

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

ANDREA L. MUSCARELLA,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NOS. 2010-T-0091 and 2010-T-0098
DARREN MUSCARELLA,	:	
Defendant-Appellee.	:	

Civil Appeals from the Court of Common Pleas, Domestic Relations Division, Case No. 2002 DR 333.

Judgment: Affirmed.

Charles E. Dunlap, 3855 Starr's Centre Drive, Suite A, Canfield, OH 44406 and *William R. Biviano*, Biviano Law Firm, 700 Huntington Bank Tower, 108 Main Avenue, S.W., Warren, OH 44481-1089 (For Plaintiff-Appellant).

Debora K. Witten, Witten & De Matteis, 173 West Market Street, Warren, OH 44481 (For Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Andrea L. Muscarella, appeals from the July 1, 2010 judgment entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, ordering her and appellee, Darren Muscarella, to cooperate with one another in order to obtain a passport for their child, N.J.M., d.o.b. September 10, 2001 ("minor child"), as well as ordering appellee's new wife, Olga Muscarella, to be added to the minor child's school pick-up list. In addition, appellant appeals from the July 23, 2010 judgment

entry, denying her emergency motion to return the minor child from appellee to herself due to appellee's three-day absence during his summer visitation schedule.

{¶2} The parties were married on May 30, 1998, and the minor child was the only offspring born as issue of the marriage. On June 28, 2002, appellant filed a complaint for legal separation against appellee.

{¶3} Following a hearing, the trial court entered a judgment dissolving the parties' marriage on December 23, 2003, and a nunc pro tunc entry on April 12, 2004. Pursuant to those entries, the trial court, inter alia, designated appellant as the primary residential parent and legal custodian of the minor child, with appellee having reasonable parenting time, and ordered appellee to pay child support.

{¶4} On May 19, 2010, appellee filed a motion requesting changes regarding companionship and visitation as well as an order requiring appellant to cooperate in securing a passport for the minor child so that he could travel to Europe with appellee.

{¶5} Prior to the start of the June 29, 2010 hearing, an in-camera interview with the minor child was held by the court. The trial judge ultimately reported that the conversation went well; the minor child is very bright, articulate, really nice, well-rounded, and happy; the minor child thought visitation with appellee was going well; the minor child has a good, strong relationship with his stepbrother and has no problems with his stepmother; and the minor child indicated that his parents had been talking about a trip to Europe and he preferred that they would both "stop."

{¶6} Following the in-camera interview, appellee testified with respect to his current visitation with the minor child under the standard order. He indicated that he married Olga in November 2007, and has a five-year-old stepson. Appellee stated that

the minor child has a very nice relationship with Olga and his stepbrother. He would like for Olga, his mother, and his sister-in-law to have the ability to pick up the minor child from school on any occasions that he is unavailable. Appellee opined that the minor child has a very close relationship with his grandmother as well as a very comfortable one with his aunt.

{¶7} Appellee further testified that Olga is from Russia and has family there as well as in Germany. He would like for appellant to cooperate with him in order to get a passport for their son so that he may take him on a vacation overseas someday. Appellee stated that pursuant to the terms of Olga's divorce, her son had been given permission from the Portage County Court to go to Germany for a month. He said that the longest he would like to go to Europe with the minor child would be for ten days. Appellee indicated that he would permit the minor child to communicate with appellant on a daily basis via Skype if he were allowed to take him to Europe. Appellee would love the opportunity to expose his son to a different culture and to experience traveling. He stressed that Olga has not had any political problems in Russia, Germany, or the United States.

{¶8} According to Olga, she has been in America for over seven years and is a United States citizen. Olga testified that she really likes the minor child, they get along well, and have a very good relationship. Olga indicated that she, appellee, her son, and the minor child traveled domestically together the previous weekend and had a wonderful time. She stated that her son was three years old the first time he traveled to Europe and had no problems. On cross-examination, Olga said that the minor child is very attached and has a strong relationship with appellant.

{¶9} Dr. Lynn DiMarzio Bertolini, a pediatric psychologist, testified that the minor child has been a patient of hers since November 2007. Her initial diagnosis of the minor child was “adjustment reaction with emotional features, including some separation and anxiety issues.” The minor child also has an eating disorder, which is psychological rather than medical, and he is being treated for that at the Cleveland Clinic. Dr. Bertolini indicated that the minor child came to see her the day before the hearing. She said that he easily disengaged from appellant, had no anxiety, and the two had a pleasant visit. Dr. Bertolini stated that the minor child enjoyed his last trip with appellee, Olga, and his stepbrother. She believed that a European trip would eventually be a wonderful, cultural experience for the minor child. Dr. Bertolini also noted that the minor child had a fear of flying as well as long periods away from appellant and friends. She opined that he is very naïve and needs reassurance. She stated that kids in general pick up on their parents’ anxieties and fears. Dr. Bertolini testified that it would be beneficial to the minor child to take a shorter plane ride to Disney World in Orlando, Florida as well as to learn some of the language of the country he is planning on traveling to prior to taking a European trip. She noted that an overseas trip is “doable” and that a year would be plenty of time to prepare the minor child for such a vacation.

{¶10} Lastly, appellant testified that the minor child comes back from appellee’s house happy but tired. She is opposed to having anyone else on the school pick-up list except herself and appellee. Appellant stated that she and appellee do not have a good line of communication with each other. She said that the minor child would like to go to Europe “when he is ready” and that the trip would be “great.”

{¶11} Following the hearing and pursuant to its July 1, 2010 judgment entry, the trial court ordered the parties to cooperate with one another in order to obtain a passport for the minor child. The trial court also ordered that Olga's name be added to the minor child's school pick-up list.

{¶12} On July 19, 2010, appellant filed an emergency motion requesting a court order directing appellee, who had their son as part of his summer visitation, to return the minor child to her prior to appellee's departure to Europe. A telephone conference was held by the court with counsel for the parties on July 21, 2010. Pursuant to its July 23, 2010 judgment entry, the trial court denied appellant's emergency motion in which it determined that the minor child would be under the care of his stepmother during appellee's three-day absence of his visitation period.

{¶13} It is from the foregoing July 1 and July 23, 2010 judgment entries that appellant filed timely appeals, asserting the following assignments of error for our review:¹

{¶14} "[1.] The trial court erred when it required the Appellant to cooperate with the Appellee, in obtaining a passport for [N.J.M.], their eight-year old son.

{¶15} "[2.] The trial court erred when it gave companionship rights to Olga Muscarella."

{¶16} In her first assignment of error, appellant argues that the trial court erred by requiring her to cooperate with appellee in order to obtain a passport for the minor child. Appellant believes that as a custodial parent, it is not in her son's best interest to travel with appellee outside of the country given his personality and issues with anxiety.

1. On September 1, 2010, this court sua sponte consolidated appellant's appeals, case Nos. 2010-T-0091 and 2010-T-0098, for purposes of briefing and disposition.

{¶17} “The standard of review which the appellate court uses when reviewing the correctness of a trial court’s determination in a domestic relations case is ‘abuse of discretion.’” *Al-Silham v. Al-Silham* (Nov. 24, 1995), 11th Dist. No. 94-A-0048, 1995 Ohio App. LEXIS 5159, at *5. An abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11.

{¶18} The test for determining if a parent’s request of an ex-spouse to cooperate in obtaining a passport for their minor child is whether or not it is in the best interest of the child. *Van Osdell v. Van Osdell*, 12th Dist. No. CA2007-10-123, 2008-Ohio-5843, at ¶16. “*** [T]he court may take into consideration many factors when addressing the child’s best interest *** [which] include balancing the risks inherent in international travel versus any benefit the child would incur from vacationing abroad.” *Id.* at ¶15.

{¶19} In the instant case, the record before us does not establish any fear or threat of fear that the minor child will be abducted, which is an issue in many cases involving the desire by one parent to obtain a passport for his or her child. Rather, this is a case where one parent wants the opportunity to apply for and receive a passport for his child so that he may, someday, take him on vacation overseas.

{¶20} Again, the trial judge indicated that during the in-camera interview with the minor child, he stated that visitation with appellee was going well; he has a good, strong relationship with his stepbrother; and has no problems with Olga. Appellee testified that he believes a ten-day trip to Europe with himself, the minor child, his stepbrother, and Olga would be an educational opportunity and cultural experience for his son. Appellee

said that he would permit the minor child to communicate with appellant on a daily basis via Skype if he were permitted to take him to Europe. Olga testified that she, appellee, her son, and the minor child had a wonderful time the last time they traveled domestically together. Dr. Bertolini also indicated that the minor child enjoyed his last trip with appellee, Olga, and his stepbrother. Dr. Bertolini believed that a European trip would eventually be a wonderful, cultural experience for the minor child.

{¶21} In its July 1, 2010 judgment entry, the trial court stated:

{¶22} “The parties [a]re Ordered to cooperate with one another to obtain a passport for the minor child. Once obtained, the passport will be held by [appellant’s attorney] as escrow for the parties. It shall not be released without Order of the Court. No trip to Europe will be permitted without agreement of the parties or an Order of the Court.

{¶23} “The Court notes that the psychologist indicated that the trip was ‘doable’ but that much advance preparation would be necessary if the child was to be comfortable with such a trip. The parties should follow a program as outlined by Dr. DiMarzio-Bertolini to help prepare the minor child for an eventual trip to Europe.”

{¶24} Based on the facts presented, we do not agree with appellant that the trial court abused its discretion by ordering her to cooperate with appellee to obtain a passport for the minor child, so that he may, someday, travel to Europe on a ten-day vacation with his father, stepmother, and stepbrother after completing a program to help prepare him for such a trip.

{¶25} Appellant’s first assignment of error is without merit.

{¶26} In her second assignment of error, appellant alleges that the trial court erred by giving companionship rights to Olga.

{¶27} In the case at bar, again, following the June 29, 2010 hearing, appellant filed an emergency motion requesting a court order directing appellee, who had their son as part of his summer visitation, to return the minor child to appellant prior to appellee's departure to Europe. A telephone conference was held by the court with counsel for the parties. Neither side alleged that the minor child was or would be in any danger by placing him under Olga's care during appellee's three-day absence.

{¶28} Pursuant to its July 23, 2010 judgment entry, the trial court denied appellant's emergency motion, stating the following: "The Child is with Father as part of his summer visitation. Father, however, will be out of town on Thursday, Friday and Saturday of the visitation period and the child would be under the care of step mother. *** Counsel for Father indicated that telephone numbers would be exchanged to keep all communication channels open." The trial court also found that the 72-hour provision in the parties' divorce decree only requires appellant to surrender the minor child to appellee if she is absent for 72 hours. There is no language in the decree requiring the same of appellee. The trial judge determined that the 72-hour provision does not apply to appellee due to the limited amount of time he has with the minor child.

{¶29} In support of her position, appellant cites to *In re E.H.*, 9th Dist. No. 04CA008585, 2005-Ohio-1952, *King v. King*, 12th Dist. No. CA2006-01-009, 2006-Ohio-5985, and *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334. We note, however, that appellant's reliance on those cases is misplaced since they deal with non-parents who sought visitation. Here, Olga did not seek visitation rights nor did the trial

court grant her any independent visitation with the minor child. The trial judge did not find any existence of an emergency suggesting it should not allow appellee to share his companionship rights with his son's stepmother during his three-day absence. Also, no court order exists requiring appellee to return the minor child to appellant during such absence. Based on the facts presented, we cannot find that the trial court abused its discretion.

{¶30} Appellant's second assignment of error is without merit.

{¶31} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.