[Cite as *Francis v. McDermott*, 2009-Ohio-4323.]

IN THE COURT OF APPEALS FOR DARKE COUNTY, OHIO

JEFFREY A. FRANCIS :

Plaintiff-Appellee : C.A. CASE NO. 1753

v. : T.C. NO. 20340013

ANDREA M. McDERMOTT : (Civil appeal from Common Pleas, Juvenile Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 21st day of August, 2009.

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DONOVAN, P.J.

{¶ 1} This child custody matter is before the Court on the Notice of Appeal of defendant-appellant Andrea M. McDermott, filed April 23, 2009. This is Andrea's second appeal of a decision rendered by the Darke County Court of Common Pleas, Juvenile Division, designating appellee-plaintiff Jeffrey Francis as the residential and custodial parent of the parties' minor child, M.F. Previously, on

December 19, 2008, this Court reversed and remanded the trial court 's ruling which adopted the magistrate's decision due to the trial court's use of an abuse of discretion standard of review rather than de novo in considering the magistrate's determination. *See Francis v. McDermott*, Darke App. No. 1744, 2008-Ohio-6723. After remand, the trial court issued a similar ruling, adopting in part and modifying in part the report and recommendation of the magistrate. The trial court's ruling once again designated Jeffrey as the residential and custodial parent, terminating the shared parenting agreement.

{¶ 2} Andrea gave birth to M.F. on July 22, 2002. Andrea and Jeffrey were never married. After Jeffrey successfully moved to establish parentage of M.F., the parties came to a final agreement of shared parenting on April 14, 2004. Originally, the parties agreed to a parenting plan that allowed each parent alternating two days of parenting time per week with additional parenting time on alternating weekends. On February 1, 2005, due in part to Andrea's move from Darke County to Dayton, Jeffrey moved for modification of parenting time to an alternating weekly basis, maintaining equal parenting time. Thereafter, on April 20, 2005, Andrea moved to modify the parenting time back to the terms previously agreed upon in the shared parenting agreement, or alternatively, Andrea moved to terminate the shared parenting plan, requesting she be named as the residential and custodial parent. Jeffrey moved to be appointed as the residential parent and legal custodian on January 12, 2007 in the event the trial court found that termination of the shared parenting agreement was in the best interests of the child.

{¶ 3} In addition to Andrea's move to Dayton, M.F. reached the compulsory

education age in 2007, necessitating the choice of schooling opportunities for the child. The Darke County Court of Common Pleas, Juvenile Division, appointed two guardians ad litem (GAL), and held a full custody hearing on May 24, 2007, June 25, 2007, and June 29, 2007. After considering the facts adduced in the hearing, a magistrate recommended that the Shared Parenting Decree be terminated and that Jeffrey be designated as the residential and custodial parent of M.F. and he recommended that Andrea be given standard visitation pursuant to the Darke County Court of Common Pleas Standard Schedule for Parenting Time. Andrea was also ordered to pay Jeffrey child support in the amount of $442.00 per month. Andrea filed objections to the magistrate's decision with the trial court on August 24, 2007. The trial court agreed with the conclusions of the magistrate, and sustained Andrea's motion to terminate the shared parenting plan. The trial court named Jeffrey the sole residential parent of M.F. and reduced Andrea's child support obligation to $331.50 per month.

{¶ 4} As previously stated, after the initial appeal, reversal and remand, the trial judge issued an opinion which substantially mirrors the substantive provisions of its previous order. It is upon this judgment that Andrea appeals.

{¶ 5} On appeal, Andrea asserts two assignments of error. The first assignment of error is as follows:

{¶ 6} “THE TRIAL COURT’S DECISION TO AWARD CUSTODY OF THE CHILD TO FATHER AND TO TERMINATE THE SHARED PARENTING PLAN BASED UPON THE MAGISTRATE’S DECISION WAS IN ERROR AND WAS AN ABUSE OF DISCRETION.”

{¶ 7} Andrea argues that the trial court abused its discretion in overruling her objections to the magistrate's decision. She argues that the magistrate incorrectly ruled that the more stringent standards of R.C. 3109.04(E)(1)(a) were not required to be applied when terminating a shared parenting decree. Furthermore, Andrea argues that the trial court's termination of the Shared Parenting Plan pursuant to R.C. 3109.04(E)(2)(c) is unreasonable, arbitrary and unconscionable; and that the court abused its discretion by failing to consider all relevant factors including those listed in R.C. 3109.04(F). We disagree.

{¶ 8} It is well settled that 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. The discretion which a trial court has in a custody matter is given the utmost respect given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. *Beismann v. Beismann*, Montgomery App. No. 22323, 2008-Ohio-984. "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. Citing Miller v. Miller* (1988), 37 Ohio St.3d 71, 74.

{¶ 9} Termination of a shared parenting plan is governed by R.C. 3109.04(E)(2)(c), which provides, "[T]he court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section *upon the request of one or both of the parents or*

whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, *upon its own motion or upon the request of one or both parents*, that shared parenting is not in the best interest of the children." (emphasis added).

{¶ 10} This section of the statute only requires the court to find that it is in the best interests of the minor child to terminate the shared parenting plan. *Beismann*, at ¶ 8. "Significantly, nothing in R.C. 3109.04(E)(2)(c) requires the trial court to find a change in circumstances in order to terminate a shared parenting agreement." *Goetze v. Goetze* (March 27, 1998), Montgomery App. No. 16491.

{¶ 11} Initially, it is important to note that it was Andrea who moved the court for modification of the shared parenting plan, or in the alternative, termination of the parenting plan. After a hearing date was scheduled, Jeffrey thereafter asked to be named the primary residential parent and legal custodian of the child.

{¶ 12} The magistrate noted that it was not required to find a change of circumstances before terminating a shared parenting plan. The magistrate observed that although not required to follow the more stringent standards of R.C. 3109.04(E)(1)(a), requiring a significant change in circumstances to modify an existing shared parenting plan, a significant change of circumstances has occurred in this case. The magistrate concludes that the child reaching the age of compulsory school attendance, coupled with Andrea's move from Darke County to Dayton, makes the shared parenting agreement impractical.

{¶ 13} Pursuant to R.C. 3109.04(F), the best interests of a child is determined by the trial court after analyzing several factors. The statute provides, in relevant part:

{¶ 14} "(1)In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

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

{¶ 16} " (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;

{¶ 17} "(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;

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

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

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

{¶ 21} " (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;

{¶ 22} "(h) Whether either parent or any member of the household of 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 or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented 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; whether either parent or any member of the household of 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;

{¶ 23} "(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;

{¶ 24} " (j) Whether either parent has established a residence, or is planning

to establish a residence, outside this state.

{¶ 25} "(2)In determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors, including, but not limited to, the factors enumerated in division (F)(1) of this section, the factors enumerated in section 3119.23 of the Revised Code, and all of the following factors:

{¶ 26} " (a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;

{¶ 27} " (b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;

{¶ 28} " (c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;

{¶ 29} " (d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

{¶ 30} " (e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem."

{¶ 31} Andrea asserts that the magistrate failed to address all of the factors set forth in 3109.04(F)(1) and (2) in making the determination that the current shared parenting decree was no longer in the best interests of the child. The magistrate stated "[w]ith respect to the enumerated 'best interest' factors of R.C. 3109.04(F)(1), this magistrate finds that most of the factors do not favor either party. However, this magistrate finds that there are two factors which clearly favor Mr. Francis being designated the residential parent." Mag. Dec. at 8. The magistrate pointed to the child's interaction and interrelationship with family

members and any other person who may significantly affect the child's best interest, and the child's adjustment to the child's home, school, and community favor Jeffrey. The magistrate thereafter points to evidence on the record in support of his decision.

{¶ 32} The expansive record included a hearing that lasted three days and the reports of two GALs. One GAL, Mark J. Donatelli, submitted three reports and was the first witness to testify at the hearings. Throughout his reports and testimony, he stated that the best interests of the child would likely be best served by continuing in a shared parenting plan. Specifically, he acknowledged that "if the present parenting schedule is disrupted, [M.F.] will suffer emotional harm and separation anxiety symptoms associated with the loss of contact with either parent." However, Donatelli also acknowledged that the circumstances in this case present a situation where the shared parenting plan is no longer workable. Additionally, there was testimony from both parties, several family members, and school personnel from which the magistrate adduced sufficient evidence to support his recommendation.

{¶ 33} The magistrate also considered the factors found in 3109.04(F)(2) as they pertain to whether maintaining the shared parenting plan is in the best interests of the child. The magistrate focuses on two of the factors that weigh against a shared parenting plan being in M.F.'s best interest, and points to competent evidence in the record to support his decision. The magistrate ultimately found that "after considering all of the best interest factors, the magistrate finds that shared parenting is not in the best interest of [the child]." Since the

magistrate's decision is supported by competent evidence in the record, the trial court did not abuse its discretion in adopting the magistrate's decision to terminate the shared parenting plan and appoint Jeffrey as the residential parent and legal custodian of M.F. Andrea's first assignment of error is overruled.

{¶ 34} Andrea asserts as her second assignment of error:

{¶ 35} "THE TRIAL COURT ERRED BY FAILING TO CONDUCT A PROPER DE NOVO REVIEW OF THE RECORD IN REVIEWING THE MAGISTRATE'S DECISION UPON APPELLANT'S TIMELY FILING OF OBJECTIONS TO THE MAGISTRATE'S DECISION."

{¶ 36} Andrea argues that the case was previously remanded from this court with the instruction that the trial court must consider objections to the magistrate's review de novo, rather than using an abuse of discretion standard. Andrea asserts that the trial court once again failed to perform a de novo review of the magistrate's decision. Specifically, Andrea argues that the trial court made no reference to any independent evaluation of the 803-page transcript of the hearing. Andrea asserts that an examination of the trial court decision and judgment entry indicates "a mere recitation of the original decision."

{¶ 37} "Magistrates are neither constitutional nor statutory courts. Magistrates and their powers are wholly creatures of rules of practice and procedure promulgated by the Supreme Court. Therefore, magistrates do not constitute a judicial tribunal independent of the court that appoints them. Instead, they are adjuncts of their appointing courts, which remain responsible to critically review and verify the work of the magistrates they appoint. . . . Civ.R. 53(E)(4)(b)

contemplates a de novo review of any issue of fact or law that a magistrate has determined when an appropriate objection is timely filed. The trial court may not properly defer to the magistrate in the exercise of the trial court's *de novo* review. The magistrate is a subordinate officer of the trial court, not an independent officer performing a separate function." *Quick v. Kwiatkowski,* Montgomery App. No. 18620, 2001-Ohio-1498.

{¶ 38} "A presumption of validity attends a trial court's action." *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313; *citing Knapp v. Edwards Labs.* (1980), 61 Ohio St.2d 197. The appellant bears the burden of rebutting the presumption through credible evidence on the record.

{¶ 39} The decision of the trial court rendered on January 29, 2009, states that "the court has conducted a de novo review of the magistrate's findings and conclusions of law." Thereafter, the court stated "after giving due consideration to all the above, including a review of the pleadings and testimony, the court affirms the decision of the magistrate . . . " Andrea's argument that the trial court made no reference to any independent evaluation of the 803-page transcript of the proceedings is rebutted by the above statements of the trial court. Andrea cannot establish that the trial court did not, in fact, conduct a thorough de novo review of the record in adopting the magistrate's recommended ruling. Therefore, Andrea's second assignment of error is overruled.

{¶ 40} Accordingly, the judgment of the trial court is affirmed.

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GRADY, J. and FROELICH, J., concur.

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