[Cite as *Anderson v. Anderson*, 2009-Ohio-5636.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

TIMOTHY ANDERSON,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-03-033
	:	O P I N I O N
- vs -		10/26/2009
	:	
RACHEAL ANDERSON nka HILL,	:	
Defendant-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 01DR26100

Timothy Anderson, 6925 Harriett, Franklin, Ohio 45066, plaintiff-appellee, pro se

Andrea G. Ostrowski, 20 S. Main Street, Springboro, Ohio 45066, for defendant-appellant, Racheal Anderson nka Hill

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Jennifer Coatney, 20 S. Main Street, Springboro, Ohio 45066, guardian ad litem

HENDRICKSON, J.

{¶1} Defendant-appellant, Racheal Anderson nka Hill, appeals a decision of the Warren County Common Pleas Court, Domestic Relations Division, regarding custody and parenting time matters involving her daughter. For the reasons set forth below, we affirm the

decision of the trial court.

{¶2} Racheal and Timothy Anderson were married in 2000 and have one child together, daughter Victoria, who was born prior to the marriage in December of 1999. Upon the parties' divorce in 2002, Racheal was designated residential and custodial parent of Victoria.

{¶3} Subsequently, in January 2007, Victoria's paternal great-grandmother and appellee in this case, Marilyn Anderson, moved to intervene in the proceeding as a third party. According to Marilyn, Racheal had placed Victoria in her care and she had been raising her since she was a baby. The trial court permitted Marilyn to intervene, and she was awarded temporary custody of Victoria in an order dated February 12, 2007, pending a hearing on her additional motion to reallocate parental rights and responsibilities. Marilyn requested that the court designate her as Victoria's legal custodian, and that Racheal be ordered to pay child support for Victoria's care.

{¶4} Subsequently, on May 7, 2007, the parties entered into an agreed order pursuant to which Marilyn was designated the "custodial parent" of Victoria, with Racheal receiving weekend parenting time on a "three week rotating basis" with Timothy and Marilyn. Both Racheal and Timothy were ordered to pay child support. According to the record, this arrangement remained in effect for several months until Racheal's relationship with Marilyn deteriorated. On February 20, 2008, Racheal filed a motion to show cause regarding Marilyn's alleged failure to comply with the terms of the May 7 order. Racheal argued that Marilyn had denied her parenting time with Victoria.

{¶5} On April 3, 2008, Marilyn moved the court to modify Racheal's parenting time with Victoria, and further moved the court for an order prohibiting all parties from smoking cigarettes in Victoria's presence. Marilyn argued that Victoria had expressed concerns, fears and reluctance over spending time with her mother, and had returned home from parenting

time smelling of cigarette smoke as a result of Racheal smoking in her home and car. Marilyn also requested that a guardian ad litem be appointed for Victoria.

{¶6} In response to Marilyn's requests, on April 4, 2008, Racheal filed a motion to modify parenting time to conform to the court's basic parenting schedule. Racheal sought to increase her parenting time with Victoria to every other weekend and on one evening during the workweek. Shortly thereafter, on April 18, 2008, Racheal moved the court to end the temporary custody she contended was awarded to Marilyn in February 2007, and requested that the court reinstate her as Victoria's residential and custodial parent. Racheal asserted that the May 7 order did not grant legal custody of Victoria to Marilyn.

{¶7} After appointing a guardian ad litem, the trial court magistrate held a hearing on the parties' motions on September 15, 2008, which was continued in progress to November 13, 2008. In its December 4, 2008 decision, the magistrate denied Racheal's motion to end the temporary custody granted to Marilyn, finding that the February 2007 temporary custody order was superseded by the May 7 agreed order designating Marilyn as the custodial parent of Victoria. The magistrate also denied Racheal's motion for custody, determining that based on the evidence presented at the hearing, it was in Victoria's best interest to reside primarily with Marilyn. In making its determination, the magistrate referenced the report of the guardian ad litem, which recommended that Victoria reside primarily with her great-grandmother.

{¶8} In denying Racheal's motion to show cause, the magistrate found that Racheal failed to demonstrate "any specific instances" of denied parenting time. In addition, after determining that it was not in Victoria's best interest to be exposed to cigarette smoke, the magistrate imposed a no-smoking ban, finding that all parties "shall prohibit cigarette smoke around [Victoria]."

{¶9} With respect to both Racheal's and Marilyn's requests to modify parenting time,

the magistrate noted that testimony at trial revealed that on many occasions, Victoria "cries, screams and throws a fit" before leaving Marilyn's house for parenting time with Racheal. The magistrate also noted that it had interviewed Victoria separately on November 20, 2008, and she had indicated her preference to spend less time at her mother's house. Although the May 2007 order permitted Racheal to exercise weekend parenting time on a rotating basis, the magistrate found that it was in Victoria's best interest to have more frequent contact with Racheal, but to shorten the duration of each visit. As a result, the magistrate modified Racheal's parenting time to alternating weekends from Saturday at 9:00 a.m. to Sunday at 6:00 p.m., as well as every Thursday evening from 6:00 p.m. to 8:30 p.m.

{¶10} Racheal filed objections to the magistrate's decision. The trial court overruled her objections and adopted the magistrate's findings in its final order dated February 23, 2009. Racheal now appeals the trial court's order, raising four assignments of error for our review.

{¶11} As an initial matter, we note that a trial court's determinations in domestic relations cases generally fall within the discretion of the court and will not be reversed on appeal absent a showing of an abuse of discretion. See *Gamble v. Gamble*, Butler App. No. CA2006-10-265, 2008-Ohio-1015, ¶3. 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. We are mindful of this standard in addressing the following assignments of error.

{¶12} Assignment of Error No. 1:

{¶13} "THE TRIAL COURT ERRED TO THE PREJUDICE OF [RACHEAL] WHEN IT GRANTED CUSTODY OF THE CHILD TO [MARILYN]."

{¶14} In her first assignment of error, Racheal argues that the trial court applied the wrong legal standard in overruling her motion for custody. Racheal contends that the May

2007 order merely detailed the parties' parental rights and responsibilities relative to Victoria, and did not award custody to Marilyn. Racheal argues that at the time she filed her motion for custody, Marilyn had only temporary custody of Victoria pursuant to the February 2007 order. As a result, Racheal contends that the trial court erred in treating her motion as one for custody modification, and that it should have reviewed her motion under a parental suitability standard rather than under a change of circumstances standard.

{¶15} At the outset, we note that although a trial court has broad discretion in determining custody matters, a court has no discretion to apply an improper legal standard in a custody dispute between a parent and a nonparent and, therefore, such "process flaws" are reviewed on appeal without deference to the trial court. *Purvis v. Hazelbaker*, 181 Ohio App.3d 167, 2009-Ohio-765, ¶9.

{¶16} It is undisputed that a parent has a fundamental right to raise her own child. As stated by the Ohio Supreme Court, "[t]he United States Supreme Court has stated that the right to raise one's children is an 'essential' and 'basic civil right.' Parents have a 'fundamental liberty interest' in the care, custody, and management of the child. Further, it has been deemed 'cardinal' that the custody, care and nurture of the child reside, first, in the parents." *In re Murray* (1990), 52 Ohio St.3d 155, 157. (Internal citations omitted.) As a result, the Ohio Supreme Court has held that in private custody disputes between a parent and a nonparent, a trial court may not award custody to the nonparent without first making a finding of parental unsuitability, that is, without first determining that the parent "abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child." *In re Perales* (1977), 52 Ohio St.2d 89 at syllabus; See, also, *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208 at syllabus.

{¶17} However, a parental unsuitability finding is required only in the context of an

original custody determination between a parent and a nonparent. This court has previously held that if an original custody award between a parent and a nonparent has been made, the party seeking to modify that award must show a change in circumstances even if the noncustodial party is a parent and the custodial party is a nonparent. *Kenney v. Kenney*, Warren App. No. CA2003-07-078, 2004-Ohio-3912, ¶15. Other courts of appeal have similarly held that once custody, has been awarded to a nonparent, a parental unsuitability determination will not be applied to later custody modification requests. See *Purvis*, 2009-Ohio-765 at ¶10; *Wilburn v. Wilburn* (2001), 144 Ohio App.3d 279, 283. Such requests are instead reviewed under the change of circumstances/best interest standard contained in R.C. 3109.04. *Purvis* at id.

{¶18} Contrary to Racheal's argument, our review of the May 2007 agreed entry indicates that it was not merely an additional temporary arrangement between the parties regarding their respective parental rights and responsibilities. The express terms of the entry clearly designate Marilyn the custodial parent of Victoria, with Racheal being awarded parenting time. In its decision, the trial court found that subsequent to the grant of temporary custody the parties had "appeared in open [c]ourt and read an agreement on the record, which stated that [Marilyn] was designated custodial parent of [Victoria]."[1] This agreement was then memorialized in the parties' May 2007 agreed entry. As the trial court noted, the record indicates that Racheal signed the agreed entry on April 27, 2007, and thus by her own voluntary actions relinquished legal custody rights to Victoria. "Parents may undoubtedly waive their right to custody of their children and are bound by an agreement to do so." *Massito v. Massito* (1986), 22 Ohio St.3d, 63, 65. Although she did not forfeit or lose all of her parental rights, her voluntary placement of Victoria in Marilyn's custody in May of 2007

1. A transcript of that hearing is not included on the record on appeal and we therefore must presume the regularity and validity of the trial court's proceedings. See *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d

prevents her from now asserting her paramount rights as a natural parent. *Bragg v. Hatfield*, 152 Ohio App.3d 174, 2003-Ohio-1441, ¶19.

{¶19} Upon review, we find that Racheal's motion for custody did not constitute an "original" custody determination and, therefore, the trial court properly treated her motion as one for custody modification. In so doing, the court correctly applied a change of circumstances test pursuant to R.C. 3109.04, and was not required to make a parental unsuitability finding in determining whether Victoria's custody arrangement should be modified.[2]

{¶20} Racheal's first assignment of error is overruled.

{¶21} Assignment of Error No. 2:

{¶22} "THE TRIAL COURT ERRED TO THE PREJUDICE OF [RACHEAL] WHEN IT REVISED THE VISITATION SCHEDULE."

{¶23} In her second assignment of error, Racheal argues that that the trial court erred in failing to award her parenting time in accordance with the court's basic parenting time schedule.

{¶24} In establishing a specific parenting time schedule, a trial court is required to consider the factors set forth in R.C. 3109.051(D). These include, in relevant part, the prior interaction and interrelationship between the parent and child; their geographic proximity and available time; the age, health, and safety of the child; the mental and physical health of all the parties; each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights; the wishes and concerns of the child, as expressed to the court; whether either parent previously has been convicted of or pleaded guilty to any

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2. Racheal has not assigned as error on appeal the trial court's determination that no significant change of circumstances existed to modify custody in this case and, therefore, we will not address the propriety of the court's findings in this regard.

criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether the residential parent has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court; whether the parent has established a residence or is planning to establish a residence outside this state; and any other factor bearing on the best interest of the child. See R.C. 3109.051(D)(1)-(16). After considering all of the factors listed in this section, the trial court, in its sound discretion, must determine what parenting time schedule is in the best interest of the child. See *Braatz v. Braatz,* 85 Ohio St.3d 40, 45, 1999-Ohio-203.

{¶25} The court's basic parenting schedule provides for parenting time on alternating weekends beginning at 6:00 p.m. on Friday and ending at 6:00 p.m. on Sunday, with additional visitation each Wednesday (or any other weekday by agreement) from 5:30 p.m. to 8:30 p.m. Racheal contends that it was error for the court to deny her parenting time on Friday evenings or on one weekday evening each week. Contrary to her argument, Racheal was awarded parenting time with Victoria every Thursday evening from 6:00 p.m. to 8:30 p.m., with additional parenting time as Racheal and Marilyn agree. Accordingly, we must consider whether the court abused its discretion in fashioning a parenting schedule that excluded time on Friday evenings.

{¶26} As the magistrate initially noted, several witnesses testified to observing Victoria cry and protest prior to leaving her great-grandmother's house for parenting time with her mother. One witness testified that Victoria was nearly "hysterical" at times. The trial court adopted the magistrate's determination that there was no evidence presented concerning a reason for Victoria's behavior, other than the fact that she was simply more comfortable at Marilyn's home. Although Racheal had made great strides within the past year to improve her parenting responsibilities, the magistrate emphasized that her relationship with Victoria

needed to be rebuilt. More frequent contact and shorter visits between the two would hopefully aid in accomplishing that goal.[3]

{¶27} In concluding that the parenting time provided under the court's basic schedule was not in the best interest of Victoria, it is clear that the trial court considered the relevant statutory factors set forth above, and focused on the specific factors regarding the interaction and relationship between Victoria and Racheal, Victoria's stated wishes and concerns with regard to parenting time, as well as the behavioral issues Victoria exhibited prior to having visitation with Racheal. Based on the foregoing, we do not find that the trial court abused its discretion in failing to award Racheal parenting time in accordance with the court's basic schedule. Racheal's second assignment of error is overruled accordingly.

{¶28} Assignment of Error No. 3:

{¶29} "THE TRIAL COURT ERRED WHEN IT GRANTED A BLANKET NO-SMOKING BAN"

{¶30} In her third assignment of error, Racheal challenges the trial court's imposition of a no-smoking ban upon the parties. Specifically, she argues that there was no evidence before the court that Victoria suffered from any health problems or had an increased sensitivity to smoke, and she contends that there must be some evidence that a child suffers physical harm before the court can restrict a parent from engaging in a lawful activity. Racheal also points to the fact that the smoking ban is not limited to the parties' homes or to the parties themselves, and argues that the ban has effectively restricted the places where she can take Victoria.

{¶31} The trial court adopted the magistrate's finding that although there was no evidence presented to indicate that Victoria has any health problems or an

3. We note that even though there was a modification of parenting time, the revised schedule provided Rachel with more parenting time overall, i.e., an additional 2 ½ hours every Thursday evening.

increasedsensitivity to cigarette smoke, it was not in Victoria's best interest to be exposed to such an activity. Indeed, other Ohio courts have made reference to the "avalanche of authoritative scientific studies" which indicate that "secondhand smoke constitutes a real and substantial danger to children because it causes and aggravates serious diseases in children, which danger is both a 'relevant factor' and a 'physical health factor'" that a trial court is required to consider in making a best interest determination under R.C. 3109.04(F). *Day v. Day*, Ashland App. No. 04 COA 74, 2005-Ohio-4343, ¶27, quoting *In re Julie Anne*, 121 Ohio Misc.2d 20, 2002-Ohio-4489, ¶57. In *Day*, the Fifth District Court of Appeals found no abuse of discretion in the trial court's imposition of a no-smoking ban, noting that the Ohio Supreme Court has recognized conclusions made by the United States Surgeon General, as well as other health agencies, that "secondhand smoke impairs the respiratory health of thousands of young children." Id., *quoting D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶53. Regardless of the condition of their health, secondhand smoke is considered a danger to all children. *In re Julie Anne* at ¶61-62, citing *Helling v. McKinney* (1993), 509 U.S. 25, 113 S.Ct. 2475.

{¶32} Based on the foregoing, Racheal has not shown that the trial court's decision to restrict Victoria's exposure to cigarette smoke was arbitrary, unconscionable, or unreasonable so as to constitute an abuse of its discretion. As the court of appeals determined in *Day*, given that the ban is not expressly limited to the parties themselves, we similarly find that the trial court's interpretation of the smoking ban should be reasonable so as to avoid contempt proceedings for the parties' inadvertent exposure of Victoria to public secondhand smoke. 2005-Ohio-4343 at ¶28.

{¶33} Racheal's third assignment of error is overruled.

{¶34} Assignment of Error No. 4:

{¶35} "THE TRIAL COURT ERRED TO THE PREJUDICE OF [RACHEAL] WHEN IT

ALLOWED UNAUTHENTICATED DOCUMENTS TO BE SUBMITTED AS EVIDENCE."

{¶36} In her final assignment of error, Racheal contends that the trial court erred in permitting unauthenticated documents to be admitted as evidence at the hearing. She claims that certain exhibits, namely, a copy of her purported 2006 "myspace" website page, as well as one of Victoria's school tests, were not properly admitted under Evid.R. 901.

{¶37} In her objection, Racheal argued generally that the magistrate's evidentiary rulings were improper. In overruling her objection, the trial court concluded that she failed to specify which documents were unauthenticated or constituted hearsay. Upon review of the record, it appears that Racheal submitted supplemental objections to the magistrate's decision on February 18, 2009, in which she specified the exhibits she contends were improperly admitted. It does not appear, however, that Racheal was granted leave by the trial court to file supplemental objections, and her subsequent filing was not referenced by the court in its decision.

{¶38} It is well-established that an appellate court will not consider issues or arguments raised by the parties on appeal that were not raised to or considered by the trial court. See *Moeller v. Moeller* (Nov. 13, 2001), Clermont App. No. CA2001-05-049. In this case, the arguments advanced by Racheal with regard to the admissibility of certain hearing exhibits were not properly raised to or addressed by the trial court in its decision and, therefore, we decline to entertain them for the first time on appeal. Racheal's fourth assignment of error is overruled.

{¶39} Judgment affirmed.

YOUNG, P.J., concurs.

RINGLAND, J., concurs separately.

RINGLAND, J., concurring separately.

{¶40} While I agree with the result of the majority's decision, I concur separately to the third assignment of error. The majority correctly observed that no evidence was presented relating to the "smoking environment" on Victoria. The trial court obviously took judicial notice of the hazardous effects of secondhand smoke. Evid.R. 201(C) authorizes a court to take judicial notice of such facts.

{¶41} Once judicial notice is taken, "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." Evid.R. 201(E).

{¶42} The federal advisory notes describe the purpose for the safeguard contained in the second sentence of Evid.R. 201(E).[4] The notes specifically state that Evid.R. 201 contains "[n]o formal scheme [for] giving [judicial] notice * * *. [A party] may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such." Fed.R.Evid. 201(e), Advisory Committee Notes. As a result, the rule provides that counsel may request, and is entitled to, a hearing following the taking of judicial notice for any fact. It is the adversely affected party's obligation to object and request the hearing. *Ohio St. Assn. of United Assn. of Journeymen and Apprentices v. Johnson Controls, Inc.* (1997), 123 Ohio App.3d 190, 196.

{¶43} Racheal failed to request a hearing to dispute the judicially-noticed facts relating to the harmfulness of secondhand smoke. Even if requested, she may have been hard-pressed to dispute the court's finding of fact on the issue and any resulting argument may have only been an exercise in academics. By failing to request the hearing, Racheal

4. Fed.R.Evid. 201(e) mirrors Ohio's Evid.R. 201(E). The principles and purposes underlying the federal rule apply equally to its Ohio counterpart. *State v. Knox* (1983), 18 Ohio St.3d 36, 37.

waived or forfeited any challenge to the judicially-noticed facts. *In re Estate of Hunter*, Mahoning App. No. 00 CA 107, 2003-Ohio-1435, ¶45. See, also, *Shaker Heights v. Coustillac* (2001), 141 Ohio App.3d 349, 352.

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