[Cite as *Cireddu v. Clough*, 2010-Ohio-5401.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JAMES V. CIREDDU, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2010-L-008**
- vs -	:	
STEPHANIE Y. CLOUGH,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Juvenile Court, Case No. 2008 CV 02029.

Judgment: Affirmed in part, and reversed in part.

Hans C. Kuenzi, Hans C. Kuenzi Co., L.P.A., 410 Skylight Office Tower, 1660 West Second Street, Cleveland, OH 44113 (For Plaintiffs-Appellees).

James P. Koerner, 10 West Erie Street, #106, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Appellant, Stephanie Clough, appeals the Judgment Entry of the Lake County Juvenile Court, adopting the magistrate's decision granting James Cireddu legal custody of Clough and Cireddu's two children, G.C. and J.C., requiring Clough to pay child support, and holding Clough in Contempt of Court. For the following reasons, we affirm in part, and reverse in part the decision of the trial court.

{¶2} Clough and Cireddu began dating in December of 2004. The couple conceived a child in March of 2005. Cireddu testified at trial that Clough had informed him in July of 2005 that she had a miscarriage and was no longer pregnant with their

child. Clough and Cireddu stopped dating shortly thereafter. Clough moved to Columbus in order to attend medical school at Ohio State University. Cireddu moved to Toledo, also to attend medical school.

{¶3} The parties had no further contact until February of 2008, when Clough and Cireddu briefly saw each other while performing medical rotations at Riverside Hospital in Columbus. Soon thereafter, Clough contacted Cireddu on the Internet, via instant messaging. Clough informed Cireddu that she had not had a miscarriage and had in fact delivered their child, J.C., on January 18, 2006. Subsequently, Clough and Cireddu resumed their relationship and Cireddu moved into Clough's apartment in Columbus. Clough then became pregnant with the couple's second child, G.C. The couple later engaged, but ended their relationship in July of 2008, prior to the birth of G.C. on December 11, 2008.

{¶4} On October 14, 2008, Cireddu filed a complaint with the Lake County Court of Common Pleas, Juvenile Division, to determine custody and also requesting parenting time. Prior to the trial on this complaint, the court conducted a hearing and granted Cireddu eight hours of parenting time a week with the children, which was later increased to sixteen hours of parenting time per week.

{¶5} Prior to trial, Cireddu filed various other motions with the court, including a Motion to Extend Parenting Time, a Motion for Shared Parenting, and two Show Cause Motions. On July 10, 2008, the trial began regarding these motions. The following was testified to at trial.

{¶6} Both children lived with Clough's parents in Madison, Ohio, for their entire lives. Clough also lived there during the majority of this time, while commuting to medical school in Columbus to take exams and complete medical rotations. After

Clough graduated from medical school, she began her residency at Ohio State University Medical Center in Columbus and wanted to move the children to Columbus. Cireddu filed an Ex Parte Motion for Temporary Restraining Order, which the court initially granted, barring Clough from taking the children to Columbus. After a hearing conducted on June 17, 2009, the court determined that Clough could take the children to Columbus but must transport the children to Cireddu, who is currently performing his residency in Cleveland, for 16 hours of visitation each week.

{¶7} Clough testified that Cireddu was abusive to both her and to J.C. On June 21, 2009, J.C. sustained an injury to her face while in Cireddu's care. Clough testified that J.C. stated that Cireddu punched J.C. in the face. Cireddu testified that J.C. fell while climbing up the steps of playground equipment at a park.

{¶8} Cireddu testified that, subsequent to the injury on June 21, Clough would no longer allow him to see the children. Cireddu filed two Show Cause Motions with the court, asserting that Clough failed to deliver the children for parenting time on two separate occasions, in violation of March 25, 2009 and June 17, 2009 court orders granting Cireddu parenting time.

{¶9} Dr. Nancy Huntsman, a psychologist appointed by the court to conduct an evaluation of both parents and the children, testified that she did not believe Clough would foster a relationship with Cireddu if she was granted legal custody. Although Dr. Huntsman initially submitted a recommendation that the children continue living with Clough's parents, upon learning that Clough was moving the children to Columbus, Dr. Huntsman recommended that legal custody should be given to Cireddu.

{¶10} On August 13, 2009, the magistrate issued a Magistrate's Decision, stating that shared parenting was not feasible in this case and would not be in the best

interests of the children. The magistrate concluded that Clough "is not likely to honor court-ordered parenting time with [Cireddu] nor is she likely to encourage the sharing of love, affection, and contact between the children and [Cireddu]." Additionally, the magistrate concluded that the geographical distance between the parents was not conducive to shared parenting. After concluding that Clough would not foster a relationship between the children and Cireddu, the magistrate found that legal custody should be granted to Cireddu and required Clough to pay $1,181.97 per month in child support. The magistrate determined that Clough should have parenting time on alternating weekends and one midweek visit per week. Clough was also found to be in Contempt of Court for refusing to allow Cireddu to exercise any parenting time with his children after the incident that occurred on June 21, 2009, and Clough was ordered to spend 30 days in the Lake County Jail and pay a fine of $250. The jail time was suspended and the contempt could be purged by obeying all pending orders pertaining to parenting time. Clough filed objections to the magistrate's decision on August 27, 2009.

{¶11} On December 22, 2009, the trial court overruled Clough's objections and adopted the magistrate's decision in full. The court made one change, changing the beginning date of the transition of custody of the children from August 21, 2009, to December 25, 2009. The transition of custody was to occur slowly over the course of four weeks, at the end of which Cireddu would have full custody and possession of the children.

{¶12} On January 20, 2010, Clough filed a Motion to Stay with this court. Clough asserted that "[i]rreparable, permanent harm will be occasioned to the minor children if the Judgment Entry is not stayed pending determination on appeal." Clough

stated that Cireddu has physically struck the children and that they have become scared since beginning the custody transition period in December of 2009. This motion was denied, with the court stating that a motion to stay had already been filed with the trial court and denied. The court noted that the trial court "is clearly in the best position to judge the general propriety of the assertions set forth in Ms. Clough's motion to stay." Clough filed a renewed motion for a stay, which was also denied by this court.

{¶13} Clough timely appeals and raises the following assignments of error:

{¶14} "[1.] The trial court erred and abused its discretion in awarding Appellee full legal custody of the minor children.

{¶15} "[2.] The trial court erred and abused its discretion by finding Appellee's Motion to Show Cause to be well taken.

{¶16} "[3.] Trial court erred and abused its discretion when it ordered Appellant to pay child support to the Appellee commencing on October 1, 2009."

{¶17} In her first assignment of error, Clough asserts that the trial court erred and abused its discretion in awarding legal custody to Cireddu.

{¶18} "Legal custody vests in the custodian the physical care and control of the child while residual parental rights and responsibilities remain intact." *In re Memic*, 11th Dist. Nos. 2006-L-049, 2006-L-050, and 2006-L-051, 2006-Ohio-6346, at ¶24, quoting *In re Fulton*, 12th Dist. No. CA2002-09-236, 2003-Ohio-5984, at ¶7; R.C. 2151.011(B)(19). "Thus, legal custody is not as drastic a remedy as permanent custody because a parent retains residual rights and has the opportunity to request the return of the children." Id. (citations omitted).

{¶19} On appeal, appellate courts only review legal custody determinations for abuse of discretion. Id. at ¶25; *In re A.W.–G.*, 12th Dist. No. CA2003-04-099, 2004-

Ohio-2298, at ¶6; *In re Gales*, 10th Dist. Nos. 03AP-445 and 03AP-446, 2003-Ohio-6309, at ¶12. "The highly deferential abuse of discretion standard is particularly appropriate in child custody cases, since the trial judge is in the best position to determine the credibility of the witnesses and there 'may be much that is evident in the parties' demeanor and attitude that does not translate well to the record.'" *Salisbury v. Salisbury*, 11th Dist. Nos. 2005-P-0010 and 2005-P-0084, 2006-Ohio-3543, at ¶18, citing *Wyatt v. Wyatt*, 11th Dist. No. 2004-P-0045, 2005-Ohio-2365, at ¶13 (citations omitted). A reviewing court is not to weigh the evidence, "but must ascertain from the record whether there is some competent evidence to sustain the findings of the trial court." *Clyborn v. Clyborn* (1994), 93 Ohio App.3d 192, 196.

{¶20} "The 'best interest of the child' should be the overriding concern in any child custody case." *Mills v. Mills*, 11th Dist. No. 2002-T-0102, 2003-Ohio-6676, at ¶37, citing *Miller v. Miller* (1988), 37 Ohio St.3d 71, 75 (citations omitted). "In determining the best interest of a child *** the court shall consider all relevant factors, including, but not limited to:" 1) the parents' wishes; 2) the child's wishes; 3) the child's relationship with his or her parents, siblings or any other person who may affect the child; 4) the child's adjustment to his or her home, school, and community; 5) the parties' mental and physical health, 6) which parent will facilitate visitation or parenting rights of the other parent; 7) a parent's failure to make child support payments; 8) whether the child was abused or neglected by either parent; 9) whether the residential parent has denied the other parent his or her visitation or parenting rights; and 10) whether either parent has moved out of state or intends to move out of state." Id., citing R.C. 3109.04(F)(1).

{¶21} The magistrate concluded that several factors were not applicable in this case. These factors included the children's wishes, whether a parent has failed to pay

court-ordered child support, and whether a parent has been convicted of abuse. The magistrate found importance in the fact that Clough was not willing to facilitate a relationship between the children and Cireddu. The magistrate also found that Clough often denied Cireddu court ordered parenting time. Ultimately, the magistrate weighed and discussed each of the best interest factors before concluding that Cireddu should be granted legal custody of the children.

{¶22} Clough contends that the court failed to give "appropriate consideration" to the fact that Clough has been the primary care giver and thus her relationship with the children was stronger than Cireddu's.

{¶23} However, a child's relationship with his or her parents is only one of the factors suggested in R.C. 3109.04(F)(1). The court may consider the primary caretaker doctrine along with the other factors in R.C. 3109.04, "but the doctrine does not rise to the level of a presumption." *Meaney v. Meaney*, 11th Dist. No. 2009-L-050, 2010-Ohio-1969, at ¶49, quoting *Bradbeer v. Bradbeer*, 11th Dist. No. 92-L-057, 1993 Ohio App. LEXIS 2184, at *8-9.

{¶24} It is clear from the magistrate's decision that the magistrate considered the primary caretaker factor, along with every other factor in R.C. 3109.04. Although Clough may have been the primary caretaker for the children for the majority of their lives, this factor alone is not the only consideration in determining custody. Additionally, the magistrate concluded in the findings of fact that Clough told Cireddu that she had a miscarriage and was no longer pregnant. Therefore, Cireddu had little contact with J.C. for the first two years of her life due to the behavior of Clough. The court considered this when determining how much weight to give the primary caretaker factor against all of the other factors and did not err in this regard.

{¶25} Clough also asserts that the court erred in making credibility determinations about Clough, Cireddu, and several witnesses at trial. Clough asserts that the trial court erred in determining that Cireddu was more credible than her.

{¶26} Generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, at the syllabus. The factfinder may believe all, some, or none of the testimony of each witness appearing before it. *State v. Brown*, 11th Dist. No. 2002-T-0077, 2003-Ohio-7183, at ¶53. "Deference to the trial court on matters of credibility 'is even more crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well.'" *Dexter v. Dexter*, 11th Dist. No. 2006-P-0051, 2007-Ohio-2568, at ¶11 (emphasis sic), quoting *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶27} As Clough points out in her brief, much of the evidence at trial was simply the testimony of Clough and Cireddu, with little outside proof of the statements. This only magnifies the importance of deference to the trial court's determinations of credibility.

{¶28} The magistrate and trial court had several reasons to doubt Clough's credibility. Clough has made many accusations claiming that Cireddu was abusive, without providing any support or evidence to prove these claims. According to testimony presented at trial, Clough has also made similar accusations against previous boyfriends. Clough filed a complaint that Cireddu abused J.C. with Child Protective Services (CPS), which was unfounded. Clough also failed to follow court orders on at least one occasion, by not allowing Cireddu to see his children for court-ordered

parenting time. Clough testified in court that she would continue to violate the court's order allowing Cireddu parenting time with the children.

{¶29} There was evidence presented at trial to support the magistrate and the court's determination that Clough was not credible. As the trial court is in a better position to determine credibility, especially in custody disputes, we cannot say that the trial court abused its discretion when determining that Clough was not credible.

{¶30} Clough further asserts that the court erred when determining that Cireddu was credible. Clough argues that Cireddu lied on several occasions during trial.

{¶31} It appears that Clough is mischaracterizing many of Cireddu's statements. Although Cireddu may have made a few inconsistent statements, they do not rise to the level of lies. For example, Clough asserts that Cireddu was lying when he testified that she told him she had a miscarriage but then testified that he later asked what happened with the pregnancy. Clough characterizes this as a lie but it could simply mean that Cireddu was concerned about Clough's health. The magistrate was in a better position than this court to evaluate whether Cireddu was being truthful and credible during his testimony.

{¶32} Clough also asserts that Katherine Henkels, a friend of Cireddu who testified at trial, was not a credible witness because she inaccurately testified about her employment and "improperly" paid a visit to influence the testimony of one of Clough's witnesses, Gail Heller.

{¶33} Again, it appears that Clough is mischaracterizing the facts. Clough can present no evidence of any action taken by Henkels to improperly influence Heller's testimony. The fact that Heller may have believed Henkels should not have paid her a visit is not evidence that Henkels attempted to influence Heller's testimony.

Additionally, the fact that Henkels mistakenly said she worked for an organization called CHOICES when she actually worked for Ohio State performing data collection *at* CHOICES does not mean that Henkels was "not truthful." The court did not abuse its discretion when determining Henkels was a credible witness.

{¶34} Clough argues that Dr. Huntsman, the court-appointed psychologist, was biased in favor of Cireddu. To support this argument, she asserts that Huntsman knew Cireddu's counsel, Hans Kuenzi, because they are former co-workers.

{¶35} Although Kuenzi and Huntsman have worked together in the past, Clough presents no evidence as to how this caused a bias. Evidence presented at trial showed that Huntsman interviewed both Clough and Cireddu and visited both of their homes. Huntsman appears to have performed her job in a way that any psychologist would have done. That Huntsman had more communications with Cireddu because Cireddu called her and Clough did not is not evidence that Huntsman was biased. The court did not err in determining that Huntsman, who has testified as a court-appointed psychologist in at least 100 trials, was credible.

{¶36} Clough finally argues that the court erred when it concluded that the injury suffered by J.C. on June 21, 2009, was not a result of abuse or neglect. Clough points to the testimony of Dr. Phillip Scribano as evidence that the injury was caused by abuse.

{¶37} Dr. Scribano testified that the injury suffered by J.C. was consistant with abuse. However, he also testified that the injury could have been caused by *any* blunt force trauma to the head, such as a fall. Henkels and Cireddu both testified that J.C. fell and bumped her head at the park. Additionally, CPS performed an investigation and found Clough's allegation of abuse to be unfounded.

{¶38} The magistrate and the trial court did not abuse its discretion when making determinations of the credibility of any of the witnesses. Therefore, using the credibility of the witnesses as an aid to determining which parent should be granted legal custody was proper.

{¶39} The first assignment of error is without merit.

{¶40} In her second assignment of error, Clough asserts that the court abused its discretion by finding her in Contempt of Court. Clough argues that she did not deny Cireddu parenting time, but instead asked that such parenting time be supervised because Clough believed Cireddu may be abusing the children.

{¶41} "[I]n a contempt proceeding, a reviewing court must uphold the trial court's decision absent a showing that the court abused its discretion." *Nolan v. Nolan*, 11th Dist. No. 2007-G-2757, 2008-Ohio-1505, at ¶28, citing *Winebrenner v. Winebrenner*, 11th Dist. No. 96-L-033, 1996 Ohio App. LEXIS 5511, at *7.

{¶42} "A finding of civil contempt requires clear and convincing evidence that the alleged contemnor has failed to comply with the court's prior orders." *Willoughby v. Masseria,* 11th Dist. No. 2002-G-2437, 2003-Ohio-2368, at ¶25, citing *Moraine v. Steger Motors, Inc.* (1996), 111 Ohio App.3d 265, 268. "In order to be clear and convincing, evidence must leave the trier of fact with the firm conviction or belief that the allegations involved are true." Id., citing *Moraine*, 111 Ohio App.3d at 268, citing *Cross v. Ledford* (1954), 161 Ohio St. 469, 477.

{¶43} On June 17, 2009, the magistrate ordered that Cireddu would have 16 hours of parenting time per week and that Clough was to provide all transportation necessary to allow for this parenting time to occur. Clough stated in her testimony at trial that she was not willing to have the children visit with Cireddu because she thought

he was abusive. When asked by Kuenzi whether she was denying Cireddu visitation time based on the fact that she believed Cireddu abused J.C., Clough testified that she "feel[s] for the safety of her children and decided that they should not have unsupervised visitation." When asked by Kuenzi whether she would withhold visitation "for as long as necessary to protect [her kids]," Clough responded that this was "correct." Clough represented in her testimony that she was not willing to continue with, and had not complied with, court-ordered visitation because she believed that abuse had occurred.

{¶44} Additionally, Cireddu testified that Clough was currently preventing him from visiting with his children. Evidence was also presented in the form of the testimony of both of Cireddu's parents, establishing that Clough had no plan of how she would be able to transport the children from Columbus to Cleveland for parenting time with Cireddu. This testimony suggested that Clough did not intend to comply with the court order for parenting time and had not done so since the incident occurred on June 21, 2009.

{¶45} There was no abuse of discretion by the trial court in finding Clough in Contempt of Court, in violation of the June 17, 2009 court order requiring that Cireddu be given parenting time. Clough herself essentially admitted in court that she had not been complying with the court-ordered parenting time. Additionally, testimony of both Cireddu and his parents showed that Clough was not complying with the court order.

{¶46} The second assignment of error is without merit.

{¶47} In her third assignment of error, Clough asserts that the court erred in ordering her to pay child support commencing on October 1, 2009. She argues that she had possession and custody of the children until December 25, 2009, when the court's

judgment ordered the transition of custody to begin. Clough does not challenge the amount of child supported granted by the court. Rather, Clough challenges the date on which the paying of child support was to commence.

{¶48} Cireddu contends that there is no evidence that the transition to his residence from Clough's residence did not occur prior to December of 2009, and therefore the support order commenced at the appropriate time.

{¶49} A trial court's decision regarding child support will not be reversed by a reviewing court unless it is shown that the trial court abused its discretion. *Pauly v. Pauly*, 80 Ohio St.3d 386, 390, 1997-Ohio-105, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144.

{¶50} "It has long been held that the right to child support does not become effective until there has been an actual change of physical custody of the minor child." *Cossin v. Holley*, 5th Dist. No. 2006CA0014, 2007-Ohio-5258, at ¶55. See *Ollangg v. Ollangg* (1979), 64 Ohio App.2d 17, 20-21; *Kline v. Kline*, 11th Dist. No. 90-L-15-175, 1992 Ohio App. LEXIS 1912, at *9-10.

{¶51} Here, the magistrate recommended that the children would begin a transition period from Clough's home to Cireddu's home on August 21, 2009. This period consisted of about one month of shared custody between Clough and Cireddu until Cireddu would ultimately take full legal custody toward the end of September. The court, when reviewing the magistrate's decision, ultimately adopted this finding, but changed the start date of the transition to December 25, 2009. Prior to December 25, the children remained in Clough's custody, pending the court's decision on the objection to the Magistrate's recommendation.

{¶52} Although Cireddu argues in his appellate brief that there is no evidence that the transition did not begin before December, the record shows that the children remained in the Clough home until the end of December. Cireddu stated in his Motion to Advance Hearing Upon Objections to Magistrate's Decision, filed on October 20, 2009, that "[p]ending ruling upon said Objections, the minor children at issue will continue to reside in the home of Wayne and Young Clough," where they have resided for their entire lives. Based on the record, Cireddu and Clough did not begin the transition of custody of the children until the end of December. Therefore, it was an abuse of discretion to award child support to Cireddu when the children remained in Clough's custody and possession.

{¶53} As noted by Clough, it appears that the trial court failed to change the date child support should begin upon changing the date that the transfer of custody would begin. The court accepted all findings made by the magistrate except the date of the custody transfer, which was changed only because the court's judgment was made several months after the magistrate's decision. The magistrate recommended commencing child support only after the transition period was complete and Cireddu had full custody of the children. The trial court's ruling demonstrates an intent to adopt all findings made by the magistrate, which would include allowing child support to begin when Cireddu had the children in his custody and possession.

{¶54} The magistrate recommended that the original custody transition period begin on August 21, 2009, and the parents would share custody throughout the month of September. Additionally, the magistrate recommended that Clough begin paying child support in the first month during which Cireddu had full and continuous legal custody of the children. This was to commence on October 1, 2009. The judge

changed the beginning date of the custody transition period to December 25, 2009. Therefore, Clough and Cireddu would have shared custody throughout the month of January. The proper date for Clough to have begun paying child support would have been February 1, 2010, as this was the first month during which Cireddu had full and continuous legal custody of the children. Therefore, the trial court should have ordered that Clough begin paying child support on February 1, 2010.

{¶55} The third assignment of error is with merit.

{¶56} For the foregoing reasons, the judgment of the Lake County Juvenile Court, ordering Clough to begin paying child support on October 1, 2009, is reversed. We hold that Clough should have begun payment on February 1, 2010. In all other respects, the judgment of the lower court is affirmed. Costs to be taxed against the parties equally.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.