[Cite as *Earley v. Earley*, 2012-Ohio-4772.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

MICHAEL SEAN EARLEY,	:	
Plaintiff-Appellant,	:	CASE NO. CA2012-01-001
	:	O P I N I O N
- vs -		10/15/2012
	:	
KATRIN EARLEY,	:	
Defendant-Appellee.	:	

APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DRA20090788

Kornman Law Office, LLC, Sharon Kornman, 731 S. South Street, P.O. Box 1041, Wilmington, Ohio 45177, for plaintiff-appellant

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YOUNG, J.

{¶ 1} Plaintiff-appellant, Michael Sean Earley (Father), appeals a decision of the Clinton County Court of Common Pleas allocating parenting time between the parties in their divorce action.

{¶ 2} Father and defendant-appellee, Katrin Earley (Mother), were married in 2002. They have two daughters who were born respectively in 2006 and 2008. During the

marriage, Mother worked for the Wilmington Fire Department. Father first worked for the Wilmington Fire Department; then, beginning in March 2005, he worked as a Wilmington police officer until he was terminated in February 2010. He subsequently worked for Life Ambulance until he was reinstated as a Wilmington police officer in October 2010. Because of their employment, both parties had schedules which changed during their marriage.

{¶ 3} By 2009, the marriage was over. Father moved out of the marital residence and filed for divorce. A mutual restraining order filed in September 2009 barred the parties from, inter alia, dissipating the parties' real property and removing the children from Clinton County. Mother was granted temporary custody of the children. In August 2010, Father moved the trial court to adopt a shared parenting plan. Father's plan proposed an equal split of parenting time between the parties in an alternating week to week schedule. That same month, Mother stopped paying the mortgage on the marital residence. Consequently, Father filed a motion for contempt on the ground that Mother's failure to pay the mortgage amounted to dissipating the marital equity in the house in violation of the mutual restraining order.

{¶ 4} On June 6, 2011, Mother filed a notice of intent to relocate from Clinton County to West Licking, Ohio, a town northeast of Columbus, Ohio. Mother had sought out and obtained a job as a fire prevention officer with the West Licking Fire Department. After being continued several times, a final hearing was at last held before a magistrate on June 23 and July 12, 2011.

{¶ 5} By decision filed on July 22, 2011, the magistrate declined to adopt Father's shared parenting plan and instead, granted custody of the children to Mother. The magistrate found that given the parties' general inability to communicate and cooperate regarding parenting time issues, Mother's relocation more than an hour away, and the parties' stipulation that a guardian ad litem "would have recommended that it would have been in the best interests of the children for [Mother]" to be granted custody, a shared

parenting plan was not in the children's best interest. After considering the factors under R.C. 3109.04(F), the magistrate also found that granting custody of the children to Mother was in their best interest.

{¶ 6} The magistrate granted Father liberal parenting time "as the parties may agree, but not less than the Clinton County Standard Order." Father was also granted parenting time (1) every other weekend from Thursday at 6 p.m. to Sunday at 6 p.m., (2) from Wednesday at 6 p.m. to Thursday at 6 p.m. on the weeks he works on weekends, and (3) on any of his week days off from 9 a.m. until 6 p.m. that evening.

{¶ 7} The magistrate denied Father's contempt motion. The magistrate found that Mother had never been ordered to pay the mortgage; neither party continued to make the mortgage payments on the property; and if failure to pay the mortgage had dissipated the value of the property, then both parties had violated the mutual restraining order, not just Mother.

{¶ 8} Father filed objections to the magistrate's decision. By interim order filed in August 2011, the trial court modified the mutual restraining order and allowed Mother to relocate with the children outside of Clinton County. On December 27, 2011, the trial court overruled Father's objections and adopted the magistrate's decision. A divorce decree was filed that day.

{¶ 9} Father appeals, raising four assignments of error.

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE COURT ABUSED ITS DISCRETION WHEN IT INCORRECTLY ALLOCATED PARENTAL RIGHTS AND RESPONSIBILITIES WHERE IT WAS NOT SUPPORTED BY THE BEST INTEREST REQUIREMENTS OF CIVIL RULE §3109.04(F)(1). [sic]

{¶ 12} Father argues that the trial court abused its discretion in granting custody of the

children to Mother. Specifically, Father argues that in allowing Mother to relocate to West Licking and in granting her custody of the children, the trial court failed to consider the adverse impact Mother's relocation will have on Father's relationship and parenting time with the children, ignored Mother's assertion she would not relocate if the children were not allowed to move with her, improperly found that Mother's new job will benefit the children because of Mother's new work schedule and increased salary, and failed to consider the cost Father will incur in visiting his children in Columbus (wear and tear on his car, cost of food and activities in Columbus).

{¶ 13} A trial court has broad discretion in custody proceedings and its decision will not be reversed absent an abuse of discretion. *Seng v. Seng*, 12th Dist. No. CA2007-12-120, 2008-Ohio-6758, ¶ 16. An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). The discretion a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceedings and the impact the court's determination will have on the lives of the parties concerned. *S.H. v. C.C.*, 12th Dist. No. CA2006-12-051, 2007-Ohio-4359, ¶ 13. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record. *Id.* at ¶ 14.

{¶ 14} Of paramount concern in any custody determination is the requirement that the trial court's decision be made in the child's best interest. *Seng* at ¶ 17; R.C. 3109.04(B). When determining the child's best interest, the court must consider all relevant factors, including, but not limited to: the wishes of the child's parents; the child's relationship with his parents and siblings; his adjustment to his home, school, and community; the mental and physical health of persons involved; whether either parent has failed to make ordered child support payment; whether either parent has willfully denied the other parent the right to

visitation; and which parent will most likely facilitate visitation. R.C. 3109.04(F)(1).

{¶ 15} A review of the record indicates that this case involved a close call on the part of the trial court. Father requested shared parenting, or alternatively sole custody; Mother preferred sole custody; the children were not interviewed. The record shows that both parties clearly love their children; the children in turn love both their parents, have a very good relationship with both parents, and are well adjusted at both homes. The children interact well and have a good relationship with Father's girlfriend and her daughter. The children have a significant relationship with their maternal grandparents who provide daycare for both of them. While the parties communicate well and cooperate with regard to most parenting issues (such as medical issues), parenting time has been a very contentious issue. With the exception of the two-week interval between the first and second day of the final hearing, during which the parties' interaction was stress free and easy, the parties have not been able to communicate and cooperate well with regard to parenting time.

{¶ 16} Although there was no testimony as to why or how Mother's new job would benefit the children, a trial court is allowed to consider financial decisions a party has made, such as employment decisions, that have an impact on the best interest of the children. *See Selby v. Selby*, 7th Dist. No. 06 BE 55, 2007-Ohio-6700; *Rosebrugh v. Rosebrugh*, 11th Dist. No. 2002-A-0002, 2003-Ohio-4595. Mother testified that with her new job, her salary will be $65,800 (an increase of $19,000), she will have better health benefits (no deductible and a much lower monthly obligation), she will have use of a car to drive from and to work and when she is on call, and she will work Monday through Friday from 8:00 a.m. to 4:00 p.m. (instead of working 24 hours and being off for 48 hours).

{¶ 17} Notwithstanding Father's assertions, the magistrate considered the impact Mother's relocation will have on Father's parenting time and the cost he will incur in visiting the children in Columbus. The magistrate found that while Mother's relocation "will affect

how parenting time is structured, it does not prevent a liberal parenting schedule for Father." The magistrate agreed with Father that it was very important for both parents to be equally involved in their children's lives. However, the magistrate found that equal time should focus on the quality of parenting time, not on the quantity. The magistrate also addressed the cost of Father's parenting time by awarding a $100 deviation per month in child support. In so doing, the magistrate noted that it was best for the children to have more than standard parenting time with Father: "[The children] have developed a strong and loving relationship with their Father and more frequent contact will assure that their relationship continues to thrive. Some of the extended parenting time is discretionary with Father."

{¶ 18} The magistrate did not address Mother's assertions at the final hearing that she would not relocate to West Licking if the children could not move with her. However, in discussing the R.C. 3109.04(F)(1) factors, the magistrate noted how Mother was the primary parent of the children, especially in 2008-2009 where Father was working third shift full time and going to school full time.

{¶ 19} We are mindful that custody issues are some of the most difficult and agonizing decisions a trial court must make. *Davis v. Flickinger*, 77 Ohio St.3d 415, 418 (1997). The trial court heard testimony from the parties and witnesses for both parties. The trial court was in the best position to judge the credibility of the witnesses.

{¶ 20} Upon thoroughly reviewing the record, we find that the trial court properly considered the best interest factors of R.C. 3109.04(F)(1). Competent, credible evidence supports the trial court's determination that granting custody of the children to Mother is in the best interest of the children. Thus, the trial court did not abuse its discretion in granting custody to Mother. Father's first assignment of error is overruled.

{¶ 21} Assignment of Error No. 2:

{¶ 22} THE COURT'S DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE

EVIDENCE WHEN IT DID NOT APPROVE FATHER'S SHARED PARENTING PLAN AS SUBMITTED, AND INSTEAD ORDERED SOLE CUSTODY TO MOTHER.

{¶ 23} The magistrate found that in light of the parties' general inability to communicate and cooperate regarding parenting time issues and Mother's relocation more than an hour away, a shared parenting plan was not in the children's best interest. Father argues that given the parties' testimony that their communication has improved and that they both want shared parenting, the trial court erred when it declined to order shared parenting. Father asserts that an inability to communicate well is not grounds to reject a shared parenting plan.

{¶ 24} When a parent requests shared parenting and files a shared parenting plan, a trial court must review the plan to determine if the plan is in the children's best interest. R.C. 3109.04(D)(1)(a) and (b). A trial court "shall not approve a plan * * * unless it determines that the plan is in the best interest of the children." R.C. 3109.04(D)(1)(b). A trial court has complete discretion as to whether to adopt a shared parenting plan. *Id.*; *Seng*, 2008-Ohio-6758 at ¶ 10.

{¶ 25} In determining whether shared parenting is in the children's best interest, the trial court must consider the best interest factors of R.C. 3109.04(F)(1), as well as the ability of the parents to cooperate and make decisions jointly; the ability of each parent to encourage the sharing of love, affection, and contact between the children and the other parent; any history or potential for child abuse, spouse abuse, or other domestic violence; the geographic proximity of the parents to each other with regard to the practical considerations of shared parenting; and the recommendation of the children's guardian ad litem. R.C. 3109.04(F)(2); *S.H.*, 2007-Ohio-4359 at ¶ 28-29.

{¶ 26} "'Successful shared parenting requires at least two things. One is a strong commitment to cooperate. The other is a capacity to engage in the cooperation required.'"

Kauza v. Kauza, 12th Dist. No. CA2008-02-014, 2008-Ohio-5668, ¶ 27, quoting *Meyer v. Anderson*, 2nd Dist. No. 01CA53, 2002-Ohio-2782, ¶ 25. "While no factor in R.C. 3109.04(F)(2) is dispositive, effective communication and cooperation between the parties is paramount in successful shared parenting." *Seng*, 2008-Ohio-6758 at ¶ 21.

{¶ 27} Father testified that he was requesting shared parenting on an alternating week to week schedule. In the alternative, he was requesting sole custody of the children. Mother testified that shared parenting was a wonderful idea and that she would be happy to do shared parenting in the future if the parties could come to an agreement. However, for the time being, she was requesting sole custody of the children. Both parties agreed that it was important for both of them to be involved in their children's life.

{¶ 28} The record shows that while the parties have always been able to communicate well and cooperate with regard to medical and school issues, such is not the case with regard to parenting time issues. In fact, as the magistrate aptly noted, parenting time "has been the most contentious issue between the parties." As a result, "[p]ast conduct shows that these parents have both failed to facilitate court-ordered time or failed to follow through on otherwise agreed parenting time."

{¶ 29} The record does show that in contrast with past instances, the parties got along very well and communicated well with regard to parenting time during the two-week interval between the first and second day of the final hearing. While acknowledging the recent improvement in the parties' communication, the magistrate also found that

> While these parties have made some progress in this regard and the Magistrate believes them when they indicate that they want to work together for the benefit of their children, their actions do not indicate that they have the ability to do so at this point. Testimony and demeanor at the final hearing causes the Magistrate to believe that any progress made by the parties was most likely adversely affected as a result of the contested hearing. * * * The Magistrate strongly believes that shared parenting can only be successful if the parties are able to

> communicate and cooperate in a civil manner and not expose the children to any negative contact. The Magistrate does not believe that the parties are able to do so at this time.

{¶ 30} Again, the trial court was in the best position to judge the credibility of the witnesses. Upon thoroughly reviewing the record, we find competent, credible evidence to support the trial court's determination that shared parenting was not in the best interest of the children and find no abuse of discretion by the trial court. *See S.H.*, 2007-Ohio-4359 (finding that shared parenting was not in the child's best interest given the parents' inability to cooperate and make decisions together with respect to the child); *Rengan v. Rengan*, 2d Dist. No. 18522, 2001 WL 726800 (June 29, 2001) (lack of communication between the parents would hinder the effective functioning of a shared parenting plan); and *Haynes v. Haynes*, 5th Dist. No. 2010-CA-01, 2010-Ohio-5801 (no error in rejecting a shared parenting plan where the parents do not argue or fight but have little communication and cooperation with regard to the children).

{¶ 31} Father's second assignment of error is overruled.

{¶ 32} Assignment of Error No. 3:

{¶ 33} THE COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE PRESENTATION OF [MOTHER'S] WITNESSES WHERE THEY WERE NOT DISCLOSED PURSUANT TO DISCOVERY REQUESTS.

{¶ 34} The final hearing was held before the magistrate on June 23 and July 12, 2011. At the end of the first day of the hearing on June 23, Father's counsel moved to exclude the testimony of two witnesses for Mother (the Wilmington Fire Chief and Mother's father) on the ground they had never been disclosed during discovery. The magistrate gave Mother's counsel the chance to find out if the witnesses had been disclosed; the hearing was continued in progress. The two witnesses did not testify on June 23. Following that hearing, Mother's counsel promptly faxed the names and contact information of the witnesses to

Father's counsel.

{¶ 35} On July 12, the second day of the hearing, Father's counsel once again moved to preclude the witnesses from testifying. The magistrate allowed their testimony to be proffered and took Father's counsel's objection under advisement. In its July 22, 2011 decision, the magistrate denied Father's counsel's request to exclude the testimony of the witnesses, stating: "This Court will sanction discovery violations under Civ.R. 37 provided parties follow the proper procedure to request sanctions. * * * [T]his Court cannot impose sanctions under Civ.R. 37 as requested by Counsel for Father (exclusion of testimony) unless the proper procedure is followed to give the Court that ability. It was not." The magistrate found that because Father's counsel never filed a motion to compel discovery, it could not impose sanctions under Civ.R. 37. The trial court subsequently denied Father's request to exclude the testimony of the two witnesses on the same ground.

{¶ 36} On appeal, Father argues that the trial court abused its discretion when it allowed the undisclosed witnesses to testify. Father also takes issue with the court's ruling that his counsel was required to file a motion to compel discovery.

{¶ 37} An appellate court reviews a trial court's decision to allow the testimony of an undisclosed witness under an abuse of discretion standard. *Kallergis v. Quality Mold, Inc.*, 9th Dist. Nos. 23651 and 23736, 2007-Ohio-6047, ¶ 14. "A trial court may exclude the testimony of an undisclosed witness as a sanction under Civ.R. 37; however, such a harsh sanction is appropriate only where the undisclosed witness caused unfair surprise with resulting prejudice to the complaining party." *Trajcevski v. Bell*, 115 Ohio App.3d 289, 294 (9th Dist.1996).

{¶ 38} Ohio appellate courts have considered four factors in determining whether the admission of testimony of an undisclosed witness is a surprise and prejudicial to the party: (1) the complexity of the subject matter, (2) whether the party who is seeking to exclude the

testimony of the witness has the ability to interview the witness since the more time the moving party has to interview the witness decreases the amount of surprise and prejudice that would result from allowing the testimony, (3) the knowledge that the moving party has of the undisclosed witness' testimony, and (4) whether the subject matter of the testimony of the undisclosed witness is cumulative to the testimony of disclosed witnesses. *See Trajcevski*; *Bernard v. Bernard*, 7th Dist. No. 00 CO 25, 2002 WL 206411 (Jan. 30, 2002); *Anderson v. Lorain Cty. Title Co.*, 88 Ohio App.3d 367 (9th Dist.1993).

{¶ 39} We find that the trial court did not abuse its discretion in allowing the testimony of the two undisclosed witnesses. The testimony concerned Mother's relationship with the children with regard to custody and parenting time matters. Thus, the subject matter of the testimony was not complicated. The hearing was continued for 13 business days, 19 calendar days. This allowed Father ample opportunity to interview and prepare for the testimony of the witnesses. *Bernard*, 2002 WL 206411 at *4. However, the record indicates that Father purposefully did not contact the witnesses during the two-week interval. *See Goldstein v. Drexel*, 8th Dist. No. 44835, 1982 WL 2608 (Dec. 16, 1982) (trial court's refusal to exclude testimony of undisclosed witnesses was not an abuse of discretion where defense counsel chose to rely on the witnesses' absence from plaintiff's pretrial list in accomplishing his pretrial preparations, and where, after the witnesses were proffered as trial witnesses, defense counsel chose to seek their complete exclusion, rather than a delay in the proceedings to interview or depose them or some other limit on their testimony). Finally, the testimony of the witnesses was overall cumulative to the testimony of the parties and disclosed witnesses.

{¶ 40} In addition, Father's counsel never sought an order to compel discovery, as required under Civ.R. 37, either before the final hearing or when it was continued for over two weeks. Civ.R. 37 requires the party seeking discovery to move for an order compelling

discovery before sanctions are appropriate. That is, "[t]he party who feels aggrieved or who wants discovery must take affirmative action. There is no automatic compulsion upon those who do not comply with discovery requests or who resist discovery." *Kristian v. Youngstown Orthopedic Assoc.*, 7th Dist. No. 03 MA 189, 2004-Ohio-7064, ¶ 20, quoting Staff Notes, Civ.R. 37. *See also Anderson v. Anderson*, 6th Dist. No. L-83-204, 1983 WL 2321 (Dec. 16, 1983) (Civ.R. 37 has no application if there has not been a court order); *Grenga v. Bank One, N.A.*, 7th Dist. No. 04 MA 94, 2005-Ohio-4474 (sanctions provided for in Civ.R. 37[B] result from a violation of a discovery order, not merely from a discovery request).

{¶ 41} Father's third assignment of error is accordingly overruled.

{¶ 42} Assignment of Error No. 4:

{¶ 43} THE COURT ABUSED ITS DISCRETION IN NOT FINDING [MOTHER] IN CONTEMPT FOR FAILURE TO MAINTAIN THE MORTGAGE PAYMENTS AND DISSIPATING A MARITAL ASSET.

{¶ 44} Father argues that in light of the mutual restraining order, the fact Mother continued to live in the marital residence following the parties' separation, and the fact she purposely stopped paying the mortgage to deprive Father of his share of the equity in the home, the trial court abused its discretion when it denied his motion for contempt.

{¶ 45} Contempt is defined in general terms as disobedience of a court order. *Ossai-Charles v. Charles*, 12th Dist. Nos. CA2010-12-129 and CA2011-01-007, 2011-Ohio-3766, ¶ 30. To support a contempt finding, the moving party must establish by clear and convincing evidence that a valid court order exists, the offending party had knowledge of the order, and the offending party violated such order. *Id.* An appellate court will not reverse a trial court's decision in a contempt proceeding absent a showing of an abuse of discretion. *Id.* at ¶ 31.

{¶ 46} The magistrate denied Father's motion for contempt on the ground that Mother had never been ordered to pay the mortgage, neither party continued to make the mortgage

payments on the property, and if failure to pay the mortgage had dissipated the value of the property, then both parties had violated the mutual restraining order. The trial court upheld the magistrate's denial of Father's motion.

{¶ 47} The record shows that after Mother continued to live in the marital residence following the parties' 2009 separation, she was never ordered to pay the mortgage on the home. The mortgage is in both parties' names. The mutual restraining order, filed a few days after Father's complaint for divorce, barred both parties from "sell[ing], dispos[ing], dissipat[ing] or allow[ing] a lien or loan to be placed against any of their real * * * property." At the time of the final hearing, the house was in the process of being foreclosed.

{¶ 48} Mother stopped paying the mortgage in August 2010 but continued living in the home. Father testified that Mother intentionally stopped paying the mortgage to prevent him from getting his share of the equity in the home. According to Father, in August 2010, Mother asked him to pay half of the mortgage payments since he would receive half of the equity; however, Mother did not offer for him to move back into the house. At the time, Father was working for Life Ambulance earning $10 an hour. After he refused to pay half of the mortgage payments, Mother told him she was "done making the house payment." Although his name was on the mortgage, Father testified that given the mutual restraining order and the fact Mother lived in the home, Mother was solely responsible for the mortgage payments.

{¶ 49} After Father was reinstated as a police officer in August 2010, earning $22.50 an hour, he did not pay or help with the mortgage payments. Father conceded that under the restraining order, both parties were barred from dissipating their real property.

{¶ 50} Mother testified that she stopped paying the mortgage in August 2010 because she could no longer pay for it. Mother explained that in April 2010, her salary was reduced by $8,000 to $9,000. In addition, because of his low income while working for Life

Ambulance, Father was now paying her $330 a month instead of the $750 a month he used to pay. Mother testified that before she stopped paying the mortgage, she offered Father to move into the house and take over the mortgage payments. She also offered for both parties to each pay half of the mortgage payments. However, Father could not financially afford either option.

{¶ 51} Both parties were clearly barred under the mutual restraining order from dissipating their real property. Beginning August 2010, neither party made any mortgage payments. The trial court heard testimony from both parties on the issue. As we previously noted, the trial court was in the best position to judge the credibility of the witnesses. In light of all of the foregoing, we cannot say that the trial court's denial of Father's motion for contempt was an abuse of discretion.

{¶ 52} Father's fourth assignment of error is overruled.

{¶ 53} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.