[Cite as *Ream v. Ream*, 2003-Ohio-2144.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
DENISE L. REAM,	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellant	:	Hon. John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 02-CA-000071
NORMAN E. REAM,	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from Licking County Court of Common Pleas, Case NO.00 DR 01543
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	4/14/03

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
BRUCE A. ENNEN P.O. Box 4461 Newark, Ohio 43058	CINDY RIPKO 35 S. Park Place, Suite 201 Newark, Ohio 43055

Boggins, J.

{¶1} This is an appeal by Appellant Denise L. Ream from a decision by the Licking County Court of Common Pleas, Domestic Relations Division, designating Appellee as

residential parent of the minor child, Sarah Ream.

{¶2} Appellee is Norman E. Ream.

STATEMENT OF THE FACTS AND CASE

{¶3} On November 30, 2000, Appellee filed a Petition for Civil Protection Order. The trial court granted a temporary civil protection order, awarded Appellee temporary custody of the minor child and possession of the marital residence.

{¶4} On November 30, 2000, Appellant filed a Complaint for Divorce.

{¶5} On April 9, 2001, and June 5, 2001, the trial court held a hearing to review temporary orders.

{¶6} On October 30-31, 2001, the trial court held the final hearing on the divorce action.

{¶7} On December 19, 2001, the Magistrate issued her decision.

{¶8} On January 2, 2002, Appellee filed objections to the Magistrate's Decision.

{¶9} On January 16, 2002, Appellee filed a request for clarification.

{¶10} On February 5, 2002, the Magistrate issued a supplemental decision which designated Appellee as residential parent for school attendance and Appellant as residential parent for all other purposes.

{¶11} On February 11, 2002, Appellee filed objections to the Magistrate's decision.

{¶12} On April 8, 2002, Appellant filed objections to the Magistrate's decision.

{¶13} On April 17, 2002, Appellee filed a Reply to Appellant's Objections.

{¶14} On April 24, 2002, Appellee filed a motion for review of newly discovered evidence.

{¶15} On April 30, 2002, the trial court issued its decision.

{¶16} On May 2, 2002, the trial court issued a Judgment entry modifying the division of marital assets and obligations and a Supplemental decision.

{¶17} On May 9, 2002, Appellant filed a request for Findings of Fact and Conclusions of Law as to the April 30, 2002, and May 2, 2002 Opinions.

{¶18} On May 14, 2002, Appellant filed a request for clarification.

{¶19} On May 29, 2002, the trial court filed a Judgment Entry denying Appellant's request for findings of fact and conclusions of law and also denying the request for clarification.

{¶20} On June 20, 2002, the Final Judgment and Decree was filed.

ASSIGNMENTS OF ERROR

I.

{¶21} "THE LICKING COUNTY COMMON PLEAS COURT, DOMESTIC RELATIONS DIVISION (THE TRIAL COURT) ABUSED ITS DISCRETION IN AWARDING CUSTODY OF THE MINOR CHILD OF THE PARTIES , SARAH REAM (SARAH), TO APPELLEE."

II.

{¶22} "THE TRIAL COURT FAILED TO CONSIDER THE BEST INTEREST OF THE CHILD IN MAKING ITS CUSTODY AWARD AND SUCH FAILURE WAS AN ABUSE OF ITS DISCRETION."

III.

{¶23} " THE TRIAL COURT FAILED TO CONDUCT AN INDEPENDENT REVIEW OF THE FACTS, EVIDENCE AND CONCLUSIONS OF THE MAGISTRATE BEFORE SUSTITUTING [SIC] ITS OWN DECISION FOR THAT OF THE MAGISTRATE."

IV.

{¶24} "THE MAGISTRATE AND THE TRIAL COURT ERRED IN ACCEPTING THE REPORT OF THE GUARDIAN AD LITEM."

V.

{¶25} "THE MAGISTRATE AND THE TRIAL COURT ERRED IN FAILING TO FIND THE APPELLANT, AS NATURAL PARENT, WAS ENTITLED TO COMPANIONSHIP WITH HER DAUGHTER OVER A NON-PARENT."

VI.

{¶26} "THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING CUSTODY TO APPELLEE AS THAT DECISION APPROVED AND REINFORCED APPELLEE'S MANIPULATION OF THE COURT SYSTEM TO OBTAIN INITIAL CUSTODY OF THE MINOR CHILD OF THE PARTIES."

VII.

{¶27} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT GIVING DUE CONSIDERATION TO APPELLANT'S STATUS AS PRIMARY CAREGIVER OF THE MINOR CHILD OF THE PARTIES."

VIII.

{¶28} "THE TRIAL COURT ERRED IN REFUSING TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO ITS OPINION OF APRIL 20, 2002 AND ITS SUPPLEMENTAL OPINION OF MAY 3, 2002."

I., II., III., VI.

{¶29} Appellant argues that the trial court abused its discretion in awarding custody of Sarah Ream, minor child, to Appellee, in each of these assignments of error. We will therefore address them simultaneously.

{¶30} Because custody issues are some of the most difficult and agonizing decisions a trial judge must make, he or she must have wide latitude in considering all the evidence and such decision must not be reversed absent an abuse of discretion. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159. The Ohio Supreme Court applied the abuse of discretion standard to custody cases in *Bechtol v. Bechtol* (1990), 49

Ohio St.3d 21, syllabus, 550 N.E.2d 178, holding: “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.” (Citation omitted). "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." *Davis*, supra at 418. In *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 461 N.E.2d 1273, the Ohio Supreme Court explained: “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.”

{¶31} Revised Code §3109.04(F)(1), which sets forth the factors a trial court must consider in determining the best interest of the child, states, in pertinent part:

> “In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, 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 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;
> “(g) Whether either parent has failed to make all child support payments * * *;
> “(h) Whether either parent previously has been convicted of or pleaded guilty to any criminal offense * * *;
> “(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.”

{¶32} In the instant action, the magistrate considered the factors enumerated in R.C. §3109.04(F)(1), and determined it would be in Sarah's best interest for Appellee-husband to be designated the residential parent. The record reveals that the Magistrate received sworn testimony from the Guardian Ad Litem, Appellant and Appellee. The Magistrate also conducted an in camera interview with Sarah.

{¶33} Upon careful review of the record, we find there was a substantial amount of credible and competent evidence to support the trial court's award of custody to Appellee.

{¶34} Appellant's Assignments of Errors I, II, III and VI are overruled.

IV.

{¶35} In her fourth assignment of error, Appellant argues that the trial court erred in accepting the report of the guardian ad litem. We disagree.

{¶36} Upon review, we find that Appellant's contention that the GAL only performed a "minimal, perfunctory investigation" in this cause is not supported by the record. The GAL in this matter issued five reports which evidenced a solid working knowledge of the facts and issues presented.

{¶37} Furthermore, R.C. §2151.414(D)(2) explicitly requires the trial court to consider the guardian ad litem's report as an expression of the wishes of a child who is too young to express them herself.

{¶38} The report of the guardian ad litem is of help and assistance to the trial court, but is not determinative of the issues. A trial court's duty is to determine the best interest of the child after a review of all the evidence presented, including a guardian ad litem's report. As we have addressed supra, we find the weight of the evidence substantiates the trial court's conclusions.

{¶39} Appellant's Assignment of Error IV is overruled.

V.

{¶40} In her fifth assignment of error, Appellant argues that the trial court erred in failing to find Appellant was entitled to companionship with her daughter over a non-parent. We disagree.

{¶41} Upon review of the record, we do not find that the trial court granted "companionship" to a non-parent.

{¶42} Appellant's Assignment of Error V is overruled.

VII.

{¶43} In her seventh assignment of error, Appellant argues that the trial court did not give due consideration to Appellant's status as primary caregiver. We disagree.

{¶44} Ohio has never formally adopted the primary caregiver doctrine. However, the doctrine is inherently a part of the best interest of the child and is included in the language of R.C. 3109.04(C)(3), i.e., "the child's interaction and interrelationship with his parents." See, *Thompson v. Thompson* (1987), 31 Ohio App.3d 254, 256. We find the fact the trial court did not award wife custody of Sarah does not establish the trial court disregarded or failed to consider the primary caregiver doctrine. The Magistrate, in her decision, found that "both parties were involved in the daily care of the child. Neither party had a "stay at home" role as both were generally employed outside of the home in the workforce." (See Magistrate's Decision, P. 21). Without an affirmative record demonstration to the contrary, we presume the trial court considered wife's role in the upbringing of the child in determining the appropriate award of custody. The trial court was in the best position to conduct such an analysis, and we cannot find anything in the record to suggest the trial court's review was improper.

{¶45} Appellant's Assignment of Error VII is overruled.

VIII.

{¶46} In her eighth and final assignment of error, Appellant argues that the trial court erred in refusing to issue findings of fact and conclusions of law as to its opinions of April 20, 2002, and May 3, 2002. We disagree.

{¶47} Appellant did not file a request for findings of fact and conclusions of law until after she filed her objections to the magistrate's decision.

{¶48} Civil Rule 53 controls the timing and form of such, which states in pertinent part:

Civ. R. 53(E)

"(2) Findings of fact and conclusions of law
If any party makes a request for findings of fact and conclusions of law under Civ. R. 52 or if findings and conclusions are otherwise required by law or by the order of reference, the magistrate's decision shall include findings of fact and conclusions of law. If the request under Civ. R. 52 is made after the magistrate's decision is filed, the magistrate shall include the findings of fact and conclusions of law in an amended magistrate's decision

"(3) Objections
"(a) Time for filing. Within fourteen days of the filing of a magistrate's decision, a party may file written objections to the magistrate's decision. If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a request for findings of fact and conclusions of law under Civ. R. 52, the time for filing objections begins to run when the magistrate files a decision including findings of fact and conclusions of law.

"(4) Court's action on magistrate's decision
"(a) When effective. The magistrate's decision shall be effective when adopted by the court. The court may adopt the magistrate's decision if no written objections are filed unless it determines that there is an error of law or other defect on the face of the magistrate's decision.(b) Disposition of objections. The court shall rule on any objections. The court may adopt, reject, or modify the magistrate's decision, hear additional evidence, recommit the matter to the magistrate with instructions, or hear the matter. The court may refuse to consider additional evidence proffered upon objections unless the objecting party demonstrates that with reasonable diligence the party could not have produced that evidence for the magistrate's consideration.

{¶49} In the case sub judice, subsequent to the filing of the Magistrate's Decision, which, it should be noted, was 43 pages plus attachments and contained Findings of Fact

and Conclusions of Law, Appellant filed her objections to same. The Trial Court reviewed said objections and entered its rulings in its Judgment Entry wherein it modified the Magistrate's Decision. Appellant is not now entitled to "Findings of Fact and Conclusions of Law" on the trial court's ruling on said objections.

{¶50} Appellant's Assignment of Error VIII is overruled.

{¶51} The decision of the Licking County Court of Common Pleas, Domestic Relations Division is affirmed.

By: Boggins, J.

Edwards, J. concurs

Farmer, P.J. dissents.

Topic: Custody

Farmer, J., Dissenting

{¶52} I respectfully dissent from the majority's opinion on Assignments of Error V and VI. In Assignment of Error V, the trial court ignores the facts of this case and favors placement with a grandparent over appellant's right to visitation. It is uncontested that because of appellee's work schedule, appellee juggles three babysitters when in fact, appellant is available for visitation on Friday nights and Saturday mornings.

{¶53} In this regard, I believe the trial court favored a non-parent over a suitable parent. The trial court should have adjusted visitation accordingly. I would sustain Assignment of Error V.

{¶54} In Assignment of Error VI, appellant argues the obtaining of a civil protection order and temporary custody was done by deception. I agree. By asserting to the trial court a domestic violence case was pending when in fact it was not, appellee obtained the subtle advantage of being awarded temporary custody. See, Appellee's Affidavit and

Exhibits filed December 4, 2000. As a result, the child becomes very acclimated to the environment and trial courts are not inclined to upset the equilibrium.

{¶55} I would remand the issue to the trial court to place each party on a level playing field and disregard in the decision who has present custody of the child. I acknowledge the result may be the same however, it is patently unjust to permit appellee to obtain this advantage by deception. I would sustain Assignment of Error VI and reverse the matter and remand the issue to the trial court for reconsideration.

JUDGE SHEILA G. FARMER