, (Dec. 29, 1992) 10th Dist. No. 92AP-1014, 1992 Ohio App. LEXIS 6774. However, the underlying case was not a dissolution, but rather a divorce. A divorce by its very nature invokes a litigation mode of discovery and tactics. Mutuality is not an integral element of a divorce.

{¶41} However, even taking into consideration the strategical posture of divorce, we are not convinced that Cari was unaware of Douglas' pension. The trial court states: "Mrs. Hardesty presented her then attorney, Gregory Gilson, with information about both parties' pension." Specifically, Exhibit E proffered by Douglas at trial and admitted as evidence, is a petition for dissolution with an attached separation agreement that includes a provision wherein each party will "retain his/her rights to his/her own retirement, pension, profit sharing, 401K, etc., plans, free and clear of any and all claims on the part of the other party***." It is important to note that according to the trial testimony, this agreement was prepared by Cari's attorney. Therefore, based on this factor, coupled with the additional evidence suggesting knowledge of the pension, we cannot agree that Cari was not aware of the existence of the pension.

{¶42} In considering Rule 60(B) motions pertaining to this type of alleged error, courts should consider the following factors: "what caused the delay in making the motion; whether the delay was reasonable; what personal knowledge the movant had

about the nature, extent and value of all the marital assets (whether included or omitted); what the movant should have known about them in the exercise of ordinary care; whether the movant expressly or implicitly concurred in the property provisions of the separation agreement; what deceptions, if any, were used by the other spouse; and what has intervened between the decree and the motion (such as, remarriage of either spouse or both spouses)." *In Re Murphy* (1983), 10 Ohio App.3d 134, at paragraph three of the syllabus.

{¶43} It appears that the trial court appropriately considered most, if not all, of these factors in rendering its decision. Cari did file her motion timely. She first objected to the magistrate's decision and then filed the Rule 60(B) upon the judgment entry by the trial court adopting the magistrate's decision. However, it is clear from the record that Cari had knowledge at least of the existence of the Parker Hannifan pension. Based on Cari's own participation in her Parker Hannifan pension, it is even appropriate to impart some knowledge regarding the value of that pension onto Cari. Cari was represented by counsel at all times throughout the proceedings and could have discovered the exact value of the pension through simple discovery methods. In regards to deception, there is nothing in the record to suggest that Douglas attempted to conceal this pension. It is important to remember again that Cari failed to disclose her Parker Hannifan pension as well. Finally in the analysis, Cari testified under oath not only that she had disclosed all of her assets, but that she believed Douglas had also made a full disclosure (with the exception of the previously discussed Merrill Lynch account).

{¶44} Considering these factors, the record and the evidence, we cannot say that the trial court abused its discretion in overruling Cari's Rule 60(B) motion in regards to the disclosure of marital assets.

{¶45} Cari's first assignment of error is without merit.

{¶46} In Cari's second assignment of error, she asserts that the trial court erred by refusing to vacate the judgment entry of divorce when the incorporated parenting agreement was not the agreement of the parties. Cari likens her case to precedent involving threats, harassment and duress. *Quebodeaux v. Quebodeaux* (1995), 102 Ohio App.3d 502; see, also, *Young v. Young* (1982), 8 Ohio App.3d 52. There is nothing in the record to support the contention that Cari was subjected to any of these external factors. Cari's allegation of "a parade of witnesses prepared to testify against her" is simply a part of the litigation process. Presumably, Cari would have had her own "parade of witnesses" present in the courthouse that day to testify for her and against Douglas. Regardless, we are not persuaded that the proximity of potential witnesses amounts to undue influence.

{¶47} Cari also alleges that she felt pressured and confused due to the actions of the guardian ad litem and therefore the trial court should have granted her Rule 60(B) motion. The trial court stated, "Mrs. Hardesty's alleged misunderstanding, lack of clear thinking and perceived sense of pressure while negotiating the agreement do not constitute "mistake" or "inadvertence" as contemplated in Civ. R.60(B)." In review of the affidavits of Cari and the guardian ad litem as they pertain to this assignment of error, we cannot say that the trial court acted unreasonably in denying the Rule 60(B) motion.

Rather, it appears that the trial court simply applied more weight to the affidavit of the guardian ad litem. We cannot say this is an abuse of discretion.

{¶48} Cari's second assignment of error is without merit.

{¶49} For the reasons stated in the Opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas, Domestic Relations Division, is affirmed.

WILLIAM M. O'NEILL, J., concurs,

COLLEEN M. O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN M. O'TOOLE, J., dissents with a Dissenting Opinion.

{¶50} I respectfully dissent from the ruling of the majority as to the first two assignments of error dealing with the agreed shared parenting plan. I concur with the majority on the property division issues contained in Assignment of Error 3.

{¶51} Appellate courts presume that a trial court's decision regarding child custody matters is correct. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. We will not reverse a child custody decision that is supported by substantial competent and credible evidence absent an abuse of discretion. Cf. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23. An abuse of discretion constitutes more than an error of law or judgment, and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore,* at 219. A trial court's discretion in a custody proceeding is broad, but not

absolute, and it must follow the procedures described in R.C. 3109.04 when making such decisions. *Miller* at 74.

{¶52} A trial court has authority under R.C. 3109.04(A) to allocate parental rights and responsibilities for the care of the minor children after hearing the testimony of either or both parents. Upon the filing of a motion or pleading requesting shared parenting and the filing of a shared parenting plan pursuant to R.C. 3109.04(G), a trial court must proceed in accordance with the applicable subdivision of R.C. 3109.04(D)(1)(a). A trial court may approve only one plan under R.C. 3109.04(D)(1)(a), and may approve a plan only if it determines the plan is in the best interest of the children. R.C. 3109.04(D)(1)(b).

{¶53} R.C. 3109.04(D)(1)(a) has three subdivisions. R.C. 3109.04(D)(1)(a)(i) applies when parents jointly request shared parenting and jointly submit a shared parenting plan; R.C. 3109.04(D)(1)(a)(ii) applies when each parent requests shared parenting and each submits his or her own separate plan; and R.C. 3109.04(D)(1)(a)(iii) applies when only one parent requests shared parenting and submits a proposed plan. There is no provision by which a guardian ad litem may submit an unsigned plan, as in this case.

{¶54} The statute requires the trial court to enter findings of fact and conclusions of law if it approves or denies a shared parenting plan under R.C. 3109.04(D)(1)(a)(ii) or (iii). There must be evidence for the trial court to consider in making its ruling. A proposed plan submitted by a guardian ad litem after a hearing without testimony is not evidence.

{¶55} At the final hearing before the magistrate in this case, no proposed plan was entered into the record, nor was any evidence of the type required under R.C. 3109.04(D) properly submitted. In effect, the magistrate found the parties in agreement about a shared parenting plan which did not yet exist, which the magistrate neither could nor did review, and which was not submitted until two months later – the date the trial court approved the magistrate's decision. Even then, the plan was not submitted by the parties, but by the guardian ad litem. Consequently, there is nothing in the record to substantiate the trial court's finding that the plan was in the child's best interest, as required by the statute.

{¶56} After a thorough review of the record, I am unable to discern the reasons underlying the trial court's decision to adopt the guardian's unsigned, unilateral shared parenting plan. That court made no factual findings or legal conclusions, other than the conclusory statement that "it is therefore ordered adjudged and decreed that the shared parenting plan is in the best interest of the minor child and that same be and hereby is approved and incorporated as if fully rewritten." R.C. 3109.04(F) sets forth the factors a trial court must consider in determining the best interests of a child. A detailed analysis of these factors is not required; a trial court substantially complies with the statute if its reasons for approving or denying a plan are apparent from the record. See, e.g., *In re Minnick*, 12th Dist. No. CA2003-01-001, 2003-Ohio-4245, at ¶23. But, in this case, there is neither a record from which the child's best interests may be gleaned, nor any statement by the trial court of the facts or law underpinning its determination. This is simply insufficient. Id. at ¶24-25.

{¶57} The majority notes that oral settlements entered in the presence of the court are valid contracts in upholding the instant matter, since Cari agreed that a plan allocating Ian's time equally between his parents would satisfy her. The majority's reasoning is flawed. Any binding contract requires a meeting of the minds. The plan allocates the vast majority of Ian's overnights to his father. Cari objects that this is not an equal sharing of Ian's time (even if, as the majority notes, Ian's "waking" hours will be shared more or less equally). It is obvious that Cari's idea of an equal allocation of Ian's time between herself and Douglas is not the same as the latter's – or, perhaps the guardian ad litem's, who actually authored the plan. The guardian ad litem is not a party to the contract. Thus, there was never any meeting of the minds, and no contract ever existed.

{¶58} The majority notes that Cari never objected to the magistrate's report in upholding the trial court's adoption of the shared parenting plan. This is putting the cart before the horse. No plan to which objection could be made existed until after the magistrate's decision issued.

{¶59} R.C. 3109.04(A) indicates a hearing should be held before any allocation of parental rights and responsibilities. When the allocation of such rights and responsibilities is contested, hearing must be held. Further, Loc.R. 8 indicates a hearing would have been appropriate to resolving the objections raised by Cari in opposing the proposed plan. The guardian ad litem filed a motion requesting an independent psychological evaluation of Ian, for custody placement, May 21, 2004, which specifically referenced the acrimony between Cari and Douglas, and their inability to agree regarding a parenting schedule. As of May 4, 2004, the trial court set this

matter for trial, acknowledging the unresolved parenting issues. Then, inexplicably, it canceled trial and entered its final decree of divorce June 10, 2004, despite the lacuna of evidence in the record on the vital parenting issues.

{¶60} Under all these circumstances, the trial court abused its discretion in approving the shared parenting plan.

{¶61} I respectfully dissent.