[Cite as *Stark v. Haser*, 2004-Ohio-4641.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRANDON RICHARD STARK

Plaintiff-Appellant

-vs-

CHRISTIANE ANN HASER

Defendant-Appellee

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Sheila G. Farmer, J.

Case No. 03CAF11057

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Juvenile Division, Case No. 01010141
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 2, 2004
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
ROBERT M. OWENS	JEFFREY BURKAM

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Hoffman, J.

{¶1} Plaintiff-appellant Brandon R. Stark ("father") appeals the October 21, 2003 Judgment Entry entered by the Delaware Court of Common Pleas, Juvenile Division, which overruled his objections to a magistrate's May 21, 2003 Decision, and ordered defendant-appellee Christiane A. Haser nka Armstrong ("mother") to remain the residential parent of the parties' minor child.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 25, 2001, father filed a Complaint to Establish Father-Child Relationship and for orders for custody for shared parenting of minor child with respect to the parties' minor child, Brevin Tyler Stark (DOB 5/14/99). Mother filed an answer on March 2, 2001, admitting the allegations set forth in father's complaint, and requesting she be designated as the residential and custodial parent of Brevin and father be provided visitation pursuant to local court rule. Via Magistrate's Decision filed May 3, 2001, father was found to be the biological father of Brevin and ordered to support the child pursuant to a previously filed support order. The magistrate ordered mother continue as the legal custodian and residential parent of the child until further hearing. Father was to file a shared parenting plan to which mother would be given an opportunity to respond.

{¶3} Father filed his Proposed Shared Parenting Plan on June 12, 2001. Through mediation, the parties reached an agreed shared parenting plan, which the trial court adopted as the order of the court via a Judgment Entry filed October 3, 2001. Mother subsequently withdrew her agreement to the shared parenting plan. The parties ultimately signed an Agreed Judgment Entry which was filed June 10, 2002. Pursuant to the entry,

mother was designated as the residential parent of the child, and both parents were designated as legal custodians.

{¶4} On October 8, 2002, father filed a Motion to Change Allocation of Parental Rights and Responsibilities as a result of mother's failure to abide by the terms of the June 10, 2002 Judgment Entry. Specifically, mother moved with Brevin to North Carolina, in September, 2002, thus denying father visitation during that month. Pursuant to the June 10, 2002 Agreed Judgment Entry, a party desiring to move outside the State of Ohio was required to file a motion.

{¶5} The matter came on for hearing on April 23, 2003, May 8, 2003, and May 9, 2003. Via Decision filed May 21, 2003, the magistrate found the record did not support a finding modification of parental rights was in Brevin's best interest. The magistrate ordered mother remain the residential parent and both parties continue as legal custodians. The trial court adopted the magistrate's decision the same day. Father filed a Motion to Transcribe Proceedings. The trial court ordered father to contact a certified court reporter, and make the appropriate deposit, thereafter, the audiotapes would be released to the court reporter. Father filed his objections on June 3, 2003. Mother filed a response thereto. No transcript was ever filed. On October 21, 2003, the trial court overruled father's objections. The trial court noted, "To date, no transcript has been Ordered by [father] from the Court Reporter. By telephone contact from a Deputy Clerk of Court inquiring as to the status of the transcript, [father's] counsel advised the clerk that it was not economically feasible to have a transcript prepared." October 21, 2003 Judgment Entry at para.3.

{¶6} It is from this judgment entry father appeals, raising the following assignments of error:

{¶7} “I. THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO APPELLANT BY ITS RULINGS ON SEVERAL ISSUES OF ADMISSION OF EVIDENCE, EXCLUDING EVIDENCE OFFERED BY APPELLANT WHICH WAS ADMISSIBLE AND ALLOWING EVIDENCE OFFERED BY APPELLEE WHICH WAS IN VIOLATION OF THE OHIO RULES OF EVIDENCE.

{¶8} “II. THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO APPELLANT BY FAILING TO MAKE FINDINGS OF FACT THAT HAVE DIRECT BEARING ON FACTORS ENUMERATED IN O.R.C. 3109.04.

{¶9} “III. THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO APPELLANT AND AGAINST MANIFEST WEIGHT OF THE EVIDENCE, IN DETERMINING THAT MODIFICATION IS NOT IN THE BEST INTEREST OF THE CHILD.

{¶10} “IV. THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO APPELLANT BY CREATING A VISITATION SCHEDULE AND CHILD SUPPORT THAT IS UNFAIRLY PUNITIVE TO APPELLANT AND DETRIMENTAL TO THE CHILD.

{¶11} “V. THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO APPELLANT BY FOLLOWING THE RECOMMENDATION OF THE GUARDIAN AD LITEM, WHEN SAID RECOMMENDATION WAS PREDICATED UPON A DOCTRINE NO LONGER RECOGNIZED BY OHIO LAW.

{¶12} “VI. THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO APPELLANT BY FAILING TO ENGAGE THE AUDIOTAPE RECORDING DEVICE TO RECORD THE TESTIMONY OF A WITNESS FOR THE APPELLANT, MARK SABATH, ESQ.

I, III

{¶13} In his first assignment of error, father challenges numerous evidentiary rulings made by the magistrate and approved by the trial court. Specifically, father submits the magistrate improperly excluded audiotapes recorded by mother; improperly terminated father's direct examination of one of his witnesses; and admitted improper hearsay over objections. In his third assignment of error, father asserts the magistrate's finding a modification was not in the best interest of the child was against the manifest weight of the evidence. Father contends the magistrate failed to consider the factors set forth in R.C. 3109.04.

{¶14} As noted supra, father failed to file a transcript of the magistrate's hearing for the trial court to review when ruling on his objections to the magistrate's decision. Civ. R. 53 states, in pertinent part: "Objections shall be specific and state with particularity the grounds of objection. If the parties stipulate in writing that the magistrate's findings of fact shall be final, they may object only to errors of law in the magistrate's decision. Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available. A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule."

{¶15} When a party objecting to a magistrate's decision has failed to provide the trial court with the evidence and documents by which the trial court could make a finding independent of the report, the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record. *State ex rel. Duncan v. Chippewa Twp.*

Trustees, 73 Ohio St.3d 728, *1995- Ohio-272*. This Court has held, “where an appellant fails to provide a transcript of the original hearing before the magistrate for the trial court's review, the magistrate's findings of fact are considered established and may not be attacked on appeal.” *Doane v. Doane* (May 2, 2001), Guernsey App. No. 00CA21, unreported; *State v. Leite* (April 11, 2000), Tuscarawas App. No.1999AP090054, unreported; *Fogress v. McKee* (Aug. 11, 1999), Licking App. No. 99CA15, unreported; and *Strunk v. Strunk* (Nov. 27, 1996), Muskingum App. No. CT96-0015, unreported.

{¶16} Consequently, this Court is unable to review the transcript filed in the appellate proceedings and father's arguments may not be raised on appeal pursuant to Civ. R. 53.

{¶17} Father’s first and third assignments of error are overruled.

II

{¶18} In his second assignment of error, father argues the trial court erred in failing to make findings of fact with respect to the R.C. 3109.04 factors. Father maintains the magistrate merely reiterated the testimony presented at the hearing. Mother counters the magistrate’s findings of fact are sufficiently detailed and the magistrate was not required to make a specific ruling on every disputed fact.

{¶19} Civ.R. 53(E)(2) states, "If any party makes a request for findings of fact and conclusions of law under Civ.R. 52,” the magistrate's decision must include findings of fact and conclusions of law. Neither Civ.R. 53 nor Civ.R. 52 state how detailed the findings of fact must be. Prior to the change in the language of Civ.R. 53 from “referee” to “magistrate”, Ohio courts found: "A referee is not required in this report to recite all of the evidence presented to him at the trial. The referee must, however, state the essential facts that form

the basis for the referee's recommendation to the trial judge." *Takacs v. Baldwin* (1995), 106 Ohio App.3d 196, 208, quoting *Zacek v. Zacek* (1983), 11 Ohio App.3d 91.

{¶20} Accordingly, if the essential facts are stated in the magistrate's findings of fact, then such findings are sufficiently detailed to enable the court to conduct a meaningful review. See, *Skaggs v. Skaggs* (Dec. 4, 1997), 3d Dist. No. 9-97-18. We find the magistrate's findings, in light of his conclusions of law, sufficiently detailed.

{¶21} Appellant second assignment of error is overruled.

IV

{¶22} In his fourth assignment of error, father argues the trial court erred in creating a visitation schedule and child support order which were unfairly punitive to father and detrimental to Brevin.

{¶23} The decisions of a trial court with respect to child support and visitation matters are governed by an abuse of discretion standard. Abuse of discretion implies the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶24} Given mother's decision to relocate, we find the trial court did not abuse its discretion with respect to the issues of visitation and child support.

{¶25} Father's fourth assignment of error is overruled.

V

{¶26} In his fifth assignment of error, father takes issue with the trial court's following the recommendation of the guardian ad litem. Specifically, father submits the guardian relied on the tender years doctrine, which is no longer Ohio law.

{¶27} Upon review of the record, we find the fact the guardian use of the term “tender years” does not establish he used the tender years doctrine as the basis of his recommendation. Furthermore, the fact the tender years doctrine is no longer law in Ohio, does not mean a guardian cannot consider the tender years of a child in evaluating a situation. The guardian used the term “tender years” as an adjective to describe the child as opposed to a doctrine of law.

{¶28} Father’s fifth assignment of error is overruled.

VI

{¶29} In his final assignment of error, father contends the trial court erred in failing to procure an audiotape recording of the testimony of Attorney Mark Sabath.

{¶30} App. R. 9(C) states:

{¶31} "Statement of the evidence or proceedings when no report was made or when the transcript is unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App. R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal."

{¶32} Upon learning the testimony of Attorney Sabath was not recorded, father had the opportunity to prepare an App. R. 9(C) statement. Father's failure to avail himself of App. R. 9(C) precludes a finding of prejudice.

{¶33} Father's sixth assignment of error is overruled.

{¶34} The judgment of the Delaware County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur

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JUDGES

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRANDON RICHARD STARK	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
CHRISTIANE ANN HASER	:	
Defendant-Appellee	:	Case No. 03CAF11057

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas, Juvenile Division, is affirmed. Costs assessed to appellant.

JUDGES