

[Cite as *Koeppen v. Swank*, 2009-Ohio-3675.]

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

MELISSA A. KOEPPEN,	:	
Plaintiff-Appellant,	:	CASE NO. CA2008-09-234
- vs -	:	<u>OPINION</u>
	:	7/27/2009
JASON A. SWANK,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS,  
DOMESTIC RELATIONS DIVISION  
Case No. DR02-08-1018

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**YOUNG, J.**

{¶1} Plaintiff-appellant, Melissa A. Koeppen, appeals a decision of the Butler County Common Pleas Court, Domestic Relations Division, modifying the terms of a shared parenting plan and finding her in contempt of the divorce decree.

{¶2} Melissa and defendant-appellee, Jason A. Swank, were married in 1999.

The marriage produced one child, Anthony, who was born on October 22, 1999. Upon their divorce in January of 2003, the parties entered into a shared parenting plan. The plan was incorporated into their divorce decree. Under the terms of the plan, Melissa was deemed residential parent for school purposes, with Jason receiving parenting time with Anthony on alternating weekends and overnight during weekdays. The plan also required Jason to pay a monthly child support obligation of \$384.02. In the event that either party elected to move outside of Butler County, the plan required them to provide written notice to the other party and to the court of their intent to relocate at least 60 days in advance of a move.

{¶3} At the time the shared parenting plan was filed, both parties resided in Ohio. Melissa was stationed at Wright Patterson Air Force Base in Dayton as an active member of the United States Air Force and Jason resided in Hamilton. In the spring of 2004, Melissa married Nick Koeppen ("Koeppen") a member of the United States Army. On or about August 12, 2004, Melissa notified Jason that she had received a military reassignment to Norfolk Naval Air Station in Virginia and would be relocating there the following October.

{¶4} As a result of Melissa's impending move, Jason petitioned the court to modify his parenting time under the shared parenting plan. The modification was approved in February 2005. Under the terms of the modification, Melissa retained her designation as residential parent for school purposes. Jason was to have parenting time during Anthony's week-long fall break each year, as well as for at least four consecutive weeks in the summer. Jason's parenting time during other school breaks and holidays was to alternate between odd and even-numbered years. The parties were required to

equally divide the transportation costs associated with transferring Anthony between Virginia and Ohio.

{¶15} In 2006, Melissa relocated to Alabama after learning that Koeppen had been reassigned to the Fort Rucker Army Post. The parties did not request further modification of the shared parenting plan, and Jason's parenting time pursuant to the terms of the modified plan remained the same.

{¶16} Subsequently, on March 10, 2008, Melissa notified Jason that Koeppen had been reassigned to a military post in Honolulu, Hawaii. Shortly thereafter, on March 13, 2008, Melissa filed a notice of intent to relocate with the trial court, listing the effective date of the move to Hawaii as April 10, 2008. Melissa also filed a motion to modify Jason's parenting time under the shared parenting plan.

{¶17} In response, Jason petitioned the court to hold Melissa in contempt of the parties' divorce decree for failing to provide him with the required 60 days notice of her intent to relocate to Hawaii. He also moved the court to terminate the parties' shared parenting plan and designate him as legal custodian and residential parent of Anthony for school purposes.

{¶18} In support of his request, Jason expressed concern as to how Anthony's schooling would be affected by the move to Hawaii, which was to be the child's third move in almost four years. He also argued that Melissa had failed to honor the terms of the parties' shared parenting plan. According to Jason, he was not permitted to be involved in any decisions made on Anthony's behalf, and although he was entitled under the plan to have telephone contact with his son on a daily basis, he was only able to speak with him as often as every two or three days. Jason alleged that Koeppen was

interfering with his contact with Anthony, and believed that Koeppen was replacing his role as Anthony's father.

{¶9} The matter was heard by a magistrate on June 12, 2008. In its June 25, 2008 decision, the magistrate recommended that the trial court grant Jason's contempt motion, finding that Melissa was in "technical contempt" of the divorce decree for failing to provide notice of her intent to relocate at least 60 days before the move to Hawaii. The magistrate did not recommend that sanctions be imposed against Melissa as a result of the contempt finding.

{¶10} The magistrate also recommended that the trial court deny Jason's motions to terminate the shared parenting plan and designate him as legal custodian and residential parent. The magistrate reviewed the factors listed in R.C. 3109.04(F) and concluded that based on the testimony at the hearing and the guardian ad litem's report, it was in Anthony's best interest to continue shared parenting.

{¶11} In addition, the magistrate found that it was in Anthony's best interest for Melissa to remain residential parent for school purposes. Although Jason had expressed concern regarding how the move would impact his education, the magistrate determined that Anthony had adjusted well to the schools he attended in Virginia and Alabama. The magistrate also noted that Anthony's previous moves had not adversely affected his relationship with his father. Despite the increased distance, the move to Hawaii would likewise not prevent Jason from exercising the same amount of parenting time with Anthony as he had during previous moves. In order to conform to Anthony's school breaks in Hawaii, the magistrate recommended that Jason have parenting time during some portion of his winter break each year, as well as during each spring and

summer break.

{¶12} With respect to transportation costs, the magistrate recommended that the parties divide the expenses equally. Because an escort was required for Anthony, two-round trip airline tickets were needed for each of his three yearly visits with Jason. The evidence indicated that two round-trip tickets between Hawaii and Ohio were estimated to cost as much as \$1,400, and the parties were encouraged to cooperate with each other in obtaining the lowest-priced airfare.

{¶13} After preparing a revised child support worksheet based on the current income of the parties, the magistrate determined that Jason's monthly support obligation of \$542.03 was not in the best interest of the child, and suggested a deviation of approximately \$155 each month to offset the costs that Jason would incur for his share of the transportation expenses. It was recommended that Jason continue to pay \$384.02 in monthly support.

{¶14} Jason objected to the magistrate's decision, challenging the finding that it was in Anthony's best interest to remain primarily with Melissa. In the alternative, he argued that in addition to parenting time during his son's winter, spring and summer school breaks, he should be afforded additional parenting time during Anthony's week-long fall break every October. Jason argued that if he did not receive parenting time in the fall, there would be "approximately five months in between his visits" with his son. Jason further objected to the magistrate's allocation of transportation costs, arguing that Melissa should be responsible for the expenses associated with transferring Anthony from Hawaii to Ohio. Jason requested to pay the full amount of child support in lieu of half of the transportation costs.

{¶15} In ruling on the objections, the trial court modified the magistrate's decision to allow for Jason to exercise parenting time during Anthony's fall break. The court also modified the order to require Jason to pay the full obligation of child support (\$542.03), with Melissa paying all transportation expenses. The court adopted the remainder of the magistrate's decision.

{¶16} Melissa has appealed the trial court's decision, advancing two assignments of error for our review.

{¶17} Assignment of Error No. 1:

{¶18} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FINDING HER IN CONTEMPT."

{¶19} In her first assignment of error, Melissa argues that the trial court erred in finding her in contempt of the parties' divorce decree. Melissa raises several issues for our review under this assignment, including: (1) whether the trial court had subject matter jurisdiction to entertain Jason's contempt motion; (2) whether a finding of contempt was in error because it was impossible for Melissa to comply with the court's relocation order; and (3) whether she had purged any contemptuous conduct prior to the hearing on the motion.

{¶20} Upon review of the trial court's decision, however, we conclude that we are without jurisdiction to consider Melissa's arguments with regard to the contempt finding. It is well-established that appellate courts have jurisdiction to review only final appealable orders from lower courts. See *In re Adams*, 115 Ohio St.3d 86, 2007-Ohio-4840, ¶26. Under Ohio law, "[c]ontempt of court consists of two elements. The first is a finding of contempt of court and the second is the imposition of a penalty or sanction,

such as a jail sentence or fine. Until both a finding of contempt is made and a penalty [is] imposed by the court, there is not a final order. The mere adjudication of contempt is not final until a sanction is imposed." *Cooper v. Cooper*, 14 Ohio App.3d 327, 328-29, quoting *Chain Bike v. Spoke 'N Wheel, Inc.* (1979), 64 Ohio App.2d 62, 64. See, also, *Lesnoski v. Lesnoski*, Trumbull App. No. 2004-T-0077, 2005-Ohio-6078.

**{¶21}** In its decision, the magistrate found Melissa in contempt of the parties' divorce decree for failing to file the notice of intent to relocate at least 60 days before the move to Hawaii. However, the magistrate did not recommend that sanctions be imposed, concluding that there was no evidence that Melissa attempted to move prior to notifying Jason. The record indicated that Jason was advised of the move on March 10, 2008, the same day that Koeppen received his official military reassignment orders. The trial court adopted the magistrate's decision regarding this issue.

**{¶22}** In light of the fact that no penalty or sanction was imposed against Melissa, the trial court's decision with respect to the contempt finding is not a final order subject to our review on appeal. Melissa's first assignment of error is therefore overruled as moot.

**{¶23}** Assignment of Error No. 2:

**{¶24}** "THE TRIAL COURT ABUSED ITS DISCRETION BY MODIFYING THE MAGISTRATE'S ORDERS."

**{¶25}** In her second assignment of error, Melissa argues that the trial court's modification of the magistrate's decision constituted an abuse of its discretion.

**{¶26}** In ruling on objections to a magistrate's decision, Civ.R. 53(D)(4)(d) requires a trial court to undertake an independent review of the objected matters to

ascertain that the magistrate properly determined the factual issues and appropriately applied the law. In so doing, a court may "adopt or reject [the decision] in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate." *Hampton v. Hampton*, Clermont App. No. CA2007-03-033, 2008-Ohio-868, fn. 3; Civ.R. 53(D)(4)(b). The ultimate authority and responsibility over the magistrate's findings and rulings is vested with the trial court, and its independent analysis may result in a different conclusion than the one reached by the magistrate. *Id.* at ¶13; *McElrath v. Travel Safe.com Vacation Ins.*, Trumbull App. No. 2002-T-0085, 2003-Ohio-7206, ¶25.

{¶27} Accordingly, a decision to modify, affirm or reverse a magistrate's decision lies within the sound discretion of the trial court and should not be reversed on appeal absent an abuse thereof. *Bartlett v. Sobetsky*, Clermont App. No. CA2007-07-085, 2008-Ohio-4432, ¶8, citing *Foster v. Foster*, 150 Ohio App.3d 298, 2002-Ohio-6390, at ¶9. An abuse of discretion is more than error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶28} Melissa raises several issues for our review under this assignment. She initially contends that Jason's objections to the magistrate's decision failed to comply with Civ.R. 53 and, therefore, the trial court should have "summarily rejected" them. We find this argument without merit.

{¶29} Civ.R. 53 (D)(3)(b)(ii) provides that an objection to a magistrate's decision "shall be specific and state with particularity all grounds for objection." This rule requires a party to make timely, specific objections in writing to the trial court, identifying any error

of fact or law in the magistrate's decision. See *In re M.W.R.*, Butler App. Nos. CA2007-04-105, CA2007-04-106, 2007-Ohio-6169, ¶15. Melissa argues that Swank's objections should have been dismissed by the court because they were not specific and were not premised on any factual error or misapplication of law. Melissa contends that the objections merely reiterated arguments previously rejected by the magistrate.

{¶30} Upon review of the record, we note that Melissa failed to raise this issue with the trial court, either in a responsive pleading or at the hearing on Jason's objections. As a result, Melissa has forfeited the right to challenge this issue on appeal.

It is well-established that the failure to raise an alleged error with the trial court deprives the court of an opportunity to correct any error, and forfeits a party's right to challenge the issue for the first time on appeal. See *Ilg v. Ilg*, Summit App. No. 23987, 2008-Ohio-6792, ¶6.

{¶31} Melissa also argues generally that the trial court abused its discretion in modifying the magistrate's order with respect to Jason's parenting time during Anthony's fall break, and by finding that Melissa was the source of the animosity between the parties. Melissa contends that in making these determinations, the trial court ignored the child's best interest and the evidence presented to the magistrate. We disagree with these contentions.

{¶32} R.C. 3109.04(E)(2)(b) permits the court to modify the terms of a shared parenting plan if it determines that the modifications are in the best interest of the child. *Castanias v. Castanias*, Warren App. No. CA2007-01-015, 2008-Ohio-2909, ¶18. Although Melissa argues that the court abused its discretion in granting Jason parenting time during the fall break, she has offered no specific argument in support of her

generalized claim of error.

{¶33} Upon review, we do not conclude that the court's decision was arbitrary, unreasonable or unconscionable. When the shared parenting plan was initially modified in 2005, it clearly provided that Jason was entitled to parenting time during his son's week-long fall break each year. It appears from the record that by and large, the parties honored this arrangement while the child was living in Virginia and Alabama, and the record is devoid of any evidence to suggest that this continued practice would not be in the child's best interest while residing in Hawaii. The trial court indicated in its entry that it had considered the best interest of the child, and in light of the evidence regarding the past practice between the parties, the court's decision regarding this issue was not an abuse of its discretion.

{¶34} We likewise find no abuse of discretion in the court's determination that a level of animosity existed between the parties as a result of Melissa's "failure to put [Jason's] role as [the child's] father first." In its decision, the trial court cited to several examples of the apparent animosity between the parties. There was testimony at the hearing that Melissa had enrolled Anthony in a youth baseball program with the last name of Koeppen, instead of Swank. The court also referenced Koeppen's testimony regarding his desire to adopt Anthony, and the "continued discussion" between the parties regarding Jason's relinquishment of his parental rights.

{¶35} Moreover, as initially noted by the magistrate, there was additional evidence presented that Koeppen had interfered with Jason's contact with the child. The trial court noted that Melissa had permitted Koeppen to state in email correspondence to Jason that he had "no say" in Anthony's participation in family

counseling, and that Anthony did not have to speak to Jason when he called. According to Jason, these actions contributed to his concern that he was being replaced by Koeppen as Anthony's father, and that Melissa was hindering his relationship with his son.

**{¶36}** Finally, Melissa challenges the trial court's decision requiring her to be responsible for the transportation costs associated with Jason's parenting time. Melissa argues that the court abused its discretion in this regard, as there was no additional evidence presented to the trial court to "change the magistrate's findings regarding the cost of airfare, the income of the parties, or the need to deviate from unjust statutory guidelines that were not in the child's best interest."

**{¶37}** Contrary to Melissa's argument, the court was not required to accept the magistrate's finding on this issue. As discussed above, the court was permitted to adopt, reject, or modify the decision, in whole or in part. See Civ.R. 53(D)(4)(b). In addition, as required under Civ.R. 53(D)(4)(d), the court indicated in its decision that it had reviewed the trial transcript, arguments of counsel, and applicable case law.

**{¶38}** Furthermore, our review of the record reveals that Melissa did not contest Jason's argument at the objections hearing that she should be responsible for the transportation costs, and there is no evidence to indicate that the costs associated with transporting the child from Hawaii to Ohio four times each year would create a financial hardship for Melissa, or would otherwise overburden her. Melissa acknowledged that the increased distance was difficult in terms of facilitating Jason's parenting time with the child, and testified that although she preferred not to pay all transportation costs, she was "fully prepared to help with the travel" and was willing to "go a little farther than I

have \* \* \*." There was additional evidence presented that free military stand-by flights may be available to transport Anthony and his escort, and the \$155 increase in monthly child support received by Melissa as a result of the court's order would likely offset some of the costs of commercial air travel. Accordingly, we do not conclude that the court's decision to require Melissa to pay all transportation expenses constituted an abuse of its discretion.

{¶39} As a result of the foregoing, appellant's second assignment of error is overruled.

{¶40} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.