

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

JOSEPH JUSTIN ROBY,	:	
	:	Case No. 15CA21
Plaintiff-Appellant,	:	
	:	
v.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
CLAUDIA RENATE ROBY,	:	
	:	
Defendant-Appellee.	:	Released: 11/10/16

APPEARANCES:

William L. Burton, Burton Law Office, LLC, Marietta, Ohio, for Appellant.¹

McFarland, J.

{¶1} Joseph Justin Roby appeals from a Washington County Court of Common Pleas judgment in a divorce case denying his motion for shared parenting and designating his wife, Claudia Renate Roby (“Claudia”), the sole residential parent and legal custodian of their three minor children. The decree incorporated the court magistrate’s decision, to which Roby had failed to timely object.

{¶2} Roby asserts that the trial court erred by examining the parties’ postnuptial agreement, which is unenforceable in Ohio, by allowing the testimony of a licensed counselor who engaged in confidential communications with him,

¹ Appellee did not file a brief or otherwise enter an appearance in this appeal.

and in rejecting the recommendation of the guardian ad litem that Roby be designated the residential parent and legal custodian.

{¶3} Roby forfeited any error by failing to object to the magistrate's decision by raising these claims and we need not address whether his claims raise plain error because he does not argue plain error on appeal. Finally, he has not established plain error. We overrule his assignments of error and affirm the judgment of the trial court.

I. FACTS

{¶4} Roby and Claudia were married in 2004 in Las Vegas, Nevada. They have three children: A.R., born in 2005, J.R., born in 2009, and I.R., born in 2011. The family lived in Germany, where Claudia is from, until 2007, when they moved to Arizona. They moved to Alabama in 2011 and then to the Belpre, Washington County, Ohio area in 2013. When they lived in Germany before they moved to the United States, the parties executed a postnuptial agreement in which Roby agreed that Claudia and their children could return to Germany. Because Roby did not ultimately adhere to his promise, Claudia felt that she was lured to America under false pretenses.

{¶5} The parties' marriage gradually deteriorated to the point that they both committed domestic violence against each other, with Claudia receiving the worst of the harm due to Roby's superior strength and more violent behavior in choking

and restraining his wife. In November 2013, Roby filed a complaint in the Washington County Court of Common Pleas for a divorce, claiming that the parties were incompatible. Claudia filed an answer in which she agreed that the parties were incompatible and counterclaimed for divorce.

{¶6} The trial court appointed a guardian ad litem (“GAL”) for the parties’ minor children upon Roby’s motion. The GAL issued several reports. The GAL concluded that although both parents loved their children, they focused on their hatred for each other instead of their children’s best interests. He recommended that Roby be named the residential parent and legal custodian of the children because if Claudia were instead named, she would move the children to Germany, which would remove Roby from having a meaningful part in their lives.

{¶7} The case proceeded to a three-day trial before a court magistrate. Several months later, the magistrate issued a detailed decision. After a thorough analysis of the pertinent statutory factors, the magistrate concluded that shared parenting was not in the best interest of the children and that it was in the children’s best interest that Claudia be designated residential parent and legal custodian of them. The magistrate determined that upon Claudia’s move with the children to Germany, Roby would have parenting time with them during summer breaks from school and for Christmas breaks every other year, and Roby could choose to visit the children in Germany. The magistrate noted that although Roby

testified that he planned to stay in Belpre while working at his federal job in Parkersburg, West Virginia, he had a history of moving to other jobs every few years to increase his career and financial positions, he claimed to have applied in 2013 for two jobs in Germany, and he had unilaterally incurred an additional \$85,000 in personal debt while the divorce was pending, making it more likely for him to leave the area in the near future. The magistrate further noted that when temporary orders were in place during the divorce, the parties were unable to cooperate and make joint decisions regarding their children and Roby had persistently harassed and manipulated his wife:

In fact, at the same time the parties were subject to an order that denied them the ability to communicate verbally with one another. This did not stop the Father from antagonizing the Mother with love notes, stealing her notes, and posting signs restricting the use of food in the home and labeling her a non-member of the Roby family. In addition, the Father put a locked box over the thermostat, during one of the coldest winters on record, and locked the Mother out of areas of the home and outbuilding. Even with an order limiting their contact to exchanges of the children and communicating via letters the parties were unable to consistently maintain a minimum level of respect towards one another in their dealing for the children's sake.

If the Court was to grant shared parenting and designated the Father the residential parent for school placement purposes, resulting in the Mother having to stay here to participate in the children's lives, the Court would be manipulating the Mother to conform to Father's wishes as to where she would live and place her at the beck and call of Father's relocation wishes. This type of manipulation is sure to breed further animosity and deep seated hatred towards the Father that would not strengthen these parties'] ability to cooperate and make decisions jointly. (*Id.*)

{¶8} The magistrate concluded that “[t]hese parents have not done well traversing the obstacles of divorce and because of this all individuals involved have suffered tremendously,” leading her to believe “that the disentangling of these parties’ lives from one another and the finality that comes with a final judgment entry is in the best interest of all involved.” The magistrate also ordered Roby to pay child support and temporary spousal support and divided the parties’ assets and liabilities.

{¶9} After receiving the unfavorable magistrate’s decision, Roby fired his counsel and filed a pro se motion to extend the time to file objections. The trial court denied the motion, and Roby, through new counsel, filed an “Objection to Magistrate’s Decision,” which included no objections but merely requested an additional ten days to file objections. The trial court treated the objection like a request for additional time and denied it and subsequently denied Roby’s motion for reconsideration.

{¶10} In May 2015, the trial court incorporated the magistrate’s decision in its final entry of divorce. Consistent with the magistrate’s decision, the trial court granted a divorce to each party based on incompatibility, denied Roby’s motion for shared parenting, and designated Claudia the sole residential parent and legal custodian of their three minor children. The trial court also adopted the magistrate’s decision that upon Claudia’s move with the children to Germany,

Roby would have parenting time with the children during their scheduled summer break and in odd-numbered years during their Christmas break. This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶11} Roby assigns the following errors for our review:

1. THE COURT ERRED BY EXAMINING AN AGREEMENT THAT WAS NOT ENFORCEABLE OR ADMISSIBLE IN OHIO.
2. THE COURT ERRED BY ALLOWING TESTIMONY AGAINST APPELLANT BY APPELLANT’S COUNSELOR.
3. THE COURT ERRED IN AWARDING CUSTODY CONTRARY TO THE GUARDIAN AD LITEM’S REPORT, NOT IN THE BEST INTEREST OF THE CHILDREN, BUT IN THE BEST INTEREST OF APPELLEE.

III. LAW AND ANALYSIS

A. Roby’s Counsel’s Failure to Comply with App.R. 16(A)(7)

{¶12} Before addressing the merits of Roby’s assignments of error, we first consider a preliminary issue. Roby is represented on appeal by the same attorney he hired after firing his original attorney in the divorce proceeding upon receiving the unfavorable magistrate’s decision.

{¶13} Under App.R. 16(A)(7), an appellant’s brief shall include “[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the

contentions, *with citations to the authorities, statutes, and parts of the record on which appellant relies.*” (Emphasis added.) “App.R. 16(A)(7) requires an appellant’s brief to contain an argument with citations to authorities.” *Prokos v. Hines*, 4th Dist. Athens Nos. 10CA51 and 10CA57, 2014-Ohio-1415, ¶ 56.

Roby’s appellate brief contains no citations to any cases, statutes, or any other authorities in support of his assignments of error. Therefore, “[i]t is within our discretion to disregard any assignment of error that fails to present any citations to cases or statutes in support.” *Robinette v. Bryant*, 4th Dist. Lawrence No. 14CA28, 2015-Ohio-119, ¶ 33; *Ogle v. Hocking Cty.*, 4th Dist. Hocking No. 14CA3, 2014-Ohio-5422, ¶ 47.

{¶14} Nevertheless, given the importance of the parental rights at issue here, we exercise our discretion and proceed to consider Roby’s assignments of error. *Compare Robinette* at ¶ 34.

B. Forfeiture of Claims on Appeal

{¶15} In his three assignments of error, Roby contests the custody determination of the trial court’s judgment.

{¶16} Roby forfeited any error by failing to raise, through timely objections to the magistrate’s decision, his claims that the magistrate had improperly relied on the parties’ postnuptial agreement, wrongly permitted the testimony of a licensed counselor, and erred in rejecting the GAL’s recommendation that Roby be named

the residential parent and legal custodian. *See Faulks v. Flynn*, 4th Dist. Scioto No. 13CA3568, 2014-Ohio-1610, ¶ 17, citing Civ.R. 53(D)(3)(b)(iv) (“A party forfeits or waives the right to challenge the trial court’s adoption of a factual finding or legal conclusion unless the party objects in accordance with Civ.R. 53(D)(3)(b)”)”; *State ex rel. Muhammad v. State*, 133 Ohio St.3d 508, 2012-Ohio-4767, 979 N.E.2d 296, ¶ 3 (appellant waived claim on appeal by failing to specifically raise claim in his objections to the magistrate’s decision in the trial court). Significantly, Roby does not challenge on appeal the trial court’s denial of his requests for extension of time to submit timely objections.

C. Plain Error

{¶17} We next consider whether Roby has established plain error. “Except for a plain error, a party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).” Civ.R. 53(D)(3)(b)(iv).

{¶18} Roby does not acknowledge his failure to timely object to the magistrate’s decision to raise his claims or invoke the plain-error doctrine on appeal. Under these circumstances, we need not address it. *See State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015-Ohio-2996, ¶ 25, citing *State v. Quartermann*,

140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 17-20 (appellate court need not consider plain error where appellant fails to timely raise plain-error claim); *State v. Sims*, 10th Dist. Franklin No. 14AP-1025, 2016-Ohio-4763, ¶ 11 (appellant cannot meet burden of demonstrating error on appeal when she only preserved plain error and did not argue plain error on appeal); *In re A.R.*, 12th Dist. Butler No. CA2015-08-143, 2016-Ohio-4919, ¶ 33 (appellant is precluded from raising plain error on appeal where he does not argue it in his brief); *Coleman v. Coleman*, 9th Dist. Summit No. 27592, 2015-Ohio-2500, ¶ 9 (when a claim is forfeited on appeal and the appellant does not raise plain error, the appellate court will not create an argument on his behalf).

{¶19} Further, “In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus. “Because parental rights determinations are difficult to make and appellate courts accord wide latitude to the trial court’s consideration of evidence in these cases, ‘[p]lain error is particularly difficult to establish.’ ” *Faulks*, 2014-

Ohio-1610, at ¶ 20, quoting *Robinette v. Bryant*, 4th Dist. Lawrence No. 12CA20, 2013-Ohio-2889, ¶ 28.

{¶20} In his first assignment of error, Roby asserts that the trial court erred by examining an agreement that was not enforceable or admissible in Ohio. Roby is correct that postnuptial agreements, with specific limited exceptions not applicable here, are not valid in Ohio. *See, e.g., Hoffman v. Dobbins*, 9th Dist. Summit No. 24633, 2009-Ohio-5157, ¶ 7; R.C. 3103.06 (“A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for support for either of them and their children during the separation”). The magistrate recognized this in her decision and allowed the agreement into evidence for the limited purpose of challenging Roby’s credibility, i.e., through the agreement, he misrepresented to his wife that if she agreed to move to the United States with him, she could return to Germany at any time with their children. The issue of whether Roby fraudulently induced his wife to move with him to the United States was manifestly pertinent to the divorce and parenting determination. Roby cites no evidence or authority to the contrary.

{¶21} In his second assignment of error, Roby contends that the trial court erred by allowing the testimony of Patty Groom, a licensed counselor, because she had conducted private counseling sessions with him. R.C. 2317.02 governs

privileged communications and acts. It does not disqualify a counselor as a witness; it merely disallows confidential communications. *Medley v. Russell*, 5th Dist. Richland No. 09-CA-18, 2009-Ohio-5667, ¶ 21; R.C. 2317.02(G)(1). The trial court permitted Groom to testify about her communications with Roby that were not privileged under R.C. 2317.02(G) and sustained objections to testimony that covered her privileged communications with Roby. No error occurred.

{¶22} In his third assignment of error, Roby argues that the trial court erred in rejecting the GAL's recommendation that he be designated the residential parent and legal custodian of the children. The trial court is not required to follow a guardian ad litem's recommendation; it has discretion to follow or reject it. *See Clyburn v. Gregg*, 4th Dist. Ross No. 11CA3211, 2011-Ohio-5239, ¶ 47; *Hammons v. Hammons*, 5th Dist. Delaware No. 13 CAF 07 0053, 2014-Ohio-221, ¶ 12. The magistrate's decision, which was ultimately incorporated by the trial court in its judgment entry, represents a thoughtful, considered analysis of the parenting issue and a reasonable decision to reject the GAL's recommendation based on the best interests of the children.

{¶23} Consequently, even if Roby had specifically raised a plain-error argument on appeal, he failed to establish that this is "the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation

of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Goldfuss*, 79 Ohio St.3d 116, 679 N.E.2d 1099, at the syllabus. We overrule his assignments of error.

IV. CONCLUSION

{¶24} Roby forfeited his claims on appeal by failing to timely raise them in objections to the magistrate’s decision. In addition, he failed to raise or establish plain error. Having overruled his assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and costs are assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Harsha, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, 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.