

[Cite as *Feltz v. Feltz*, 2004-Ohio-4160.]

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
MERCER COUNTY**

KEITH J. FELTZ

CASE NUMBER 10-04-04

PLAINTIFF-APPELLEE

v.

OPINION

TIFFANY J. FELTZ

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Domestic Relations Division.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: August 9, 2004.

ATTORNEYS:

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For Appellee.**

Bryant, J.

{¶1} Defendant-appellant Tiffany J. Feltz (“Tiffany”) brings this appeal from the judgment of the Court of Common Pleas of Mercer County, Domestic Relations Division, ordering shared parenting between Tiffany and plaintiff-appellee Keith J. Feltz (“Keith”).

{¶2} On May 8, 1998, Tiffany and Keith were married. Two children, Emily (D.O.B. December 16, 1996) and Cole (D.O.B. September 16, 1998), were born to the couple. On October 25, 2002, Keith filed for divorce claiming irreconcilable differences as the grounds for the divorce. Tiffany and Keith set up a visitation schedule that was followed while the divorce was pending. On November 15, 2002, Tiffany filed her answer and counterclaim for divorce. Tiffany filed a motion for the appointment of a guardian ad litem on July 17, 2003, and deposited \$1,000.00 with the clerk of courts. A guardian was never appointed.

{¶3} On August 29, 2003, the parties reached a partial property settlement and a partial agreement concerning the custody of the children. A final hearing was held on October 7, 2003, to finalize the child support and remaining custody issues. At that hearing, Tiffany entered her objections to the shared parenting plan previously introduced. The magistrate ordered that shared parenting plan be

implemented on October 29, 2003. Tiffany filed objections to the magistrate's decision. On February 17, 2004, the trial court overruled the objections concerning the shared parenting plan. Tiffany appeals from this judgment and raises the following assignment of error.

The trial court abused its discretion by ordering shared parenting of the parties minor children and naming [Keith] residential [parent for school placement purposes without appointing a guardian ad litem pursuant to the motion filed by [Tiffany].

{¶4} The allocation of parental rights and responsibilities is regulated by R.C. 3109.04, which states the following.

(A) In any divorce * * * upon hearing the testimony of either or both parents * * * , the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage. Subject to division (D)(2) of this section, the court may allocate the parental rights and responsibilities for the care of the children in either of the following ways:

(1) If neither parent files a pleading or motion in accordance with division (G) of this section, if at least one parent files a pleading or motion under that division but no parent who filed a pleading or motion under that division also files a plan for shared parenting, or if at least one parent files both a pleading or motion and a shared parenting plan under that division but no plan for shared parenting is in the best interest of the children, the court, in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children, including, but not limited to, the responsibility to provide support for the children and the right of the parent who is not the residential parent to have continuing contact with the children.

(2) If at least one parent files a pleading or motion in accordance with division (G) of this section and a plan for shared parenting is in the best interest of the children and is approved by the court in accordance with division (D)(1) of this section, the court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children in accordance with the approved plan for shared parenting. * * *

(B)(1) When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding * * * the court shall take into account that which would be in the best interest of the children. In determining the child's best interest for purposes of resolving any issues related to the making of that allocation, the court in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

(2) If the court interviews any child pursuant to division (B)(1) of this section, all of the following apply:

(a) The court, in its discretion, may and, upon the motion of either parent, shall appoint a guardian ad litem.

*** * ***

(D)(1)(a) Upon the filing of a pleading or motion by either parent or both parents, in accordance with division (G) of this section, requesting shared parenting and the filing of a shared parenting plan in accordance with that division, the court shall comply with division (D)(1)(a)(i), (ii), or (iii) of this section, whichever is applicable.

(i) If both parents jointly make the request in their pleadings or jointly file the motion and also jointly file the plan, the court shall review the parents' plan to determine if it is in the best interest of the children. If the court determines that the plan is

**in the best interest of the children, the court shall approve it. * * *
* The court shall not approve a plan under this division unless it determines that the plan is in the best interest of the children.**

*** * ***

(iii) If each parent makes a request in the parent's pleadings or files a motion but only one parent files a plan, or if only one parent makes a request in the parent's pleadings or files a motion and also files a plan, the court in the best interest of the children may order the other parent to file a plan for shared parenting in accordance with division (G) of this section., The court shall review each plan filed to determine if any plan is in the best interest of the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan. * * * If the court approves a plan under this division, either as originally filed or with submitted changes, or if the court rejects the portion of the pleadings or denies the motion or motions requesting shared parenting under this division and proceeds as if the request or requests or the motion or motions had not been made, the court shall enter in the record of the case findings of fact and conclusions of law as to the reasons for the approval or the rejection or denial. Division (D)(1)(b) of this section applies in relation to the approval or disapproval of a plan under this division.

(b) The approval of a plan under division (D)(1)(a)(ii) or (iii) of this section is discretionary with the court. The court shall not approve more than one plan under either division and shall not approve a plan under either division unless it determines that the plan is in the best interest of the children. If the court, under either division, does not determine that any filed plan or any filed plan with submitted changes is in the best interest of the children, the court shall not approve any plan.

R.C. 3109.04.

{¶5} In this case, Tiffany claimed that the trial court's judgment is in error because no guardian ad litem was appointed after she requested one. The

statute states that a guardian ad litem must be appointed if requested by the parents if the court addresses the child. The trial court here did not meet with the children before entering a judgment. Thus, there was no requirement that the trial court appoint a guardian ad litem.

{¶6} The parties submitted a shared parenting plan for the trial court's review. However, prior to the final hearing, Tiffany withdrew her agreement to participate in the shared parenting plan originally submitted. She asked the court to appoint her as the sole residential parent. This left the status of plan as if it had been submitted by Keith alone. Thus, the situation before the trial court was the one presented in R.C. 3109.04(D)(1)(a)(iii), in which one party presents a shared parenting plan and the other does not. This section of the statute requires the trial court to review the plan to make a determination that it is in the best interest of the children before approving the plan. The statute also requires the trial court enter into the record findings of fact and conclusions of law as to why the plan was approved. The trial court did not enter any findings of fact or conclusions of law in this case because the parties did not request them. Instead, the trial court stated the following in its judgment entry.

A Shared Parenting Plan is ordered and the parties are to divide their parenting time as residential parent as stated in Exhibit 1 attached hereto wherein both parties are hereby named the residential and custodial parent of the minor children * * *.

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Judgment Entry, 2. At no time did the trial court address the best interest of the children. The trial court failed to make a determination that the shared parenting plan proffered by Keith is in the best interest of the children and failed to make findings of fact and conclusions of law as required by statute. These omissions are contrary to statute and thus constitute an abuse of discretion. The assignment of error is sustained.

{¶7} The judgment of the Court of Common Pleas of Mercer County is reversed and the cause is remanded for further proceedings.

Judgment reversed
and cause remanded.

CUPP and ROGERS, JJ., concur.