[Cite as *In re A.M.*, 2010-Ohio-948.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

IN THE MATTER OF:	:	
	:	Appellate Case No. 2009-CA-66
A.M.	:	
	:	Trial Court Case No. C36597
	:	
	:	(Criminal Appeal from
	:	Common Pleas Court)
	:	
	:	

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O P I N I O N

Rendered on the 12th day of March, 2010.

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BROGAN, J.

{¶ 1} Diane M. and Shannon M. had a daughter, and they agreed to share custody of her under a shared-parenting plan. Later, Shannon petitioned a juvenile court to terminate the plan and grant him sole custody. A magistrate concluded that shared parenting was in the child's best interest so he denied Shannon's petition. Shannon objected. Contrary to the magistrate, the juvenile court concluded that

shared parenting was no longer in the child's best interest, so the court issued a decision and order that granted Shannon's petition, designating him the child's residential parent and legal custodian.

{¶ 2} Diane appeals the court's order on two grounds. First, she contends that the order is erroneous because the shared-parenting plan (SPP) is void *ab initio*. And, second, Diane contends that, because the magistrate heard and saw most of the witnesses, he was in a better position to judge their credibility, so the trial court should defer to his decision. We conclude that after the court terminated the SPP whether or not it is void *ab initio*, it is certainly void *nunc*. And we hold that the trial court, in conducting its de novo review, need not defer to the magistrate's decision or witness-credibility determinations. Therefore, we will affirm.

{¶ 3} Diane and Shannon were not in a mutual relationship when their daughter, A.M., was born in 2003, and they have not been in such a relationship since. At a hearing in October 2004, Shannon's attorney read into the record an agreed shared-parenting plan. The juvenile court accepted the plan and told the attorney (Diane was not represented) to file a written version with the court within thirty days. But it was not until April 2006 that the attorney filed the plan, which was signed in January 2005 by Shannon and Diane and their witnesses. Later the same month, the court issued the Final Decree of Shared Parenting, which incorporated the SPP. A.M. was to live with Diane and Shannon was granted parenting time.

{¶ 4} Two years later, in August 2008, Shannon sought sole custody of A.M. Prompting his action was A.M.'s imminent entry into kindergarten. Article VII of the written SPP said, "The parties agree that the child, [A.M.], shall use her mother's

residence as her home address for purposes of school district designation so long as mother continues to reside in Greene County, Ohio." Shannon claimed that Diane had been living in Fairborn, Ohio, which is in Greene County, at the time they agreed to the SPP but, he claimed, she had since moved to her parents' home in Carlisle, Ohio, which is not in Greene County. So Shannon filed a Complaint for Emergency Ex Parte and Interim Orders of Custody, a Petition to Terminate Shared Parenting, and a Petition for Custody and Other Relief. The court granted Shannon emergency custody. By the time a hearing on the grant was held a few days later, Diane had agreed to give Shannon interim custody. In October 2008, the trial judge presided over a hearing on Shannon's petition to terminate shared parenting and his request for custody. Because the one day was not enough time, the hearing was continued until the following December. A magistrate presided over the continued hearing. In February 2009, Diane filed a motion under Civil Rule 60(B) that asked the court to vacate the written SPP because it did not conform to what was read into the record. Diane claimed that at the 2004 hearing she did agree that she would be the residential parent for school district purposes but she did not agree this would be true only if she lived in Greene County, like the written SPP said. Diane asked the court to enter a new SPP that conformed to the terms read at the hearing.

{¶ 5} In May 2009, the magistrate found that the written SPP did differ from the oral one in the way that Diane claimed. So the magistrate struck Article VII of the written SPP. The magistrate also concluded that it was in A.M.'s best interest for the parties to continue shared-parenting under the existing SPP (minus Article VII). Shannon filed objections to this decision with the juvenile court.

{¶ 6} In August 2009, the juvenile court rejected the magistrate's decision. While the court also found that the oral and written SPP's differed, it did not address the issue further. The court concluded that shared parenting was no longer in A.M.'s best interest, so it terminated the shared-parenting decree and plan and designated Shannon A.M.'s residential parent and legal custodian.

{¶ 7} Diane timely appealed, and she now assigns two errors for our review.

The legal status of the prior SPP is moot

{¶ 8} Diane, in the first assignment of error, contends that the SPP is void *ab initio*.[1] Shannon responds by claiming that Diane's appeal of the juvenile court's adoption of the SPP now, over three years later, is untimely. This claim is meritless because the time limits for appeal do not apply here–an agreement or "[a] judgment void ab initio can certainly be attacked at any time." *In re Estate of Vitelli* (1996), 110 Ohio App.3d 181, 184 (Citations omitted). However, a party cannot (and has no reason to) attack such an agreement or such a judgment after a court has already set it aside, like the juvenile court did to the shared-parenting decree and plan here.

{¶ 9} Under section 3109.04 of the Revised Code, courts have in certain situations the statutory authority to terminate a shared-parenting decree and plan and issue a modified custody decree. A court may terminate a shared-parenting decree and plan when it decides that shared parenting is no longer in the best

[1]"THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING A VALID SHARED PARENTING PLAN THAT IS VOID AB INITIO."

interest of the child. See R.C. 3109.04(E)(2)(c). After termination, the court must issue a modified decree of parental rights and responsibilities "as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made." R.C. 3109.04(E)(2)(d). This means, according to sections 3109.04(A)(1) and (B)(1), that the court must allocate parental rights and responsibilities in a way that comports with the child's best interest.

{¶ 10} These steps were followed by the juvenille court here. The court concluded that shared parenting no longer served A.M.'s best interest, so it terminated the existing shared-parenting decree and plan. The court then concluded that A.M.'s best interest laid in vesting Shannon with sole custody, so it designated Shannon her residential parent and legal custodian. Whether or not the SPP is void *ab initio*, it is certainly void *nunc*.

{¶ 11} The first assignment of error is overruled.

Trial court need not defer to the magistrate

{¶ 12} Diane, in the second assignment of error, contends that the juvenile court made a legal error by relying on transcripts of witness testimony to reverse the magistrate.[2] She argues that reading transcribed testimony did not allow the court to properly judge credibility, like hearing and seeing the witnesses allows. We see no error.

{¶ 13} Initially, we note that the same argument can be used to support the

[2]"THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY ISSUING FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT RELIED ON

contention that the court properly did *not* defer to the magistrate. The court and the magistrate each presided over part of the testimony, so the magistrate must have relied on transcripts too. But the more important point is that, when considering objections to a magistrate's recommendation, a trial court must conduct an independent review. See *Crosby v. McWilliam*, Montgomery App. No. 19856, 2003-Ohio-6063, at ¶35. Among other things, this means that "[the] trial court need not defer to [the] magistrate's determinations regarding witness credibility." *First Natl. Bank of Southwestern Ohio v. Individual Bus. Servs., Inc.*, Montgomery App. No. 22435, 2008-Ohio-3857, at ¶11, citing *Coronet Ins. Co. v. Richards* (1991), 76 Ohio App.3d 578, 585. Diane does not point to a specific credibility issue, so we will follow this general rule.

{¶ 14} The second assignment of error is overruled.

{¶ 15} Because both assignments of error were overruled, the juvenile court's judgment is Affirmed.

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DONOVAN, P.J., and FAIN, J., concur.

Copies mailed to:

Randall Roach
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Hon. Robert W. Hutcheson

TRANSCRIBED PROCEEDINGS AND NOT LIVE TESTIMONY."