

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY**

In the Matter of the Custody of:

E.M.W. and E.J.P.W.

Appellate Case No. 08-CA-25

Trial Court Case Nos. 05-JG-06
05-JG-16088

(Juvenile Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 19th day of June, 2009.

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FAIN, J.

{¶ 1} James Whitt appeals from an order of the Champaign County Common Pleas Court, Juvenile Division, terminating a prior shared parenting agreement and awarding custody of Whitt's two minor children to their mother, appellee Tiffany Young. Whitt contends that the trial court relied upon irrelevant evidence, failed to consider the report of the guardian ad litem and failed to follow the appropriate statutory guidelines

for re-allocating parental rights.

{¶ 2} We conclude that the record does not support a finding that the trial court abused its discretion with regard to the evidence it considered in reaching its decision. We further conclude that the trial court did consider the proper statutory guidelines in rendering its decision.

{¶ 3} Therefore, the judgment of the trial court is Affirmed.

I

{¶ 4} Whitt and Tiffany Adamson (nka Young) are the parents of two minor children. Whitt and Young were never married, and at some point ceased to live together. They entered into a shared parenting agreement that was adopted by the trial court in 2005. Neither parent was designated as the residential or custodial parent. Instead the agreement provided that Whitt and Young were to share fully in all decisions regarding the children. Neither party was required to pay child support to the other. The agreement further provided that the children would reside with Whitt on Mondays and Tuesdays, with Young from Wednesday afternoon until Friday, with weekends alternating between the parents.

{¶ 5} Subsequently, both parties married other individuals. Young's current husband is employed in Mt. Orab, Ohio, which is approximately ninety miles from her current home in Champaign County. Young filed a motion seeking to "dismantle the shared parenting plan and name her primary residential parent," due to her desire to obtain a residence closer to her husband's place of employment.

{¶ 6} After conducting an investigation, a guardian ad litem issued a report in

which he opined that keeping the shared-parenting plan intact would be in the best interest of the children. Following a hearing, the magistrate granted Young's motion. Whitt filed objections thereto. The trial court adopted the magistrate's decision as the order of the court. From the order terminating the shared parenting agreement and designating Young as the primary residential parent, Whitt appeals.

II

{¶ 7} Whitt's First Assignment of Error states as follows:

{¶ 8} "THE TRIAL COURT ERRED IN CONSIDERING IRRELEVANT UNSUBSTANTIATED INNUENDO AS ALLEDGED [SIC] EVIDENCE."

{¶ 9} Whitt contends that the judgment of the trial court should be reversed because the trial court improperly considered evidence having no bearing on the issue of shared parenting. Specifically, Whitt claims that the trial court was presented with testimony regarding matters pre-dating the shared parenting agreement, testimony concerning litigation between Whitt and his siblings, and testimony concerning vandalism that occurred on the premises of Whitt's former employer immediately after Whitt's employment was terminated.

{¶ 10} Without some affirmative indication in the record to the contrary, an appellate court presumes that a trial court considers only relevant and competent evidence. *Gonzalez v. Spoffard*, Cuyahoga App. No. 85231, 2005-Ohio-3415, ¶43; *State v. Sieng*, Clark App. No. 2003 CA 35, 2003-Ohio-7246, ¶32.

{¶ 11} In this case, we need not presume. The magistrate's decision clearly notes that "many of the concerns raised by Ms. Young were not relevant and incidents

that will occur in everyday living and parenting.” The magistrate went on to list evidence that was considered relevant to the issue of whether to terminate the shared parenting agreement, none of which relates to the testimony of which Whitt complains. Further, the decision of the trial court reflects agreement with the magistrate as to the relevant evidence.

{¶ 12} The First Assignment of Error is overruled.

III

{¶ 13} Whitt's Second Assignment of Error is as follows:

{¶ 14} “THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE INDEPENDENT REPORT OF THE GUARDIAN AD LITEM APPOINTED IN THIS CASE.”

{¶ 15} Whitt contends that the trial court did not give proper consideration to the report issued by the guardian ad litem appointed to represent the children.

{¶ 16} In his report, the guardian ad litem opined that the shared parenting plan “worked well, at least until additional parties and pressures were added to the mix. With both parties remarried and the minor children now having a step-parent on each side of the plan, new issues and problems have surfaced. It is clear that these have clouded the shared parenting plan and have caused division between the parties.” Nevertheless, the report concluded by recommending the denial of Young's motion to terminate the shared parenting agreement.

{¶ 17} The GAL also testified at the hearing, during which he stated that his recommendation in his report was based upon the fact that “both parties * * * said the

first year or so that they didn't have any major complaints [with regard to the shared parenting plan]." The GAL admitted that his last contact with the parties occurred approximately three months prior to the hearing. The GAL was unaware that Whitt and his current wife had separated. The GAL also admitted that he had mistakenly believed that child support payments were being made by one of the parties to the other.

{¶ 18} A trial court is not bound to follow the recommendations of a guardian ad litem. *Smith v. Quigg*, Fairfield App. No. 2005-CA-002, 2006-Ohio-1495, ¶66; *In re J.P.M.*, Summit App. No. 23694, 2007-Ohio-5412, ¶63. The trial court should review the report of a guardian ad litem "in connection with all other evidence presented to it." *Id.* The trial court, as the trier of fact, determines the credibility of, and weight to be given to, the report. *Baker v. Baker*, Lucas App. No. L-03-1018, 2004-Ohio-469, ¶30; *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 19} We find nothing in the record from which to conclude that the report of the GAL was ignored by the magistrate or by the trial court. Furthermore, in view of the fact that the GAL had not had recent contact with the parties, and was unaware of a major change in Whitt's marital situation, we cannot say that it was an abuse of discretion to give correspondingly less weight to the report. Further, the GAL's report did note that the parties were having difficulties with the shared parenting plan, which supports the trial court's judgment.

{¶ 20} The Second Assignment of Error is overruled.

IV

{¶ 21} Whitt's Third Assignment of Error provides:

{¶ 22} “THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO PROPERLY FOLLOW THE STATUTORY PROCEDURES SET FORTH IN THE OHIO REVISED CODE WHEN REALLOCATING PARENTAL RIGHTS AND RESPONSIBILITIES.”

{¶ 23} In this assignment of error, Whitt contends that the trial court erred in granting Young’s motion because: (1) there was no substantial change in circumstances to justify termination of the shared parenting agreement; (2) the trial court did not consider the factors listed in R.C. 3109.04 when determining the best interest of the children; and (3) the trial court did not consider whether the benefit of changing the parenting arrangement would outweigh the harm likely to be caused by a change of custody.

{¶ 24} We begin by noting that “R.C. 3109.04(E)(2)(c) addresses the *termination* of shared parenting plans. It permits the termination of a shared parenting plan on the court’s own initiative or at the request of one or both parents if the court determines that shared parenting is not in the best interest of the children. The best interest of the children is the only criterion discussed in this section. There is no requirement in R.C. 3109.04(E)(2)(c) that the court identify a change of circumstances.” *Murphy v. Murphy*, Greene App. No. 2007 CA 43, 2007-Ohio-6692, ¶ 12 (emphasis in original). Thus, Whitt’s claim that the trial court erred by terminating the shared parenting agreement absent a change in the circumstances of the parties is without merit.

{¶ 25} We also note that R.C. 3109.04(E)(2)(c) does not mandate that the trial court determine whether the harm caused by a change of environment outweighs the advantages of the change. Instead, that is one of the criteria for a modification of a

shared parenting plan provided for in R.C. 3109.04(E)(1)(a). Thus, the claim that the trial court was required to consider this, in any respect other than as part of a general review of the best interest of the children, lacks merit.

{¶ 26} Finally, we consider whether the trial court considered the appropriate factors when determining the best interest of the children.

{¶ 27} To determine what is in the best interest of a child for the purpose of determining how to reallocate parental rights, the trial court must consider the following factors set forth in R.C. 3109.04(F)(1):

{¶ 28} “(a) The wishes of the child's parents regarding the child's care;

{¶ 29} “(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

{¶ 30} “(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

{¶ 31} “(d) The child's adjustment to the child's home, school, and community;

{¶ 32} “(e) The mental and physical health of all persons involved in the situation;

{¶ 33} “(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶ 34} “(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

{¶ 35} “(h) Whether either parent previously has been convicted of or pleaded

guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

{¶ 36} “(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

{¶ 37} “(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.”

{¶ 38} The magistrate’s decision specifically stated that the magistrate had reviewed the factors listed above and had concluded that the review compelled the termination of the shared parenting agreement, with an award of custody to Young.

{¶ 39} The evidence in the record shows that Young wants to be awarded sole custody of the children, while Whitt wishes to maintain the current arrangement. The

magistrate noted that the children have a good relationship with both parents and that both Whitt and Young “love their children very much.” The magistrate also noted that Young has more time to spend with the children, that she is “more nurturing than [Whitt], more involved in the care of the children, is in a better position to provide stability and consistency during the school year and has been more willing to communicate with [Whitt] over issues with the children.” The magistrate went on to state that “[Whitt’s] separation from his wife has caused a level of instability that is not in the children’s best interests, particularly because they are part of the reason cited for the separation.” Furthermore, Whitt “does not foresee a divorce,” which indicates that the children will continue to be subjected to actions of the step-mother, whom the evidence demonstrates is not attentive to the children, even when Whitt leaves them alone with her.

{¶ 40} The trial court, in its decision, stated that it “had considered all the factors specified by paragraph (F)(1) of Revised Code Section 3109.04” and that even after making an independent assessment of those factors, it agreed with the reasoning of the magistrate.

{¶ 41} The discretion that a trial court enjoys in custody matters should be afforded great respect, given the nature of the proceeding and the impact the court’s determination will have on the lives of the parties concerned. 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. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Thus, a reviewing court may not reverse a custody determination unless the trial court has abused its discretion. *Pater v. Pater* (1992), 63 Ohio St.3d 393. An

abuse of discretion implies an attitude of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218.

{¶ 42} While this case appears to have involved a close call on the part of the trial court, we cannot say that the trial court abused its discretion in determining that the best interest of the children supported the termination of the shared parenting agreement and the designation of Young to be the primary residential parent. Accordingly, Whitt's Third Assignment of Error is overruled.

V

{¶ 43} All of Whitt's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FRENCH, JJ., concur.

(Hon. Judith L. French, from the Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

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