[Cite as *Bonner v. Bonner*, 2010-Ohio-742.]

IN THE COURT OF APPEALS FOR DARKE COUNTY, OHIO

NICOLE L. BONNER nka BOERGER :

Plaintiff-Appellant : C.A. CASE NO. 2009 CA 10

v. : T.C. NO. 06DIV63135

TERRY SHAWN BONNER : (Civil appeal from Common Pleas Court, Domestic Relations)

Defendant-Appellee :

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O P I N I O N

Rendered on the 26th day of February, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Nicole Boerger, filed September 14, 2009. Boerger appeals the Darke County Court of Common Pleas adoption of the Magistrate's decision finding Boerger in contempt and changing the location

for the parties to exchange their minor children for parenting time purposes.

{¶ 2} Boerger and Terry Shawn Bonner were married on December 12, 1998, in Englewood, Ohio. Two daughters were born of their marriage, whose dates of birth are March 12, 2002, and June 10, 2000. Boerger filed a complaint for divorce on July 18, 2006, and the divorce became final on February 26, 2008. On December 9, 2008, Bonner filed a motion for contempt and a motion to modify shared parenting order, which Boerger opposed.

{¶ 3} According to Bonner, in violation of the parties' "Agreed Judgment Entry/Shared Parenting Plan and Shared Parenting Order," Boerger denied him one period of two uninterrupted weeks of visitation with their daughters in the summer of 2008, denied him visitation on Labor Day 2008, and denied him telephone contact with the parties' children on Tuesday and Thursday evenings at 8:00 p.m. Bonner also sought an order altering the location for exchange of the children to the Visitation House in Greenville, Ohio, from John's IGA in Versailles. Finally, Bonner sought attorney fees.

{¶ 4} On June 9, 2009, after a hearing, the Magistrate determined, "[Boerger] should be found in contempt for failure to allow free communication between [Bonner] and the children, and parenting time in the summer of 2008, as well as Labor Day." The Magistrate determined that Bonner was entitled to "an additional two weeks this summer, to make up for the time he missed last summer." The Magistrate further noted that during the course of one exchange at John's IGA, the children witnessed an altercation in the presence of the police between Bonner and Boerger's new husband, Gary, in which the police threatened Bonner with arrest and also threatened to use a Taser on Gary if he did not return

to his truck. The Magistrate determined, "It appears from the testimony that not much has changed as far as the exchange between the parties to which the children are exposed. It is appalling that they were witnesses to the police threatening to tase their stepfather and to arrest their father. Had [Boerger] and Gary not felt it necessary to get involved when [Bonner] was talking with the police, the incident would not have happened. By the same token, [Bonner] should restrain himself and not get so upset and angry that the police might feel it necessary to threaten him with arrest. The Magistrate finds, therefore, that, for the sake of the children, the request to exchange at the Visitation House should be granted." The Magistrate sentenced Boerger to three days in the Darke County Jail, "to be suspended on the condition that she permits all visitations and phone calls as ordered." Finally, the Magistrate awarded Bonner attorney fees in the amount of $300.00, with court costs charged to Boerger.

{¶ 5} In adopting the decision of the Magistrate, the trial court noted the Magistrate's determination "(1) that visitation exchange should occur at The Visitation House in Greenville instead of in Versailles, (2) that [Boerger] was in contempt regarding parenting time/visitation issues, (3) that [Bonner] should receive two additional weeks of summer visitation, and (4) that Plaintiff should pay $300 as attorney fees of [Bonner] and the court costs. * * *

{¶ 6} "Upon a review of the pleadings, the Court finds that the Magistrate's decision is supported by the evidence as presented and is in conformity with the law. The credibility of the witnesses is not so easily discerned from reading a transcript when compared to actual observations. However, interference with the terms of parenting time/

visitation provisions occurred. Also, the spirit of the parenting time/ visitation was violated by [Boerger]. Both subtle and obvious interference occurred. The Court adopts the facts and conclusions of the Magistrate, as well as the decision of the Magistrate." Finally, the trial court noted that Bonner had only received one of the two weeks to which he was entitled in the summer of 2009, determining that "the second week of summer visitation shall be granted to [Bonner] in the summer of 2010."

{¶ 7} Boerger asserts four assignments of error. Her first assignment of error is as follows:

{¶ 8} "THE TRIAL COURT FAILED TO CONDUCT A DE NOVO REVIEW OF THIS CASE AND MERELY ADOPTED THE MAGISTRATE'S DECISION."

{¶ 9} Boerger contends that the trial court only reviewed the pleadings herein and refused to consider the credibility of the witnesses as revealed in the transcript, and thus failed to conduct a de novo review.

{¶ 10} "Initially, it should be noted that in accordance with Civ.R. 53, the trial court must conduct an independent review of the facts and conclusions contained in the magistrate's report and enter its own judgment. *Dayton v. Whiting* (1996), 110 Ohio App.3d 115, 118. Thus, the trial court's standard of review of a magistrate's decision is de novo.

{¶ 11} "An 'abuse of discretion' standard, however, is the appellate standard of review when reviewing a trial court's adoption of a magistrate's decision. Claims of trial court error must be based on the actions taken by the trial court, itself, rather than the magistrate's findings or proposed decision. When an appellate court reviews a trial court's

adoption of a magistrate's report for an abuse of discretion, such a determination will only be reversed where it appears that the trial court's actions were arbitrary or unreasonable. *Proctor v. Proctor* (1988), 48 Ohio App.3d 55, 60-61. Presumptions of validity and deference to a trial court as an independent fact-finder are embodied in the abuse of discretion standard. *Whiting*, supra.

{¶ 12} "An abuse of discretion means more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. *Berk v. Mathews* (1990), 53 Ohio St.3d 161." *Randall v. Randall*, Darke App. No. 1739, 2009-Ohio-2070, ¶ 8-10.

{¶ 13} Other than Boerger's assertions, we have no basis to conclude that the trial court failed to conduct a proper de novo review. Although the court noted that credibility is difficult to discern from a written record, the court also clearly found that "interference" with Bonner's parenting time occurred, and we can reasonably infer that such a determination resulted from a review of the transcript. In other words, we can conclude from the express language of the trial court's decision that the transcript was reviewed, and that the trial court conducted an independent review of the facts and conclusions contained in the Magistrate's report and then entered its own judgment. Further, there is evidence in the record, contained in the transcript of the proceedings, to support the trial court's judgment. Since we cannot conclude that the trial court improperly deferred to the Magistrate, Boerger's first assigned error is overruled.

{¶ 14} We will consider Boerger's second and third assignments of error together. They are as follows:

{¶ 15} "THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION BY FINDING PLAINTIFF/APPELLANT IN CONTEMPT OF COURT FOR FAILURE TO ALLOW PARENTING TIME IN THE SUMMER OF 2008, AS WELL AS LABOR DAY," And,

{¶ 16} "THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION IN FINDING PLAINTIFF/APPELLANT IN CONTEMPT FOR FAILURE TO ALLOW FREE COMMUNICATION BETWEEN DEFENDANT/APPELLEE AND THE CHILDREN."

{¶ 17} "The essential element of a contempt proceeding is that the person facing contempt charges has obstructed the administration of justice in some manner. (Citation omitted). Technical violations of a court order do not necessarily require a finding of contempt. (Citation omitted).

{¶ 18} "In *Quint v. Lomakoski*, 173 Ohio App.3d 146, 2007-Ohio-4722 * * *, we reversed a finding of contempt * * * . However, the trial court's finding in that case was with regard to the deprivation of 45 minutes of visitation time. In *Quint*, we determined that even if the record established the violation, which we doubted, it would be, at most a technical violation. We noted that the mother had provided visitation in excess of what the court order required, and that she had fully complied with an order that had been reversed.

{¶ 19} * *

{¶ 20} "A prima facie case of contempt is made by establishing a prior court order and a violation of its terms. (Citation omitted). A court's contempt finding must be

supported by clear and convincing evidence (citation omitted). Absent an abuse of discretion, * * * we will not reverse the trial court's findings." *Martin v. Martin*, 179 Ohio App.3d 805, 2008-Ohio-6336, ¶20-21, 24.

{¶ 21} With those standards in mind, we find no abuse of discretion in the trial court's finding Boerger in contempt for denying Bonner part of his summer visitation and his Labor Day visitation, and for interfering with the telephone communication between him and his daughters.

{¶ 22} The parties' "Agreed Judgment Entry/ Shared Parenting Plan and Shared Parenting Order" provides in part that Boerger is the residential parent, and that "[Bonner] shall have parenting time with the children according to the Standard Schedule for Parenting Time as published by the Darke County Common Pleas Court * * * . For purposes solely of interpretation of the Standard Schedule for Parenting time, 'residential parent' as used in the Standard Schedule shall apply to [Boerger] and 'non-residential parent' as used in the Standard Schedule shall apply to [Bonner]." The "Standard Schedule for Parenting Time" provides in part that Bonner is to have the children on Labor Day in even numbered years, and that Boerger is to have the children on the Fourth of July in even numbered years. It further provides that Bonner "shall have parenting time for 28 days each summer. Summer parenting time shall be taken into two 14 days segments, separated by not less than seven (7) consecutive days, unless otherwise agreed. * * * The parent who is entitled to have parenting time with the children on the July 4th holiday * * * has priority to choose summer parenting time dates, provided written notice is given to the other parent by May 1st of each year. * * *

{¶ 23} "Usually, the regular alternate weekend and weekday parenting schedule shall

continue throughout the summer, with the residential parent continuing to have the children on the weekends and weekdays said parent would normally have them pursuant to this schedule. However, during the summer parenting time, each parent is entitled to [a] maximum of 14 days of uninterrupted parenting time to accommodate a parent's schedule, out-of-town, overnight vacation plans. The out-of-town vacation time shall be scheduled as set forth above with written notice provided to the other parent. When exercising out-of-town vacation time, each parent shall provide the other parent with destination, times of departure and arrival, and mode of travel."

{¶ 24} Regarding holidays, the Standard Schedule for Parenting Time provides, "Holiday parenting time shall be from 5:30 p.m. of the day before the holiday to 5:30 p.m. of the holiday."

{¶ 25} The "Agreed Judgment Entry/ Shared Parenting Plan and Shared Parenting Order" further provides, "The parties agree that open and free communication shall be permitted at all times with the parent with whom the child is not then residing, including, but not limited to, free use of the telephone. Also, the Father shall initiate a telephone [call] to the children weekly each Tuesday and Thursday evenings at 8:00 o'clock p.m."

{¶ 26} The record reflects that Bonner did not receive part of his summer parenting time nor his Labor Day parenting time, and the violations here are not merely technical.

{¶ 27} At the hearing, Boerger testified she sent Bonner a certified letter requesting time with the girls the first two weeks in July, and that the girls returned to school on August 20th. Bonner testified that he had uninterrupted parenting time with his daughters for the first two weeks in August, and "the other two weeks that I had coming I continuously asked

for them. They were always going camping. They were always doing this. She just wouldn't allow me to schedule it." Bonner stated that he began trying to schedule his summer parenting time right after the girls got out of school.

{¶ 28} Boerger denied that Bonner requested time with the children for his additional two uninterrupted weeks. She stated that she offered Bonner an additional week of time while she attended "apprenticeship school" for carpentry, and Bonner agreed to count that week as one of his vacation weeks. According to Boerger, "it was an interrupted vacation week because I did see the girls that Sunday."

{¶ 29} Bonner testified that Boerger asked him to watch the children, not so that she could attend "apprentice school," but because she and Gary had broken up and she was moving to Ithaca to repair a home there. According to Bonner, Boerger "called and asked me if the kids could stay with me during this time of turbulence between her and her boyfriend and her moving into Ithaca." Bonner testified that he picked the children up on a Friday, and he "kept them for four days after that period of time and she did come over on that Wednesday and take them out that night and then that Sunday she's talking about was her weekend anyway so I kept them for four days after my weekend." Bonner testified, "this was something I agreed to do to have them be with me rather than paying a baby-sitter. And I said, 'I will do this any time you want me to,' but it wasn't a time that I had scheduled where I made plans for us to spend time together to go do something and she knew that. And, in fact, later on when she threw it up saying this was one of your weeks, I said, 'No, it wasn't. You never said anything about that.' "

{¶ 30} Boerger argues as follows in her brief: "[Bonner] provided written notice but

did not follow the summer vacation provision, and therefore [Boerger] denied the request. The fact that [Bonner] may have 'asked numerous times throughout the summer,' according to the Magistrate's Decision, should have no bearing on the trial court's decision. The Local Rule requires written notice and the Local Rule is intended 'to be used when the parents cannot agree.'"

{¶ 31} Boerger was entitled to have parenting time with the children on the Fourth of July, in 2008, and she accordingly had priority to choose such dates as long as she provided written notice to Bonner by May 1st. Contrary to her assertions in her brief, Bonner was not required to provide written notice to her unless he planned to take the children out of town, and there is no evidence that he intended to do so. Boerger's testimony that Bonner did not request his second two-week period of parenting time is belied by Boerger's brief, in which she states that she denied his requests because they were not in writing.

{¶ 32} Regarding Labor Day in 2008, it is undisputed that Boerger was camping with her children and did not bring them to the designated exchange spot at 5:30 p.m. on Sunday night. According to Boerger, she took the girls to Bonner's home on Monday morning because the girls wanted to stay the extra night to play with their friends. There is no evidence that Bonner agreed to the change in plan.

{¶ 33} Finally, regarding the Tuesday and Thursday evening phone calls, Bonner testified that he has "run into a lot of interference in attempting to make those calls." Bonner supplied phone records from August of 2008 until March of 2009 that were admitted into evidence reflecting calls he initiated to Boerger's residence and cell phone in an attempt to speak to the girls. Bonner testified that the records demonstrate that he "religiously"

initiated phone calls on Tuesday and Thursday evenings. The following exchange occurred on direct examination:

{¶ 34} "Q. * * * are there specifics that you can pick out, without going through the entire record, of times that you made an attempt to call but that your attempts were either aborted in some way or that you - - by your records, can you make any determination?

{¶ 35} "A. I'd say 90 percent of the time they're two minutes calls and there's no way I'm going to talk to my two daughters for two minutes. What it is is I'm getting the recording and I usually right after that you'll see me calling her cell phone number * * * . And prior to that you'll see that I called the house phone * * * ."

{¶ 36} Boerger admitted to losing track of time in her garden when Bonner was due to call, and that the girls were often not home at the designated time due to Girl Scout activities. Boerger also admitted that Gary "records his calls for his business" on their home phone, and that "a couple" of the calls between Bonner and the girls have been recorded. Gary admitted that in one instance, when Bonner attempted to reach the girls via Gary's cell phone, that Gary threatened to "unhook my phone. And then he would have to call Nikki's cell phone to talk to the girls."

{¶ 37} Having reviewed the record, we find that clear and convincing evidence exists that Boerger violated the terms of the "Agreed Judgment Entry/Shared Parenting Plan and Shared Parenting Order." The evidence shows that Bonner did not receive his second two weeks of uninterrupted parenting time in the summer of 2008, and he did not have parenting time on Labor Day of 2008, due to the interference of Boerger. Further, the evidence shows that Boerger failed to allow free communication between Bonner and the

children on Tuesday and Thursday nights at 8:00. There being no abuse of discretion, the trial court properly found Boerger in contempt. Boerger's second and third assignments of error are overruled.

{¶ 38} Boerger's fourth assignment of error is as follows:

{¶ 39} "THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION IN GRANTING A MODIFICATION OF PARENTAL RIGHTS AND RESPONSIBILITIES BY FINDING THAT THE EXCHANGE FOR VISITATION SITE SHOULD BE CHANGED FROM THE VERSAILLES IGA TO THE VISITATION HOUSE IN GREENVILLE, OHIO WITHOUT FINDING THAT A CHANGE IN CIRCUMSTANCES EXISTS FOR SAID MODIFICATION."

{¶ 40} The "Agreed Judgment Entry/Shared Parenting Plan and Shared Parenting Order" provides in part that the Shared Parenting Plan shall not be altered unless there is a change of circumstances, and Boerger further asserts, "Ohio Revised Code §3109.04(E) requires that a modification of parental rights and responsibilities must be supported by evidence showing a change in circumstance, and only after such a finding should the Court then consider the best interest of the minor children in modifying the parenting plan." Bonner responds, the "trial court has jurisdiction to modify the terms of the Shared Parenting Plan as it did in this case pursuant to Ohio Revised Code Section 3109.04(E)(2)(b)."

{¶ 41} R.C. 3109.04 provides in relevant part:

{¶ 42} "(E)(1)(a) The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on the facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a

change has occurred in the circumstances of the child, the child's residential parent, * * * , and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

{¶ 43} * *

{¶ 44} "(2) In addition to a modification authorized under division (E)(1) of this section:

{¶ 45} * *

{¶ 46} "(b) The court may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree upon its own motion at any time if the court determines that the modifications are in the best interest of the children or upon the request of one or both of the parents under the decree. Modifications under this division may be made at any time. The court shall not make any modification to the plan under this division, unless the modification is in the best interest of the children."

{¶ 47} We agree with Bonner that the change of the location for the parties to exchange their children is a modification contemplated by R.C. 3109.04(E)(2)(b), and not a modification of parental rights and responsibilities for the care of the children requiring that a change of circumstances be shown, pursuant to R.C. 3109.04(E)(1)(a). The terms of the Shared Parenting Plan cannot supersede the statutory authority of the court. Boerger failed to appear at John's IGA on Labor Day at the appropriate time, and the children witnessed an

altercation between Gary and Bonner at that location. Given that the exchanges will be witnessed and documented at the Visitation House, we conclude that the trial court properly concluded that changing the site for the exchange of the children was in the children's best interest. There being no merit to Boerger's fourth assigned error, it is overruled. The judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

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