[Cite as *Hopkins v. Hopkins*, 2014-Ohio-5850.]

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

ANTHONY HOPKINS,	:	
Plaintiff-Appellee,	:	Case No. 14CA3597
vs.	:	
STEPHANY HOPKINS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT:	Matthew F. Loesch, 611 Court Street, Portsmouth, Ohio 45662
COUNSEL FOR APPELLEE:	Justin R. Blume, The Blume Law Firm, LLC, 9050 Ohio River Road, Wheelersburg, Ohio 45694

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-30-14

ABELE, P.J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court, Domestic Relations Division, judgment that modified the allocation of parental rights and responsibilities entered in the divorce proceedings between Anthony Hopkins, plaintiff below and appellee herein, and Stephany Hopkins, defendant below and appellant herein.

{¶ 2} Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE MAGISTRATE'S DECISION OF AUGUST 14, 2013 AND SUBSEQUENT JUDGMENT ENTRY OF THE TRIAL COURT ADOPTING SAID DECISION (A) FAILED TO PROPERLY ANALYZE THE BEST INTERESTS STANDARD PROMULGATED BY [R.C.] 3109.04(F)(1) USED TO DETERMINE THE CHILDREN'S BEST INTERESTS IN ALLOCATING PARENTAL RIGHTS AND RESPONSIBILITY AND (B) FAILED TO PROPERLY CONCLUDE HOW THE BENEFITS OF A MODIFICATION OF PARENTAL RIGHTS AND RESPONSIBILITY OUTWEIGHED POTENTIAL HARMS UNDER [R.C.] 3109.04(E) AND AS SUCH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."
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> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT FAILED TO GIVE PROPER SCRUTINY IN ITS REVIEW OF FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ITS REVIEW OF THE APPELLANT'S OBJECTIONS TO THE MAGISTRATE'S DECISION."

{¶ 3} The parties divorced in 2008. Since that time, they have been involved in extensive post-divorce decree litigation regarding the custody of their three children. When the parties divorced, the trial court designated appellee the children's residential parent and legal custodian for school purposes. Three years later, in September 2011, the court granted custody to appellant. In November 2012, appellee filed a motion to modify the court's September 2011 custody order.

{¶ 4} On August 14, 2013, the magistrate recommended that the trial court grant appellee's

motion and designate him the children's residential parent. The magistrate determined that a change in circumstances had occurred because the children had "excessive school absences" while in appellant's custody. The magistrate additionally found that modifying custody would be in the children's best interest and that the benefits of the change outweighed any potential harm.

{¶ 5} Appellant objected to the magistrate's decision. She asserted that the magistrate failed to follow the statutory best interest test set forth in R.C. 3109.04 in that the magistrate's decision did not contain "a substantive analysis and/or application of the aforementioned factors to the case." Appellant also argued that the magistrate's finding that the children's best interest would be served by designating appellee the children's residential parent "is unsupported by the evidence." Appellant further objected to the magistrate's finding that the benefits of the modification outweighed any potential harm.

{¶ 6} On September 6, 2013, appellee filed a motion to dismiss appellant's objections due to appellant's failure to file a transcript. The trial court subsequently granted appellee's motion and dismissed appellant's objections.

{¶ 7} On December 16, 2013, the trial court adopted the magistrate's August 14, 2013 decision and granted appellee's November 2012 motion to modify custody. The court stated that it independently reviewed the magistrate's decision and found that the magistrate "properly determined the factual issues and appropriately applied the law." The court concluded that (1) the children's excessive school absences and poor academic performance constituted a change in circumstance, (2) the benefits of the change outweighed any potential harm, and (3) the modification would be in the children's best interest. This appeal followed.

I

{¶ 8} In her first assignment of error, appellant contends that the trial court's decision to grant appellee's motion to modify the allocation of parental rights and responsibilities and to designate appellee the residential parent is against the manifest weight of the evidence. Appellant asserts that the trial court failed to set forth a detailed analysis of the R.C. 3109.04(F)(1) best interest factors and failed to analyze whether the benefits of the change outweighed the potential harm. She argues that if the court had engaged in a factor-by-factor analysis, the court would have determined that modifying custody would not be in the children's best interest and that the harm outweighed the benefits.

A

STANDARD OF REVIEW

{¶ 9} Appellate courts generally review trial court decisions regarding the modification of a prior allocation of parental rights and responsibilities with the utmost deference. Davis v. Flickinger, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997); Miller v. Miller, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). Consequently, absent an abuse of discretion, we will not disturb a trial court's decision to modify parental rights and responsibilities. Davis, 77 Ohio St.3d at 418. In Davis, the court defined the abuse of discretion standard that applies in custody proceedings:

> "'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. (Trickey v. Trickey [1952], 158 Ohio St. 9, 47 O.O. 481, 106 N.E.2d 772, approved and followed.)' [Bechtol v. Bechtol (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus].
>
> 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. As we stated in Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80-81, 10 OBR 408, 410-412, 461 N.E.2d 1273, 1276-1277:
>
> '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, especially to the extent where the appellate court relies on unchallenged, excluded evidence in order to justify its reversal.'
>
> 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."

Id. at 418-419.

B

STANDARD FOR MODIFYING A PRIOR ALLOCATION OF PARENTAL RIGHTS AND RESPONSIBILITIES

{¶ 10} R.C. 3109.04(E)(1)(a) governs the modification of a prior decree allocating parental rights:

> The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on 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, or either of the parents subject to a shared parenting decree, 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 * * * unless the modification is in the best interest of the child and one of the following applies:
>
> * * *
>
> (iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

Thus, before a court may modify a prior allocation of parental rights and responsibilities, it must

consider: (1) whether a change in circumstances occurred, (2) whether modification is in the child's best interest, and (3) whether the benefits that result from the change outweigh any harm.

{¶ 11} In the case at bar, appellant did not challenge the trial court's conclusion that the children's poor academic performance and excessive school absences constituted a change in circumstance occurred. Therefore, we need not address this part of the trial court's analysis. Appellant, instead, challenges the court's best interest finding and its R.C. 3109.(E)(1)(a)(iii) finding that the advantages of the modification outweigh any potential harm.

{¶ 12} R.C. 3109.04(F)(1)(a)-(j) set forth the factors that a court must consider when determining a child's best interest:

> (a) The wishes of the child's parents regarding the child's care;
> (b) If the court has interviewed the child in chambers pursuant to division (B) of this section 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;
> * * *
> (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;
> * * * *

{¶ 13} In the case sub judice, appellant contends that the trial court failed to apply the best interest factors and that its best interest finding is against the manifest weight of the evidence. She likewise argues that the trial court's finding that the advantages of the modification outweigh any potential harm is against the manifest weight of the evidence. However, two deficiencies prevent

us from fully reviewing these arguments. First, appellant did not request either the magistrate or the trial court to enter Civ.R. 52 findings of fact and conclusions of law. Second, appellant did not submit a transcript to the trial court when she filed her objections to the magistrate's decision.

1

Request for Findings of Fact and Conclusions of Law

{¶ 14} Civ.R. 53(D)(3)(a)(ii) states that "a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law." Civ.R. 52 likewise states: "When questions of fact are tried by a court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law."

{¶ 15} The purpose of Civ.R. 52 findings of fact and conclusions of law is "'to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment.'" In re Adoption of Gibson, 23 Ohio St.3d 170, 172, 492 N.E.2d 146 (1986), quoting Werden v. Crawford, 70 Ohio St.2d 122, 124, 435 N.E.2d 424 (1982). Thus, a party may file a Civ.R. 52 request in order "to ensure the fullest possible review." Cherry v. Cherry, 66 Ohio St.3d 348, 356, 421 N.E.2d 1293 (1981).

{¶ 16} When a party does not request Civ.R. 52 findings of fact and conclusions of law, appellate review is limited. Pettet v. Pettet, 55 Ohio App.3d 128, 130, 562 N.E.2d 929 (1988); Yocum v. Means, 2nd Dist. Darke No. 1576, 2002–Ohio–3803, ¶7. When a party does not request findings of fact and conclusions of law, we ordinarily presume the regularity of the trial court proceedings. E.g., Bugg v. Fancher, 4th Dist. Highland No. 06CA12, 2007–Ohio–2019, ¶10. This

means that "the reviewing court must presume that the trial court applied the law correctly and must affirm if there is some evidence to support the judgment." Ratliff v. Ohio Dept. of Rehab. & Corr., 133 Ohio App.3d 304, 311–312, 727 N.E.2d 960 (10th Dist.1999). "It is difficult, if not impossible, to determine the basis of the trial court's ruling without findings of fact and conclusions of law * * *." Leikin Oldsmobile, Inc. v. Spofford Auto Sales, 11th Dist. Lake No. 2000–L–202, 2002–Ohio–2441, ¶17. Thus, in the absence of a request for findings of fact and conclusions of law "[w]e must presume that the trial court heard the evidence," that the trial court used the proper legal standard when evaluating the evidence, "and that sufficient evidence was presented to support the trial court's judgment." Id. As the court explained in Pettet v. Pettet (1988), 55 Ohio App.3d 128, 130, 562 N.E.2d 929:

> "[W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position superior to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence.
>
> The message is clear: If a party wishes to challenge the * * * judgment as being against the manifest weight of the evidence he had best secure separate findings of fact and conclusions of law. Otherwise his already 'uphill' burden of demonstrating error becomes an almost insurmountable 'mountain.'"

See, also, Bugg; McCarty v. Hayner, 4th Dist. Jackson No. 08CA8, 2009-Ohio-4540, at fn.1.

Furthermore, the absence of a request for findings of fact and conclusions of

> law ordinarily results in a waiver of the right to challenge the trial court's lack of an explicit finding concerning an issue. E.g., Fultz v. Fultz, 4th Dist. Pickaway No. 13CA9, 2014-Ohio-3344, ¶51.

Moreover, a party that does not request findings of fact and

conclusions of law cannot complain on appeal as to a lack of specificity of such findings. Fultz at ¶51.

{¶ 17} In the case at bar, the trial court did not engage in a factor-by-factor analysis of the R.C. 3109.04 best interest factors. However, in the absence of a Civ.R. 52 request, it is not required to do so. In re E.W., 4th Dist. Washington Nos. 10CA18, 10CA19, and 10CA20, 2011–Ohio–2123, ¶22; Bates v. Gould, 4th Dist. Highland No. 03CA12, 2004-Ohio-571, ¶12. This precludes appellant from challenging the court's lack of a detailed analysis regarding the statutory factors set forth in R.C. 3109.04. Consequently, in the absence of evidence to the contrary, we presume the regularity of the trial court proceedings and presume that the trial court properly applied the law to the facts of the case.

{¶ 18} In the case sub judice, nothing in the record indicates that the trial court failed to consider R.C. 3109.04. Instead, the court's decision shows that it did consider the statute. The court specifically referred to the statute in its decision and stated that it considered the statutory factors. Simply because the court did not engage in a factor-by-factor analysis does not mean that the court failed to consider the factors.

{¶ 19} Moreover, as we explain infra, the lack of a transcript circumscribes our review of her argument that the court's findings are against the manifest weight of the evidence.

2

Transcript

{¶ 20} It is well-established that appellate courts will not consider evidence that a party did not submit to the trial court. Babcock v. Welcome, 4th Dist. Ross No. 11CA3273, 2012-Ohio-5284, ¶16. "A reviewing court cannot add matter to the record before it, which was not a part of

the trial court's proceedings, and then decide the appeal on the basis of the new matter." State v. Ishmail, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. In other words, an appellate court is "precluded from considering anything that was not before the trial court when it overruled appellant's objection to the magistrate's decision." Ragins v. Dains, 10th Dist. Franklin No. 12AP-124, 2012-Ohio-5089, ¶9. When a party objecting to a magistrate's decision does not provide the trial court with a transcript of the magistrate's proceedings, appellate review "is limited to whether the trial court abused its discretion in adopting the [magistrate]'s report." State ex rel. Duncan v. Chippewa Twp. Trustees, 73 Ohio St.3d 728, 730, 654 N.E.2d 1254 (1995). "In other words, an appeal under these circumstances can be reviewed by the appellate court to determine whether the trial court's application of the law to its factual findings constituted an abuse of discretion." Id. Accord Liming v. Damos, 4th Dist. Athens No. 08CA34, 2009–Ohio–6490, ¶17 (stating that when a party does not file a transcript of evidence or an affidavit with the trial court, our review is limited to determining whether the trial court abused its discretion when applying the law to the facts).

{¶ 21} In the case at bar, appellant did not present a transcript of the proceedings before the magistrate when she filed her objections in the trial court. Thus, we cannot consider the transcript that appellant filed for appeal purposes. Consequently, without the transcript properly before us, our review of the court's findings is limited to whether the trial court abused its discretion in adopting the magistrate's decision. Based upon the record before us, we have no basis to conclude that the trial court abused its discretion by adopting the magistrate's decision and by designating appellee the residential parent.

{¶ 22} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 23} In her second assignment of error, appellant asserts that the trial court failed to independently review the magistrate's decision. Appellant further complains that the trial court improperly dismissed her objections due to her failure to file a transcript of the proceedings.

{¶ 24} Civ.R. 53(D)(4)(d) governs a trial court's ruling on objections to a magistrate's decision and states: "In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Thus, a trial court's review of a magistrate's decision "contemplates a de novo review of any issue of fact or law that a magistrate has determined when an appropriate objection is timely filed." Knauer v. Keener, 143 Ohio App.3d 789, 793–94, 758 N.E.2d 1234 (2nd Dist. 2001).

{¶ 25} Civ.R. 53(D)(4)(d) presupposes, however, that a party objected to a magistrate's decision in accordance with Civ.R. 53(D)(3). Civ.R. 53 requires that a party objecting to a factual finding support the objection with "a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." Civ.R. 53(D)(3)(b)(iii). In the absence of a transcript or affidavit, a trial court is required to accept the magistrate's findings of fact and may only determine the legal conclusions drawn from those facts. Ragins at ¶8; Sliwinski v. Capital Properties Mgt. Ltd., 9th Dist. Summit No. 25867, 2012-Ohio-1822, ¶9; Lesh v. Moloney, 10th Dist. Franklin No. 11AP–353, 2011–Ohio–6565, ¶11. If the objecting party does not file a proper transcript of all relevant testimony, "'a trial court's review is

necessarily limited to the magistrate's conclusions of law.'" Allread v. Allread, 2nd Dist. Darke No. 2010CA6, 2011-Ohio-1271, ¶18, quoting Dayton Police Dept. v. Byrd, 2nd Dist. Montgomery No. 23551, 2010–Ohio–4529, ¶8. Consequently, a trial court may properly adopt a magistrate's factual findings without further consideration when the objecting party does not provide the court with a transcript of the magistrate's hearing or other relevant material to support their objections. In re Maxwell, 4th Dist. Ross No. 05CA2863, 2006–Ohio–527, ¶27.

{¶ 26} In the case at bar, appellant did not file a transcript to support her objections to the magistrate's decision. Because appellant did not object to the magistrate's decision in accordance with Civ.R. 53(D)(3), the trial court did not have a duty to independently review the magistrate's decision to ascertain that the magistrate properly applied the law. Without a transcript, the trial court could not ascertain whether the magistrate properly determined the factual issues. Instead, the court was required to accept the magistrate's factual findings.

{¶ 27} Appellant nevertheless claims that she did not object to the magistrate's factual findings, but instead, objected to the magistrate's legal conclusions. Appellant asserts that she challenged the magistrate's legal conclusions that designating appellee the residential parent is in the children's best interest and that the advantages of the modification outweighed any potential harm. Appellant's first objection stated that "the Magistrate in the instant case failed to properly follow the best interest test as promulgated by [R.C.] 3109.04(F)(1)." Appellant then cited the statute and asserted: "[T]he Magistrate's Decision contains no substantive analysis and/or application of the [statutory] factors to the facts of the case." Appellant later stated: "[T]he Magistrate failed to properly analyze and apply the aforementioned best interests [sic] factors to the evidence presented at the hearing." She contended that the magistrate's best interest finding "is

unsupported by the evidence." Appellant further objected to the magistrate's finding that the advantages of the modification outweighed any potential harm.

{¶ 28} Although appellant attempts to frame these objections as objections to the magistrate's legal conclusions, "what is in the best interest of a child is primarily a question of fact that should be reversed only if it is against the manifest weight of the evidence." Kokoski v. Kokoski, 9th Dist. Lorain No. 12CA10202, 2013-Ohio-3567, ¶26; Knouff v. Walsh–Stewart, 9th Dist. Wayne No. 09CA0075, 2010–Ohio–4063, ¶11; In re Gill, 4th Dist. Washington No. 84X4 (Feb. 11, 1985). Furthermore, determining what is in a child's best interest necessarily involves a consideration of the evidence. A court cannot properly determine what is in a child's best interest without considering the evidence relating to the child's best interest.

{¶ 29} In the case at bar, without a transcript or other evidence to review, the trial court could not independently ascertain whether the magistrate appropriately determined that designating appellee the residential parent was in the children's best interest or whether the benefits of a modification outweighed any potential harm. We therefore disagree with appellant that the trial court erred by not independently reviewing the magistrate's decision and by dismissing her objections due to her failure to file a transcript of the proceedings before the magistrate.

{¶ 30} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee shall recover of appellant 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 that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY:_____

Peter B. Abele
Presiding 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.