[Cite as *Brewer v. Brewer*, 2011-Ohio-1275.]

IN THE COURT OF APPEALS FOR DARKE COUNTY, OHIO

AMY BREWER :

Plaintiff-Appellee : C.A. CASE NO. 2010 CA 17

v. : T.C. NO. 09DIV65300

CECIL J. BREWER : (Civil appeal from Common Pleas Court, Domestic Relations)

Defendant-Appellant :

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O P I N I O N

Rendered on the 18th day of March, 2011.

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FROELICH, J.

{¶ 1} Cecil Brewer appeals from a judgment and decree of divorce of the Darke County Court of Common Pleas, which divided the parties' assets and debts, granted custody of their minor child to Amy Brewer, established child support, and ordered Mr.

Brewer to attend anger management classes. For the following reasons, the judgment of the trial court will be affirmed.

I

{¶ 2} Mr. and Mrs. Brewer married on July 19, 2008, and separated in September of the same year. On February 27, 2009, Mrs. Brewer filed a complaint for divorce; at that time, she was pregnant with Mr. Brewer's child. Their daughter, M.J.B., was born in May 2009.

{¶ 3} Both parties filed Affidavits of Income, Expenses and Financial Disclosure with the court. Mrs. Brewer's form indicated that she was unemployed, and Mr. Brewer's form indicated that he was self-employed and earned $40,000 per year. The matter was referred to a magistrate, who conducted a hearing in April 2010.

{¶ 4} On April 28, 2010, the magistrate filed a Decision and Order resolving the disputed issues. The decision granted custody of the child to Mrs. Brewer and ordered Mr. Brewer to pay child support. In calculating child support, the magistrate imputed the minimum wage to Mrs. Brewer and relied on Mr. Brewer's representation that he earned $40,000 per year, which resulted in a child support payment of $448.13 per month. The magistrate found that Mr. Brewer had not been visiting with the child and that she was too young to be taken to Columbus (where Mr. Brewer lived) for weekend visitation. Because Mr. Brewer did not have a home, family, or friends in the area, the magistrate decided that parenting time should take place at Visitation House in Greenville.

{¶ 5} Additionally, the magistrate adopted the guardian ad litem's recommendation that Mr. Brewer's parenting time be "phased in," beginning with three-hour visits at the

Visitation House and building toward the standard schedule, taking into account the child's age and the distance between the parties. The magistrate also ordered Mr. Brewer to attend and complete an anger management class before the "'phase-in' visitation" would begin.

{¶ 6} Regarding the division of marital assets, the magistrate ordered that each party retain his or her own vehicle(s) and other personal property. Various expenditures that had been charged to Mrs. Brewer's credit card, including the wedding rings, the honeymoon, and a cash advance that was used to pay housing expenses, were divided equally; Mr. Brewer was ordered to pay for half of these amounts by making a payment to Mrs. Brewer. Additionally, Mr. Brewer was ordered to reimburse Mrs. Brewer for the full value of expenses related to the maintenance and repair of his dump truck, which were also charged on Mrs. Brewer's credit card. In total, Mr. Brewer was ordered to pay $3,435.43 to Mrs. Brewer to effectuate an equitable property settlement.

{¶ 7} Mr. Brewer filed objections to the magistrate's decision and order. After considering those objections and the record of the case, the trial court adopted the magistrate's decision.

{¶ 8} Mr. Brewer raises four assignments of error on appeal.

II

{¶ 9} Mr. Brewer's first assignment of error states:

{¶ 10} "THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION BY ORDERING APPELLANT TO PAY APPELLEE A SUM OF $3,453.43. OF THAT TOTAL SUM, APPELLEE'S CREDIT CARD STATEMENTS REFLECT THAT $2,214.32 WAS SPENT ON PURCHASES RELATING TO APPELLANT'S TRUCK

WHILE APPELLANT AND APPELLEE LIVED TOGETHER AND/OR WERE MARRIED. THE TRIAL COURT TREATED OTHER, SIMILAR DEBT AS MARITAL DEBT, BUT ERRED BY TREATING THE TRUCK-RELATED DEBT DIFFERENTLY."

{¶ 11} Mr. Brewer contends that the trial court acted inconsistently in its division of marital debts. With respect to a cash advance on Mrs. Brewer's credit card, which was purportedly used on housing expenses, the trial court concluded that the expense benefitted both parties, and it divided the debt equally. But Mr. Brewer was ordered to pay all of the charged expenses related to his dump truck. Mr. Brewer contends that, because his truck was the source of his income, Mrs. Brewer "enjoyed a similar benefit from truck-related expenses as she did from the cash advance during the time the parties lived together." In other words, he argues that, like the housing expenses, he should only have been ordered to reimburse Mrs. Brewer for half of the truck expenditures. Thus, the amount in dispute under this assignment of error is $1,107.16 (half of the truck expenditures of $2,214.32), not the entire payment of $3,453.43.

{¶ 12} The parties lived together for a total of four or five months before and during the marriage; during this time, they lived in a home owned by Mr. Brewer near Columbus. Mr. Brewer purchased the dump truck one month before the parties' marriage.

{¶ 13} Mrs. Brewer testified that she had encouraged Mr. Brewer to get a loan to cover his expenses related to his truck and business, such as oil, gas, and repairs, and that she had been uncomfortable with his charging these items on her credit card. Nonetheless, she had a higher limit on her credit card and allowed Mr. Brewer to charge some items. She also testified that she had given Mr. Brewer a $1,000 cash advance from her credit card,

which he claimed to use on his mortgage payment, but that she did not know how it had actually been spent.

{¶ 14} Mr. Brewer testified that he and Mrs. Brewer had each contributed whatever they could every month to their common expenses, without any system for dividing or attributing the expenses. He claimed that he had not agreed to reimburse Mrs. Brewer for the business expenses charged on her credit card, and he felt that she had benefitted from those expenditures.

{¶ 15} R.C. 3105.171(B) requires a court that grants a decree of divorce to divide the parties' marital property equitably between them. "'A trial court is vested with broad discretion when fashioning [the] division of marital property.'" *Smith v. Smith*, 182 Ohio App.3d 375, 2009-Ohio-2326, ¶15, quoting *Bisker v. Bisker* (1994), 69 Ohio St.3d 608, 609.

{¶ 16} When reviewing a division of marital property, an appellate court is limited to determining whether, after examining the totality of the circumstances, the trial court abused its discretion in formulating the award. *James v. James* (1995), 101 Ohio App.3d 668, 680; *Jones v. Jones* (Oct. 13, 2000), Montgomery App. No. 18082. An abuse of discretion occurs when the decision of a court is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 17} Although the magistrate did not elaborate on her reasons for treating the truck expenses differently from the cash advance, we cannot conclude that this distribution of the parties' liabilities was unreasonable, arbitrary, or unconscionable. By Mr. Brewer's own admission, the parties' arrangement for contributing to their joint expenses was very loosely formulated. It is unclear how long it would have taken for him to realize income from the

truck expenditures in question and, considering the very short period of time during which the parties lived together, it is possible that the income attributable to these expenses, if any, was earned after Mrs. Brewer had moved out of his home. Thus, she may not have benefitted from this investment. By contrast, it appears that the cash advance was used for the parties' more immediate needs, from which they both clearly benefitted. The trial court did not abuse its discretion in ordering Mr. Brewer to repay all of the truck expenses charged on Mrs. Brewer's credit card.

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

III

{¶ 19} Mr. Brewer's second assignment of error states:

{¶ 20} "THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THAT APPELLEE SHOULD BE THE SOLE RESIDENTIAL AND LEGAL CUSTODIAN OF APPELLANT'S DAUGHTER. IN PARTICULAR, THE TRIAL COURT ERRED BY DISREGARDING APPELLANT'S CONCERNS REGARDING APPELLEE'S EXISTING MENTAL CONDITIONS AND ITS POTENTIAL TO HARM APPELLANT'S DAUGHTER BECAUSE APPELLANT HAD LIMITED CONTACT WITH HIS DAUGHTER AND DID NOT REQUEST A PSYCHOLOGICAL EVALUATION OF APPELLEE."

{¶ 21} Mr. Brewer claims that Mrs. Brewer should not have been designated as the residential and custodial parent because her obsessive compulsive disorder made it difficult for her to distinguish "fantasy from reality and perceived threats from real threats." He also asserts that her obsessive compulsive disorder worsens under stressful conditions, such as

parenting.

{¶ 22} At the hearing, Mrs. Brewer admitted that she had been diagnosed with obsessive compulsive disorder, but she said that her symptoms were mild and did not affect her day-to-day activities. She was not receiving any treatment for the disorder, which manifested itself primarily in frequent hand-washing and an occasional need to double-check whether appliances had been turned off. Mrs. Brewer testified that her obsessive compulsive disorder did not interfere with her job or her parenting and was not made worse by caring for her daughter.

{¶ 23} With respect to Mrs. Brewer's obsessive compulsive disorder, Mr. Brewer claimed Mrs. Brewer had thoughts "that I don't think is normal - - for normal people to think." He testified that he was worried by her belief that she does not need medication for her condition. He stated that she would make him check the stove when they were living together to be sure that it was off, and that she would sometimes stare off into space during a conversation. He also recounted incidents wherein Mrs. Brewer claimed that she could not recall whether she had dipped her parents' toothbrushes or her own toothbrush into the toilet, so she bought new ones just to be safe. He claimed that Mrs. Brewer had told him of taping toilet lids closed in the past in order to prevent such behavior on her part. He also recounted an incident where Mrs. Brewer pulled into a driveway where her father-in-law was power-washing the dump truck; according to Mr. Brewer, she refused to get out of her car because she was worried about "overspray." Mr. Brewer also claimed that Mrs. Brewer had expressed fear that she could get rabies by driving past a dead animal. Mr. Brewer testified that, with their daughter in Mrs. Brewer's custody: "[I] fear for my child's safety up to and

including her life. *** I lose sleep at night worrying about my child every day." Mr. Brewer acknowledged, however, that he had not called Childrens Services about his intense concern for their child.

{¶ 24} On rebuttal, Mrs. Brewer testified that Mr. Brewer had "twisted" her concern about toothbrushes; she stated that she had never put anyone's toothbrush in a toilet, but that she had replaced toothbrushes in the past after having thoughts about such an incident. She denied that she had ever feared getting rabies from a dead animal on the road. With respect to her treatment for obsessive compulsive disorder, Mrs. Brewer stated that she had tried taking medication for the condition in the past, but that the medication had caused her to doubt her own behaviors more than she did when she was not taking the medication. At the time of the hearing, Mrs. Brewer had not taken medication for the condition in several years.

{¶ 25} The guardian ad litem recommended that Mrs. Brewer serve as the custodial parent.

{¶ 26} Where custody has never been litigated, the parties stand on equal footing regarding allocation of parental rights and responsibilities. *In re A.K.*, Champaign App. No. 09-CA-32, 2010-Ohio-2913, ¶22; *Pyburn v. Woodruff*, Clark App. No. 2009-CA-10, 2009-Ohio-5872, ¶8. The child's best interest is the sole issue, and it is evaluated using the non-exclusive list of factors set forth in R .C. 3109.04(F)(1). *Pyburn* at ¶8-9. These factors include the child's "interaction and interrelationship" with the parents and other family members, the child's adjustment to his or her home, and the mental and physical health of all persons involved. We review the trial court's decision for

abuse of discretion. Id. at ¶9.

{¶ 27} Mr. Brewer contends that the trial court abused its discretion in failing to place greater weight on the parties' mental health, particularly Mrs. Brewer's obsessive compulsive disorder, in its decision to name her as the residential and custodial parent. We disagree. The parties presented conflicting evidence about the seriousness of Mrs. Brewer's obsessive compulsive disorder. The trial court was in the best position to assess the credibility of the witnesses, and it was not required to credit Mr. Brewer's testimony about Mrs. Brewer's mental health. The magistrate observed that Mr. Brewer's concerns were "not particularly persuasive *** given the little contact he has had with [the child] and his failure to request psychological evaluations, which could have validated his concerns."

{¶ 28} Moreover, Mr. Brewer's argument completely ignores the significant weight that the trial court could have reasonably given to other factors relevant to its custody determination. For example, it was undisputed that Mr. Brewer saw their daughter shortly after she was born, and then did not see her again for more than nine months, notwithstanding a temporary visitation order which gave him the right to do so. Mr. Brewer offered various excuses for this lapse, such as scheduling and financial hardships. But these purported explanations do not alter the fact that Mr. Brewer had virtually no relationship with the child when he sought custody of her.

{¶ 29} The trial court did not abuse its discretion in naming Mrs. Brewer as the residential and custodial parent.

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

IV

{¶ 31} Mr. Brewer's third assignment of error states:

{¶ 32} "THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING APPELLANT TO COMPLETE AN ANGER MANAGEMENT COURSE PRIOR TO ALLOWING 'PHASE-IN' VISITATION TO BEGIN. THE TRIAL COURT'S ORDER WAS NOT BASED ON ANY PSYCHOLOGICAL EVALUATION OF APPELLANT, AND WAS CONTRARY TO A SUBSTANTIAL AMOUNT OF TESTIMONY TO APPELLANT'S PEACEFUL DEMEANOR."

{¶ 33} Mr. Brewer asserts that the trial court should not have required him to complete an anger management course as a condition of his expanded visitation. He particularly objects to the trial court's "double standard," i.e., its skepticism about his concerns regarding Mrs. Brewer's mental health, which were based in part on his failure to request a psychological evaluation of her, in contrast to its willingness to require an anger management class without a psychological evaluation of Mr. Brewer.

{¶ 34} According to Mrs. Brewer's testimony, Mr. Brewer had become angry with her in the past because she did not answer the phone or touched his belongings. Although she admitted that he had never struck her, he acted out his anger in other ways, such as breaking a vase, throwing something into the television speaker, throwing a lamp into the air, and threatening to kill her dog. She also claimed that he had "busted through" a locked bedroom door, cussing at her, while she was pregnant. Some of the damage to the house from these incidents and past incidents involving other girlfriends, which Mr. Brewer had

recounted to Mrs. Brewer, were documented with photographs.

{¶ 35} Mr. Brewer offered different explanations for the incidents Mrs. Brewer had described and for the damage depicted in the photographs. For example, he stated that some of the damage had been caused by moving furniture. With respect to the incident where he kicked open the locked bedroom door, Mr. Brewer claimed that Mrs. Brewer had been hyperventilating inside the room, "gasping for air," and he had wanted to help her. Mr. Brewer also presented testimony from his girlfriend, mother, and sister that he was "a calm, peaceful man."

{¶ 36} Mrs. Brewer's testimony supported the trial court's cautious decision to require an anger management class, and this requirement was not an onerous one. The trial court did not abuse its discretion.

{¶ 37} The third assignment of error is overruled.

V

{¶ 38} Mr. Brewer's fourth assignment of error states:

{¶ 39} "THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING APPELLANT TO CONTINUE MAKING CHILD SUPPORT PAYMENTS IN ACCORDANCE WITH THE TEMPORARY ORDER. TESTIMONY WAS PRESENTED AT TRIAL THAT DEMONSTRATES THAT THE FIGURES FOR APPELLANT'S INCOME WERE NOT ACCURATE, AND THAT HIS NET INCOME IS SIGNIFICANTLY LESS THAN WHAT WAS USED WHEN CALCULATING THE INITIAL CHILD SUPPORT PAYMENT AMOUNT."

{¶ 40} Mr. Brewer contends that the trial court erred in calculating his child support payment, because his income was actually much lower than he had initially

reported. He does not dispute the amount of income imputed to Mrs. Brewer.

{¶ 41} The temporary child support order was based on an annual income figure – $40,000 – provided by Mr. Brewer in his Affidavit of Income, Expenses and Financial Disclosure. At the hearing, Mr. Brewer claimed that the person who was preparing his taxes told him that his income "gross after expenses was something like $30,000." Mr. Brewer did not provide any documentation in support of this claim; he claimed that he did not have the money to pick up his tax forms from the preparer.

{¶ 42} Without documentation of a substantial reduction in income, the trial court did not abuse its discretion in utilizing the income figure originally provided by Mr. Brewer.

{¶ 43} The fourth assignment of error is overruled.

VI

{¶ 44} The judgment of the trial court will be affirmed.

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HALL, J. and BROGAN, J., concur.

(Hon. James A. Brogan, retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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