[Cite as *McGraw v. McGraw*, 2010-Ohio-3956.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

CLINT McGRAW,	:	
Plaintiff-Appellee,	:	Case No: 09CA3327
v.	:	
JULIE McGRAW,	:	**DECISION AND JUDGMENT ENTRY**
Defendant-Appellant.	:	File-stamped date: 8-06-10

APPEARANCES:

Joan M. Garaczkowski, Garaczkowski & Hoover, Portsmouth, Ohio, for Appellant.

Rick L. Faulkner, Wheelersburg, Ohio, for Appellee.

Kline, J.:

{¶1} Julie McGraw (hereinafter "Julie") appeals the judgment of the Scioto County Court of Common Pleas, Domestic Relations Division, which denied her motion to terminate a shared parenting plan. On appeal, Julie contends that the trial court should have terminated shared parenting and designated her as her children's legal custodian. However, because substantial competent and credible evidence supports the trial court's decision, and because we are not permitted to weigh the evidence, we cannot overturn the trial court's decision. Accordingly, we overrule Julie's assignment of error and affirm the judgment of the trial court.

I.

{¶2} The marriage of Julie and Clint McGraw (hereinafter "Clint") produced two children. A male child (hereinafter the "Son") was born on January 3, 1996, and a female child (hereinafter the "Daughter") was born on September 28, 1997. Collectively, we will refer to the Son and Daughter as the "Children."

{¶3} Julie and Clint separated in 2002, and they were divorced in 2004. As part of their divorce, Julie and Clint adopted a shared parenting plan (hereinafter the "Plan"). The Plan (1) designated Clint as the children's residential parent for school purposes and (2) established a parenting-time schedule for Julie.

{¶4} Since their divorce, both Julie and Clint have entered into new long-term relationships. Julie is engaged to Kevin Prater (hereinafter the "Fiancé"), and they have lived together for several years. Clint married Melissa McGraw (hereinafter "Melissa") and also adopted her two children (hereinafter the "Half-Siblings").

{¶5} On January 23, 2008, Julie filed three separate motions. In her Motion To Terminate Shared Parenting, Julie requested that the trial court "terminate the [Plan] and vest full custody of the parties' minor children with her." Julie also filed a Motion For Contempt, wherein she requested that Clint "show cause why he should not be punished for contempt for failure to comply with the Court's orders for parenting-time right of first acceptance [i.e., for Julie to be the "first option" for child care during Clint's parenting time], decision making, degrading talk, and providing school records, medical records and activity schedules." Finally, Julie filed a Motion For In Chambers Interview Of Children.

{¶6} On March 13, 2008, the trial court appointed a guardian ad litem for the Children. After visiting with the involved parties, the guardian ad litem recommended

that the trial court "should not terminate or otherwise modify the * * * Plan[.]" Revised Guardian Ad Litem's Report at 5.

{¶7} A magistrate held hearings on September 10, 2008 and February 2, 2009. From these hearings, it became apparent that Clint had not provided Julie with the right of "first acceptance" as mandated by the Plan. The following issues were also addressed at the hearings: (1) whether Clint had provided Julie with the Children's sports schedules, school records, and medical reports; (2) whether Clint consulted with Julie on the Children's medical care; (3) the Children's relationship with Melissa and the Half-Siblings; (4) the Children's relationship with the Fiancé; (5) the Children's behavior, activities, and grades; (6) how Clint and Julie communicate with each other; (7) the Son's finicky eating habits; (8) the Daughter's issues with head lice; and (9) various other topics of dispute.

{¶8} On March 13, 2009, the magistrate interviewed the Children in chambers. During the interview, the Children expressed their frustrations with Melissa and claimed that Clint favors the Half-Siblings. For these reasons, both Children stated that they want to live with Julie.

{¶9} On May 12, 2009, the magistrate issued a decision that included findings of fact and conclusions of law. Initially, the magistrate found Clint in contempt for "failing to allow [Julie] to exercise her first option to provide care pursuant to" the Plan. Magistrate's Decision at 10. As a result, the magistrate stated that Julie had "been denied an indeterminate number of visits she could have received on three day weekends and long holidays." Id. The magistrate also found "that it is in the best interest of the children * * * that changes be made to the [Plan], but the [Plan] shall not

be terminated and [Clint] shall remain residential parent for school purposes." Id. With this in mind, the magistrate extended Julie's parenting time under the Plan.

{¶10} Julie filed objections to the magistrate's decision, but the trial court overruled Julie's objections, adopted the magistrate's decision, and entered the magistrate's recommended orders.

{¶11} Julie appeals and asserts the following assignment of error: "The Trial Court erred in denying Defendant/Appellant's Motion to Terminate Shared Parenting and Vest Full Custody pursuant to Ohio Revised Code 3109.04(B), (E), and (F)."

II.

{¶12} In her sole assignment of error, Julie contends that the trial court should have terminated the Plan and designated her as the Children's legal custodian.

{¶13} "Although a trial court must follow the dictates of R.C. 3109.04 in deciding child-custody matters, it enjoys broad discretion when determining the appropriate allocation of parental rights and responsibilities." *H.R. v. L.R.*, 181 Ohio App.3d 837, 2009-Ohio-1665, at ¶13, citing *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74; *Parker v. Parker*, Franklin App. No. 05AP-1171, 2006-Ohio-4110, at ¶23. See, also, *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260; *In re J.L.R.*, Washington App. No. 08CA17, 2009-Ohio-5812, at ¶30 ("An appellate court reviews a trial court's decision to terminate a shared parenting plan under an abuse of discretion standard."). "An appellate court must afford a trial court's child custody determinations the utmost respect, 'given the nature of the proceeding[,] the impact the court's determination will have on the lives of the parties concerned[, and the fact that] [t]he 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.'" *H.R.*, 181 Ohio App.3d 837, at ¶13, quoting *Pater v. Pater* (1992), 63 Ohio St.3d 393, 396 (alterations sic) (other internal quotation omitted). "Therefore, we will not disturb a trial court's custody determination unless the court abused its discretion." *Bishop v. Bishop*, Washington App. No. 08CA44, 2009-Ohio-4537, at ¶26, citing *Miller* at 74.

{¶14} "In *Davis,* the court defined the abuse of discretion standard that applies in custody proceedings as follows: 'Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court.

{¶15} "'The reason for this standard of review is that the trial judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page. * * * The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. * * * A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. The determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal * * *. This is even more crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well.'" *Posey v. Posey*, Ross App. No. 07CA2968, 2008-Ohio-536, at ¶10,

quoting *Davis* at 418-19 (other internal quotations omitted). See, also, *Wilson v. Wilson*, Lawrence App. No. 09CA1, 2009-Ohio-4978, at ¶21; *Jones v. Jones*, Highland App. No. 06CA25, 2007-Ohio-4255, at ¶33.

{¶16} R.C. 3109.04(E)(2)(c), which governs the termination of a shared parenting plan, provides that a trial court "may terminate a prior final shared parenting decree that includes a shared parenting plan * * * whenever it determines that shared parenting is not in the best interest of the children." See, also, *In re J.L.R.*, 2009-Ohio-5812, at ¶31. To determine the children's best interests, a trial court must consider the factors set forth in R.C. 3109.04(F)(1)(a)-(j) and R.C. 3109.04(F)(2)(a)-(e). See R.C. 3109.04(F)(2); *In re J.L.R.*, 2009-Ohio-5812, at ¶32-33.

{¶17} Pursuant to R.C. 3109.04(F)(1), "the court shall consider all relevant factors, including, but not limited to: (a) The wishes of the child's parents regarding the child's care; (b) If the court has interviewed the child in chambers * * * 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; (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; (d) The child's adjustment to the child's home, school, and community; (e) The mental and physical health of all persons involved in the situation; (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights; (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; * * * (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; (j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

{¶18} "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: (a) The ability of the parents to cooperate and make decisions jointly, with respect to the children; (b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent; (c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent; (d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting; (e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem." R.C. 3109.04(F)(2)(a)-(e).

{¶19} "[N]othing 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." *Beismann v. Beismann*, Montgomery App. No. 22323, 2008-Ohio-984, at ¶8, quoting *Goetze v. Goetze* (Mar. 27, 1998), Montgomery App. No. 16491. As a result, terminating a shared parenting plan does not require a change-in-circumstances finding. See *In re J.L.R.*, 2009-Ohio-5812, at ¶28; *Francis v. McDermott*, Darke App. No. 1753, 2009-Ohio-4323, at ¶10; *Rogers v. Rogers*, Huron App. No. H-07-024, 2008-Ohio-1790, at ¶13; *Murphy v. Murphy*, Greene App. No. 2007 CA 43, 2007-Ohio-6692, at ¶12.

{¶20} Initially, Julie contends that a change in circumstances may have occurred because of the Children's ages and changes in Clint's immediate family. However, as we noted above, terminating a shared parenting plan does not require a change in circumstances. Therefore, we need not address Julie's change-in-circumstances argument. Instead, we will focus only on Julie's argument that terminating the Plan would be in the best interest of the Children.

{¶21} Here, we cannot find that the trial court abused its discretion because substantial competent and credible evidence supports the trial court's decision. First, the guardian ad litem recommended that the Plan not be terminated. See R.C. 3109.04(F)(2)(e). And although a trial court is not bound to follow the recommendation of a guardian ad litem, we must afford deference to the trial court when it chooses to do so. See *Davis* at 418 (stating that we must give deference to the findings of the trial court); *Wine v. Wine*, Delaware App. No. 04 CA F 10 068, 2005-Ohio-975, at ¶75 (stating that "a trial court has discretion to follow or reject the recommendation of a guardian ad litem"); cf. *Lumley v. Lumley*, Franklin App. No. 09AP-556, 2009-Ohio-6992, at ¶46 ("Because assessment of the credibility and weight of the evidence is reserved for the trial court, we will not second guess the court's decision to disregard the guardian ad litem's recommendation.").

{¶22} Second, the witnesses seemed to agree that the Children are well adjusted and relatively well behaved. On recross-examination, Julie's Fiancé testified to the following:

{¶23} "Q. You say these kids are fairly well adjusted or you said that their [sic] age appropriately adjusted. You feel that they're mature and age appropriate.

{¶24} "A. Uh-huh

{¶25} "Q. So, in spite of whatever's going on, these kids are pretty good?

{¶26} "A. They're great kids." September 10, 2008 Transcript at 218.

{¶27} The Children have friends, participate in extra-curricular activities, and seemingly get along with each other. Further, both Julie and her Fiancé testified that the Children are not discipline problems. And although the Children's grades dropped after Julie filed her motion to terminate shared parenting, Julie agreed that the drop could be attributed to "the trauma of the moment of the filing." February 2, 2009 Transcript at 158. Thus, from the evidence, it appears that the Children are doing well under the Plan. See, e.g., R.C. 3109.04(F)(1)(d).

{¶28} Third, although there have been some issues, Clint and Julie seem to communicate reasonably well through email. They sometimes email each other four-or-five times per week, and Julie agreed that this form of communication is "workin' pretty well for the best interest of the kids[.]" February 2, 2009 Transcript at 152. This evidence supports the trial court's finding that Clint and Julie are able to cooperate with each other. See R.C. 3109.04(F)(2)(a).

{¶29} Julie argues that the trial court should have granted her motion to terminate shared parenting for the following reasons: (1) the Children expressed their desire to live with her, see R.C. 3109.04(F)(1)(a)&(b); (2) the Children do not get along with Melissa or the Half-Siblings, see R.C. 3109.04(F)(1)(c); (3) the Daughter is being picked on at school, see R.C. 3109.04(F)(1)(d); (4) the Children have developed health problems while in Clint's care, see R.C. 3109.04(F)(1)(e); (5) Clint is less likely to facilitate Julie's parenting time, see R.C. 3109.04(F)(1)(f); and (6) Clint and Julie cannot

cooperate effectively, see R.C. 3109.04(F)(2)(a). Based on the evidence, some of these factors may indeed favor Julie. "However, the mere presence of some evidence supporting a party's position does not entitle him or her to a favorable judgment. Rather, the trial court weighs each party's evidence. Our role under the abuse of discretion standard of review does not permit us to weigh the evidence." *Knight v. Knight* (Sept. 29, 1999), Meigs App. No. 99CA2, citing *Davis* at 418 (other citation omitted).

{¶30} Thus, even though some factors may favor Julie, we find that substantial competent and credible evidence supports the trial court's decision. First, the guardian ad litem recommended that shared parenting not be terminated. Second, the Children seem to be doing well under the Plan. And third, the evidence supports the trial court's finding that Julie and Clint are able to cooperate with each other through email. Without question, the record indicates that Julie is an exceptional parent. Furthermore, we believe that Julie would perform more than capably as the Children's legal custodian. Nevertheless, our standard of review does not permit us to find that the evidence favoring Julie carries greater weight than the evidence supporting the trial court's decision.

{¶31} Accordingly, for the foregoing reasons, we overrule Julie's assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court, Domestic Relations Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY:_____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.