

[Cite as *Rooney v. Rooney*, 2010-Ohio-2439.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DANIEL J. ROONEY
Plaintiff-Appellee

JUDGES:
Hon. Julie A. Edwards, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

-vs-

JUDY M. ROONEY, NKA CAIN
Defendant-Appellant

Case No. 2009CA00256

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Domestic Relations
Division, Case No. 2000DR01720

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 1, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Judy M. Rooney nka Cain (“Mother”) appeals the September 30, 2009 Judgment Entry entered by the Stark County Court of Common Pleas, Domestic Relations Division, which terminated the Shared Parenting Agreement between Mother and plaintiff-appellee Daniel J. Rooney (“Father”).

STATEMENT OF THE FACTS AND CASE

{¶2} The parties were married on December 17, 1993, in Canton, Ohio. Three children were born as issue of the marriage, to wit: Katie (DOB 5/10/94), Allison (DOB 1/17/97), and Lauren (DOB 11/4/98). Father filed a Complaint for Divorce on October 31, 2000. The matter came on for final hearing on July 19, 2001, before a magistrate.

{¶3} The magistrate issued her Decision on August 30, 2001, recommending the parties be granted a divorce on the grounds of incompatibility, and recommending the parties have shared parenting of the minor children pursuant to the terms of the negotiated agreement. The first guardian ad litem involved in the matter, Attorney Robert Reese, assisted the parties in negotiating the shared parenting plan. Pursuant to the plan, Mother was named the residential parent of the three girls during the school year, while Father was named the residential parent during the summer months. Mother filed objections to the Magistrate’s Decision relative to the division of marital property and debt, and the limited term of spousal support. The trial court issued its Judgment Entry/Divorce Decree on September 27, 2001. The trial court granted the parties a divorce, following all of the magistrate’s recommendations and incorporating the shared parenting plan agreed upon by the parties.

{¶14} Within the month following the filing of the divorce decree, Mother filed two motions to show cause. The parties appeared before the trial court on January 28, 2002, and reached an agreement with respect to the issues raised in Mother's motions. Thereafter, the trial court dismissed both contempt motions.

{¶15} On October 21, 2002, Father filed a Motion for Reallocation of Parental Rights and Responsibilities, and for Modification of the Companionship Schedule. The motion was predicated upon the fact Mother had relocated to Wadsworth, Ohio, and such move negatively affected Father's companionship schedule. Through the agreement of the parties, Attorney Susan Burns was named guardian ad litem. Mother subsequently filed a Motion to Reallocate Parental Rights and Responsibilities. The guardian ad litem filed a report on January 28, 2003, recommending Mother be required to return to Stark County or southern Summit County within forty days. The guardian stated she did not believe Mother's move to Wadsworth was in the best interest of the children, and the move effectively eliminated Father's ability to enjoy mid-week companionship. The guardian further recommended, if Mother failed to return to Stark County or southern Summit County, the shared parenting agreement be modified with Father being named as the residential parent, and Mother having Schedule A companionship. The guardian also recommended the parties immediately stop denigrating and harassing each other in the children's presence, and refrain from involving the children in adult communications about the matter.

{¶16} On August 7, 2003, Father and Mother entered into an Agreed Judgment Entry, settling all pending issues. The parties agreed the shared parenting plan filed September 19, 2001, would be retained and the children would reside primarily with

Mother during the school year, and Father during the summer months. The agreement also provided Father with extra companionship.

{¶7} Over the course of the next five years, the parties filed a barrage of motions to show cause on issues ranging from Mother's failure to pay her student loans to Father's failure to maintain payments towards childcare and medical costs. The parties were ordered to mediation a number of times, but each attempt was unsuccessful. In fact, one of the trial court's mediators, who was a high-conflict specialist, resigned from the case and indicated she never wanted to work with the parties again. Both Mother and Father filed motions for reallocation of parental rights and responsibilities. The trial court conducted a hearing on these motions as well as pending contempt motions on September 9, 10, and 11, 2009. Prior to the hearings, on July 28, 2009, the trial court conducted an in-camera interview of the children.

{¶8} At the hearing, Dr. Mark Tully, a psychologist and a forensic evaluator in child custody cases, testified on Father's behalf. Dr. Tully explained a forensic evaluation is objective in nature. Dr. Tully reviewed Dr. Robyn Tener's report as well as the guardian ad litem's report. Dr. Tully agreed with Dr. Tener's evaluation Mother had engaged in parental alienation. The doctor rated Mother's degree of parental alienation as somewhere between mild and moderate. The doctor discussed parental alienation and the negative effects it has on the child's relationship with the parent being alienated as well as the child's future relationships with others. Dr. Tully noted research has shown traditional therapy does not work in parental alienation cases, and the only solution in the instant matter was a change of custody. In his opinion, a change of custody of the children would be less harmful to them than the continued alienation.

{¶9} When asked whether Mother's counseling with Dr. Bergen could successfully modify her behavior, Dr. Tully indicated he did not believe so. Dr. Tully explained Mother needed a very strong, confrontational counselor, and Dr. Bergen viewed Mother as a victim of Father and the system. Dr. Tully had reviewed Dr. Bergen's notes, and found Dr. Bergen did not recognize Mother's engaging in alienation. Dr. Tully recognized the children's bond with Father was weak due to the alienation, and added although the children love Mother, their bond with her was enmeshed and unhealthy. Dr. Tully made specific references to Dr. Tener's report which exemplified Mother's engaging in alienating behavior. Dr. Tully recognized Father had made mistakes during the course of the matter.

{¶10} Dr. Cecil Bergen, a licensed professional clinical counselor working with Mother, testified he did not agree with Dr. Tener's finding Mother engaged in parental alienation. Dr. Bergen stated he did not believe Mother was intentionally trying to pull the girls away from Father, but explained she overreacts and wants to "rescue" them. He believes Mother's behavior results from the fact she was abandoned by her mother as a child, and, as a result Mother overreacts by trying to be the best mother she can possibly be. Dr. Bergen found some of Mother's reactions to be inappropriate, noting Mother sees more danger from Father than actually exists. Dr. Bergen denied his viewing Mother as the victim, and stated the only real victims were the children. Dr. Bergen conceded Mother had done things which harmed Father's relationship with the children, but added Father had done so as well. The doctor believed Father had the power to affect the relationship with the children regardless of any actions by Mother.

On cross-examination, Dr. Bergen indicated he and Dr. Tener, although viewing the same behavior by Mother, classified such differently.

{¶11} Dr. Robyn Tener was also called to testify. Like Dr. Tully, she defined the term “parental alienation”. Dr. Tener noted Mother did not want the children to have a positive perception of Father. The doctor acknowledged Father had said and done inappropriate things, however, Mother’s conduct was much more pervasive. Dr. Tener rated the degree of alienation as moderate. Mother capitalized on all of Father’s failings. Dr. Tener found it significant Mother spoke negatively about Father in front of the children. Mother spent an entire session with Dr. Tener venting about Father despite the presence of the children in the room. Dr. Tener attempted to redirect Mother, however, she did not stop criticizing Father. In response to being alienated, Father has become reactive, upset, and focused on punishing Mother. Dr. Tener explains Father should be doing reasonable planning with the children, determining what they really need or want. Dr. Tener discussed how parental alienation affects children. Dr. Tener explained the girls feel self-righteous and feel good about their hatred toward Father. The trial court noted it experienced the same attitude by the girls during its in-camera interview with the children. The guardian ad litem also reported the girls believe Father is trying to ruin their lives.

{¶12} Dr. Tener stated if Mother did not change her behavior, the alienation would continue and the relationship between Father and the children would worsen. Dr. Tener noted Dr. Bergen’s file did not contain anything to indicate Mother saw her behavior as an issue or as something she needed to change. Because Mother and Father were not able to negotiate, Dr. Tener believed neither party should be given full

control of the children. Although Father did not alienate the children, he did say negative things about Mother within the children's earshot. Dr. Tener felt Father deserved a chance to try to fix his relationship with his daughters. Dr. Tener indicated Father could do things, without any help from Mother which would have some positive affect with the children. Any efforts by Dr. Tener to engage Mother in a discussion about what type of visitation schedule would work, resulted in Mother complaining about Father being unreasonable and the children not wanting to be with him. Dr. Tener found the children overwhelmed by the persistent conflict between Mother and Father. In her report, Dr. Tener indicated no shared parenting plan would completely counteract the difficult personalities involved in the matter, but she hoped once visitation was structured and predictable, there would be improvement between the parties.

{¶13} Via a fifty-plus page Judgment Entry filed September 30, 2009, the trial court terminated the parties' shared parenting agreement. The trial court named Mother as the residential and custodial parent of Katie, and named Father the residential and custodial parent of Allison and Lauren. The trial court also set forth a weekend companionship schedule, but ordered no midweek visitation. Further, the trial court set forth specific directives regarding holidays, school vacations, and school activities.

{¶14} It is from this judgment entry Mother appeals, raising the following assignments of error.

{¶15} "I. ALTHOUGH MOTHER DID NOT OBJECT TO DR. TULLY'S OPINION, IT WAS PLAIN ERROR FOR THE TRIAL COURT TO ALLOW DR. TULLY'S TESTIMONY WHEN HIS OPINION WAS NOT BASED UPON FACTS PERSONALLY

KNOWN TO HIM OR UPON FACTS THAT WERE ADMITTED INTO EVIDENCE DURING TRIAL.

{¶16} “II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT TERMINATED THE PARTIES’ SHARED PARENTING PLAN AND APPOINTED FATHER AS THE CUSTODIAN OF THE TWO YOUNGEST CHILDREN.”

I

{¶17} In her first assignment of error, Mother contends the trial court’s admission of Dr. Tully’s testimony was plain error as Dr. Tully’s opinion was not based upon facts personally known to him or facts admitted into evidence during trial.

{¶18} Because Mother failed to object to the trial court’s admission of Dr. Tully’s testimony, she has waived all but plain error in the trial court’s admission of such evidence.

{¶19} In civil cases, plain error must be used with utmost caution and applied only "to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse affect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 1997-Ohio-401.

{¶20} We find the alleged error in the trial court’s admission of Dr. Tully’s expert testimony did not rise to the level of plain error under the circumstances of this case. Upon review of the entire record in this matter, including the transcripts of the hearing on the motions for reallocation of parental rights, we find the admission of Dr. Tully’s testimony did not seriously affect the basic fairness, integrity, or public reputation of the

judicial process. We do not believe a manifest miscarriage of justice resulted from admission of Dr. Tully's expert testimony.

{¶21} Mother's first assignment of error is overruled.

II

{¶22} In her second assignment of error, Mother maintains the trial court abused its discretion in terminating the parties' shared parenting plan and naming Father as the residential and custodial parent of the parties' two youngest children.

{¶23} A trial court's decision in custody matters will be reversed only upon a showing of an abuse of discretion. *Trickey v. Trickey* (1952), 158 Ohio St. 9, 13-14, 106 N.E.2d 772, 774-775. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142.

{¶24} As stated supra, we have reviewed the entire record in the matter, including the transcripts of the September 9th, 10th, and 11th, 2009 Hearing and have carefully reviewed the trial court's extensive judgment entry. We find no abuse of discretion in the trial court's decision to terminate the shared parenting plan. We note Dr. Tully's testimony was not the only evidence to support the trial court's ruling.

{¶25} Mother's second assignment of error is overruled.

{¶26} The judgment of the Stark County Court of Common Pleas, Domestic Relations Division is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

