[Cite as *Kish v. Dobos*, 2009-Ohio-4895.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DAVID A. KISH

Plaintiff-Appellee

-vs-

TERRI A. DOBOS

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 08 CAF 10 0058

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 05-12-2091
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	September 16, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DOUGLAS WARNOCK 20 East Central Avenue Delaware, Ohio 43015	PAMELLA A. LAMMON 103 North Union Street, Suite B Delaware, Ohio 43015

Wise, J.

{¶1} Appellant Terri A. Dobos appeals the decision of the Delaware County Court of Common Pleas, Juvenile Division, which established an order of parental rights and responsibilities regarding her two children. Appellee David A. Kish is the father of said children.[1] The relevant facts leading to this appeal are as follows.

{¶2} Appellant and appellee are the parents of two children: C.K., born in 2001, and K.K., born in 2005. Appellant and appellee have never been married, but they lived together for approximately fourteen years. In November 2005, appellant moved out with the two children and relocated to the residence of her mother and stepfather in Streetsboro, Ohio, approximately two and one-half hours northeast of Delaware County.

{¶3} On December 16, 2005, appellee filed a complaint to determine custody in the Delaware County Court of Common Pleas, Juvenile Division. The trial court thereafter ordered the parties to submit to genetic paternity testing at the Delaware County CSEA.

{¶4} The custody complaint thereafter proceeded to evidentiary hearings conducted on the following dates: July 24, 2007, July 31, 2007, September 18, 2007, September 20, 2007, September 21, 2007, January 4, 2008, and January 7, 2008.

{¶5} In addition, the guardian ad litem filed her recommendations on January 22, 2008. Appellant and appellee filed their respective responses to said report on February 11, 2008.

{¶6} On September 22, 2008, the trial court issued its judgment entry, ordering inter alia that the parties were to exercise shared parenting, with appellee-father to be

[1] The trial court file generally utilizes "David J. Kish" as appellee's name.

designated the residential parent of both children for school attendance purposes. The court also made the following orders, conditioned on where appellant-mother would be residing:

{¶7} "2. Parenting time shall be as follows if mother resides out of the Central Ohio area:

{¶8} "(a.) Visitation shall be two (2) weekends in a row (Friday 7:00 P.M. to Sunday 7:00 P.M.) with the children with the mother and one weekend with father on a rotation. The children will reside with father during the school week days.

{¶9} "(b.) The summer schedule shall be from Sunday to Sunday with mother and from Sunday to Sunday with father rotated and exchanged on Sundays. The parents may each have a two (2) week uninterrupted vacation time.

{¶10} "3. Parenting time shall be as follows if mother returns to reside in the Central Ohio area:

{¶11} "(a.) Shared Parenting with the following during school: Mondays and Tuesdays the children shall be with mother, Wednesdays and Thursdays the children shall be with father and every other weekend from Friday to Sunday rotated between the parents.

{¶12} "(b.) The summer schedule, if both parents reside in Central Ohio, shall remain the same as the school schedule with opportunity for two (2) weeks of uninterrupted vacation time for both parents." Judgment Entry at 6-7.

{¶13} On October 2, 2008, appellant filed a notice of appeal. She herein raises the following two Assignments of Error:

{¶14} "I. WHETHER THE JUDGMENT OF THE TRIAL COURT WAS AN ABUSE OF DISCRETION.

{¶15} "II. WHETHER THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I., II.

{¶16} In her First and Second Assignments of Error, appellant maintains the trial court's decision was an abuse of discretion and was against the manifest weight of the evidence.

{¶17} As an appellate court, we review a trial court's decision allocating parental rights and responsibilities under a standard of review of abuse of discretion. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, 523 N .E.2d 846. An abuse of discretion occurs when the trial court's judgment is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Furthermore, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Ralich v. Ralich*, Stark App.No. 2006CA00215, 2007-Ohio-2484, ¶14, citing *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758. Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. Id. 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. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159. Finally, the trier of fact is in a far better position

to observe the witnesses' demeanor and weigh their credibility. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶18} R.C. 2151.23(F)(1) directs that a juvenile court shall exercise its jurisdiction in child custody matters in accordance with, inter alia, R.C. section 3109.04. In determining the best interest of a child in custody matters, R.C. 3109.04(F)(1) directs that " * * * the court shall consider all relevant factors, including, but not limited to:

{¶19} "(a) The wishes of the child's parents regarding the child's care;

{¶20} "(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;

{¶21} "(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;

{¶22} "(d) The child's adjustment to the child's home, school, and community;

{¶23} "(e) The mental and physical health of all persons involved in the situation;

{¶24} "(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶25} "(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;

{¶26} "(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child;

whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

{¶27} "(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;

{¶28} "(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

{¶29} There is no requirement that a trial court separately address each factor enumerated in R.C. 3109.04. *In re Henthorn,* Belmont App. No. 00-BA-37, 2001-Ohio-3459. Absent evidence to the contrary, an appellate court will presume the trial court considered all of the relevant "best interest" factors listed in R.C. 3109.04(F)(1). *Id.,* citing *Evans v. Evans* (1995), 106 Ohio App.3d 673, 677.

{¶30} In addition, in determining whether shared parenting is in the best interest of the children, the court is required under R.C. 3109.04(F)(2) to "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 the following factors:

{¶31} "(a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;

{¶32} "(b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;

{¶33} "(c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;

{¶34} "(d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

{¶35} "(e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem."

{¶36} In the case sub judice, the trial court found that shared parenting, which was the recommendation of the guardian ad litem, would be in the children's best interest, noting that C.K. and K.K. are well-adjusted and have good relationships with both parents and with appellant's extended family. The court also noted that "all involved" were in good physical health, although appellant had exhibited "some behaviors that impact her parenting ***." Judgment Entry at 5. The court further concluded that both parents were likely to facilitate court-ordered parenting time, and recognized that both parties continued to reside in the State of Ohio.

{¶37} Appellant emphasizes that the testimony and recommendations of Dr. Jeffrey Smalldon, who was appointed by the court to conduct the custody evaluation in this case, were extensively critiqued by appellant's expert, Dr. Jim Davidson, who opined that Dr. Smalldon's report did not meet the minimal standards of the profession. Tr. at 524. However, no substantive evaluation contrary to Dr. Smalldon's report was presented to the court.[2]

{¶38} Appellant directs us, inter alia, to testimony of her stepfather and herself that appellee used derogatory language about her in front of the children. She also points out evidence that she attended a parenting program and that she has been taking responsibility for the children's medication and extracurricular activities. Appellant described appellee as "controlling" and alleged that he did not properly handle C.K.'s allergies. In contrast, appellee points to testimony that he was an active father when the parties were together, but that following their break-up, appellant made unilateral parenting decisions and excluded him. He points out the trial court's conclusion that appellant showed a lack of structure and discipline for the children.

{¶39} On the merits, our review of the record and full transcript in this instance does not indicate that appellate reversal would be warranted against the trier of fact who observed the proceedings firsthand. Nonetheless, appellant points out that the trial court issued a conditional shared parenting order, even though neither party had requested same or filed a proposed shared parenting plan. In *Torch v. Torch* (June 19, 1996), Tuscarawas App.No. No. 95AP060041, 1996 WL 363429, we held as follows: "The thrust and philosophy of the shared parenting scheme in Ohio is to permit the parents to

[2] We further note that appellant did not challenge Dr. Smalldon's qualifications until after he completed his recommendation.

participate jointly in determining a satisfactory plan that is livable to *all* parties. By statute, the legislature placed the responsibility of proposing a shared parenting plan on the parties, not the trial court. A trial court is not given the authority to force shared parenting when none has been requested." (Emphasis in original). See, also, of *Stalnaker v. Stalnaker* (Dec. 20, 1999), Stark App.No. 1999CA00059, 2000 WL 1676. Although the school-year portion of the court's order, should appellant remain in Streetsboro, resembles a standard custody order with increased visitation to appellant, the overall order is clearly a conditional shared parenting plan.

{¶40} Accordingly, we hold the trial court's decision to invoke a shared parenting order under these circumstances constituted an abuse of discretion in light of our precedent in *Torch* and *Stalnaker*.

{¶41} Appellant's First and Second Assignments of Error are sustained in part.

{¶42} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Juvenile Division, Delaware County, Ohio, is hereby reversed and remanded.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES

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

DAVID A. KISH	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TERRI A. DOBOS	:	
Defendant-Appellant	:	Case No. 08 CAF 10 0058

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, Delaware County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to Appellee.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES