**[Cite as *Williams v. Tumblin*, 2014-Ohio-4365.]**

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| NICHOLAS GRANT WILLIAMS | : | JUDGES: |
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| | : | Hon. Sheila G. Farmer, P.J. |
| Plaintiff - Appellee | : | Hon. Patricia A. Delaney, J. |
| | : | Hon. Craig R. Baldwin, J. |
| | : | |
| -vs- | : | |
| | : | |
| LEANNA TUMBLIN NKA VOLK | : | Case No. 2014CA0013 |
| | : | |
| | : | |
| Defendant - Appellant | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Coshocton County Court of Common Pleas, Juvenile Division, Case Nos. 21340018 & 21340019 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT: | September 26, 2014 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendant-Appellant |
|---|---|
| CHRISTIE M.L. THORNSLEY<br>309 Main Street<br>Coshocton, OH 43812 | VICKY M. CHRISTIANSEN<br>JULIA K. FIX<br>172 Hudson Ave<br>Newark, OH 43055 |

*Baldwin, J.*

{¶1} Appellant Leanna Tumblin nka Volk appeals a judgment of the Coshocton County Common Pleas Court, Juvenile Division, awarding custody of the parties' two minor children to appellee Nicholas Grant Williams.

STATEMENT OF FACTS AND CASE

{¶2} Appellant and appellee were never married, but had two children together: a son, K.W., born in 2006, and a daughter, R.W., born in 2010. Appellee also has a daughter with another woman, born three weeks after R.W.

{¶3} Appellant and appellee lived together with appellee's parents before K.W. was born. During this time, appellant engaged in kissing and fondling with appellee's father. During the time they lived together, they both worked varying schedules and appellant went to nursing school. Appellee's parents babysat the children both when they lived with appellee's parents and after, including overnight visits.

{¶4} The relationship between the parties deteriorated, until their arguing escalated into domestic violence on both sides in front of the children. They separated in April, 2010. After this time, appellant refused to allow appellee to see the children unless she was at work. She considered the children to be hers, and believed appellee should change his work schedule to be available when she was at work. She did not seek child support from the court after they separated because she feared the court would order parenting time for appellee.

{¶5} The children are close to both sets of grandparents and to aunts, uncles, and cousins, all of whom live in Coshocton. In 2012, appellee married, and the children have a good relationship with their stepmother.

{¶6} In October of 2012, appellant entered into a serious relationship with Robert Volk, a man 20 years her senior, who lives in Florida. Volk came to Ohio for five days in November of 2012, and met the children for the first time in a cabin in North Carolina in January, 2013. He came back to Ohio for a visit in February, 2013, for 8 to 10 days.

{¶7} After hearing in February of 2013 that appellant intended to move the children to Florida with Volk, appellant filed a complaint to establish the allocation of parental rights and responsibilities and a motion to restrain appellant from removing the children from the jurisdiction. On February 20, 2013, the court ordered appellant not to move the residence of the children from Ohio. On March 2, 2013, Volk came to Ohio with a trailer and moved appellant and the children to Florida. Appellant believed she could move to Florida with the children as long as she homeschooled K.W. Appellant and Volk were married on March 31, 2013, and intend to remain in Florida.

{¶8} After moving to Florida, appellant blocked calls and texts from appellee. Although Volk and appellant lived in a bad neighborhood in Jacksonville, they intended to rent a home in a safe neighborhood with good schools; however, they could not sell their current Florida home because they owed $100,000.00 more than the current market value. In Florida, Volk cared for the children while appellant worked.

{¶9} On March 7, 2013, the trial court granted emergency temporary custody of the children to appellee. Appellee tried to remove the children from the Volk residence with the assistance of Florida police. Although appellant knew appellee was in Florida and had custody of the children, she did not turn over the children to appellant pursuant to the court order. However, at an April 4, 2013, pretrial, appellant through her attorney

agreed to exchange the children at the Coshocton County Juvenile Court before 4:00 p.m.

{¶10} At 4:15, appellant texted appellee stating that the children were in Zanesville and appellee should meet them at her parents' home in Coshocton. Appellee and his mother both went to appellant's parents' home. Appellee's mother blocked the driveway with her car. Volk came out and asked her to move her car, but she waited in her car because the police had been called. Appellant and the children sat in the car in the garage at the home for 40 minutes. Finally, a Coshocton County Sheriff's Department deputy facilitated the transfer of the children to appellee.

{¶11} Following a trial before a magistrate in the Coshocton County Common Pleas Court, Juvenile Division, appellee was named the residential parent of the minor children. The magistrate found that appellant was a good mother until she began making poor decisions in February of 2013. The magistrate found that on multiple occasions, Volk verbally abused appellee, including calling and visiting his place of employment. Volk also bullied and abused appellant's family. The magistrate relied on the guardian ad litem's report, which noted that Volk could not safely care for K.W. during a visit the guardian observed, Volk had issues with boundaries, and Volk did not treat the guardian with respect.

{¶12} Appellant filed objections to the magistrate's report. The court sustained an objection regarding a finding of contempt, but in other respects overruled appellant's objections and entered judgment in accordance with the magistrate's decision.

{¶13} Appellant assigns the following errors:

{¶14} "I. THE TRIAL COURT'S AWARD OF CUSTODY OF THE PARTIES' CHILDREN TO PLAINTIFF/APPELLEE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, WAS AN ABUSE OF DISCRETION, AND WAS NOT IN THE CHILDREN'S BEST INTERESTS.

{¶15} "II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ORDERED DEFENDANT/APPELLANT TO PAY CHILD SUPPORT IN THE FULL STATUTORY GUIDELINE AMOUNT.

{¶16} "III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ADOPTING THE MAGISTRATE'S DECISION WITHOUT CONDUCTING AN INDEPENDENT REVIEW OF THE TRANSCRIPT AND RECORD.

{¶17} "IV. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO GRANT VISITATION TO DEFENDANT/APPELLANT DURING THE PENDENCY OF THE PROCEEDINGS."

I.

{¶18} In her first assignment of error, appellant argues that the trial court abused its discretion in naming appellee the residential parent of the children. Appellant argues the judgment is against the manifest weight of the evidence, and was not in the best interests of the children.

{¶19} The parties were never married, and the order appealed from is an initial custody decision between the parties. The standard of review in initial custody cases is whether the trial court abused its discretion. *Davis v. Flickinger,* 77 Ohio St.3d 415, 416-17, 674 N.E.2d 1159, 1997-Ohio-260. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5

Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Given the nature and impact of custody disputes, the juvenile court's discretion will be accorded paramount deference because the trial court is best suited to determine the credibility of testimony and integrity of evidence. *Gamble v. Gamble,* 12th Dist. Butler App. No. CA2006-10-265, 2008-Ohio-1015, ¶ 28. Specifically, "the knowledge a trial court gains through observing witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). Therefore, giving the trial court due deference, a reviewing court will not reverse the findings of a trial court when the award of custody is supported by a substantial amount of credible and competent evidence. *Davis, supra* at 418, 674 N.E.2d 1159.

{¶20} The juvenile court must exercise its jurisdiction in child custody matters in accordance with R.C. 3109.04. R.C. 3109.04(B)(1) governs initial custody awards, and provides in pertinent part: "When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children."

{¶21} Because this action involved an original determination of custody of a child of an unmarried mother, R.C. 3109.042 confers a default status on appellant as the residential parent until an order is issued by the trial court designating the residential parent and legal guardian. However, when making an initial custody determination of the child of an unmarried mother, R.C. 3109.042 requires the court to treat each parent as standing upon equal footing. Under these circumstances, the trial court's custody determination need only be based on the best interests of the child according to R.C.

3109.04(F)(1). See *In Re Cihon,* Guernsey App. No. 09 CA 00002, 2009-Ohio-5805 at paragraph 17.

{¶22} R.C. 3109.04(F)(1) provides:

> (F)(1) 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, including all arrearages that are required of that parent pursuant to a child support order under which that parent is an obligor;

(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;
>
> (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.

{¶23} Appellant argues that the court failed to consider the evidence that she had been the children's primary caregiver, that appellee has a daughter from another relationship with whom he has little contact, that appellee is relying on his new wife and the extended family of the parties to care for the children, that appellee's new wife has cystic fibrosis, the emotional toll the change in custody had taken on the parties' son, and the best interests of their three-year-old daughter. Appellant argues the court placed too much emphasis on the fact that she disobeyed a court order by moving the children to Florida.

{¶24} The evidence reflected that the children were bonded with extended family in Ohio, including both sets of grandparents. While appellant had been the primary caretaker of the children, the evidence demonstrated that after she and father separated, she refused to allow appellee to see them unless she was at work, and she

believed he should change his work schedule to be available when she was at work. She did not seek child support from appellee because she feared the court would order parenting time for appellee.

{¶25} The evidence demonstrated that the children had a good relationship with extended family in Ohio, including both sets of grandparents. The families coordinated babysitting. Appellee's wife has a good relationship with the children and with the extended family. While she suffers from cystic fibrosis and spent three weeks in the hospital in the last year, other family members stepped in to help with the children during her illness.

{¶26} Appellant's family members expressed concerns about her decisions after she became seriously involved with Volk and suddenly moved to Florida. Appellant's mother first learned that appellant and Volk were married when questioned by counsel during the hearing. Tr. 94. The guardian ad litem expressed concerns about Volk's interaction with K.W., finding that he did not safely care for K.W. during the home visit, and noting that Volk had problems with boundaries and was not respectful toward her. Volk himself testified to problems with K.W., which appellant told him came because appellee "weaponized him against me." Tr. 274. He testified that he had no interaction with R.W. other than cleaning her crayon marks off the walls and attempting to put together money that she tore up, and he stated that R.W. is "Leanna's project." *Id*. Volk and appellant admit they live in a bad neighborhood in Jacksonville and planned to move for the sake of the children; however, they owed $100,000.00 more on the home than its current market value. After moving to Florida, appellant blocked calls and texts from appellee. She ignored a court order prohibiting her from changing the residence of

the children to Florida, homeschooling K.W. in Florida rather than enrolling him in school. She did not withdraw K.W. from school in Ohio, and did not respond to notices from the school regarding unexcused absences, but mailed back his library and school books. There was evidence that when K.W. returned to Ohio, appellee worked with him to help him catch up with his class.

{¶27} The evidence supported the court's finding that awarding custody to appellee was in the best interests of the children. The evidence supports the court's finding that appellant began making questionable decisions after she entered into a serious relationship with Volk, and the children were bonded and well-adjusted in Ohio, where they had extended family who had been involved with them since birth. The court's decision was supported by substantial, credible evidence.

{¶28} The first assignment of error is overruled.

II.

{¶29} Appellant argues that the court erred in ordering her to pay child support in the full statutory guideline amount. She argues that she will incur expenses to exercise parenting time due to the distance from Florida to Ohio. She also argues that she received no child support from appellee from the time they separated in November of 2010, until April of 2013. She argues that the court ignored appellee's testimony that he wanted support from appellant so that his new wife could take more days off work to care for the children.

{¶30} Trial courts are given broad discretion in determining child support. *Booth v. Booth,* 44 Ohio St.3d 142, 144, 541 N.E.2d 1028, 1030 (1989). In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable,

arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶31} Child support is generally calculated using the child support guidelines and worksheet. R.C. 3119.03. This figure is rebuttably presumed to be the correct amount of child support. However, the court may order an amount of child support that deviates from the worksheet and schedule amount if, after considering the factors and criteria set forth in R.C. 3119.23, the court determines that this amount would be unjust or inappropriate and would not be in the best interest of the child. R.C. 3119.22.

{¶32} R.C. 3119.23 sets forth the following factors to be considered by the court in considering a deviation from the guideline amount:

> (A) Special and unusual needs of the children;
>
> (B) Extraordinary obligations for minor children or obligations for handicapped children who are not stepchildren and who are not offspring from the marriage or relationship that is the basis of the immediate child support determination;
>
> (C) Other court-ordered payments;
>
> (D) Extended parenting time or extraordinary costs associated with parenting time, provided that this division does not authorize and shall not be construed as authorizing any deviation from the schedule and the applicable worksheet, through the line establishing the actual annual obligation, or any escrowing, impoundment, or withholding of child support because of a denial

of or interference with a right of parenting time granted by court order;

(E) The obligor obtaining additional employment after a child support order is issued in order to support a second family;

(F) The financial resources and the earning ability of the child;

(G) Disparity in income between parties or households;

(H) Benefits that either parent receives from remarriage or sharing living expenses with another person;

(I) The amount of federal, state, and local taxes actually paid or estimated to be paid by a parent or both of the parents;

(J) Significant in-kind contributions from a parent, including, but not limited to, direct payment for lessons, sports equipment, schooling, or clothing;

(K) The relative financial resources, other assets and resources, and needs of each parent;

(L) The standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued or had the parents been married;

(M) The physical and emotional condition and needs of the child;

(N) The need and capacity of the child for an education and the educational opportunities that would have been available to the

child had the circumstances requiring a court order for support not arisen;

(O) The responsibility of each parent for the support of others;

(P) Any other relevant factor.

{¶33} Pursuant to the court's long-distance parenting time schedule, appellant will be exercising parenting time with the children only two to three times each year. The record does not reflect that the travel costs associated with this visitation will be so great as to require a deviation from the guideline amount. The court specifically found that appellant did not seek support from appellee after they separated because she did not want a court to award him parenting time. Appellee testified that he offered to help appellant financially with the children, that he bought the children clothes and winter coats, that he paid all of K.W.'s school fees and most of the cost of his school supplies, and that he provided health insurance for the children. The trial court did not abuse its discretion in ordering appellant to pay child support in accordance with the guideline amount.

{¶34} The second assignment of error is overruled.

III.

{¶35} Appellant argues that the court erred in failing to conduct an independent review, and simply rubber-stamped the magistrate's decision.

*{¶36}* Civ. R. 53(D)(4)(d) provides that in ruling on objections to a magistrate's decision, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and

appropriately applied the law. "A presumption of regularity attaches to all judicial proceedings." *State v. Raber,* 134 Ohio St.3d 350, 2012–Ohio–5636, 982 N.E.2d 684, ¶ 19. Appellate courts thus presume that a trial court conducted an independent analysis in reviewing a magistrate's decision in accordance with Civ.R. 53(D)(4)(d), and the party claiming that the trial court did not do so bears the burden of rebutting the presumption. *Faulks v. Flynn,* 4th Dist. Scioto App. No. 13CA3568, 2014-Ohio-1610, ¶27. This burden requires more than a mere inference, and simply because a trial court adopted a magistrate's decision does not mean that the court failed to exercise independent judgment. *Id.*

{¶37} Appellant's argument that the court failed to exercise independent judgment rests on the fact that the court failed to specifically mention certain factors, and also on the fact that the trial court overruled her objections. However, the trial court's failure to agree with appellant or to specifically discuss every factor weighing into the decision does not rebut the presumption that the trial court conducted an independent analysis in accordance with Civ. R. 53(D)(4)(d).

{¶38} Appellant also notes that the magistrate issued an order on December 3, 2013, overruling appellant's objections to her own decision regarding interim parenting time. Any issues relating to this interim order are rendered moot by the filing of a final judgment in the case.

{¶39} The third assignment of error is overruled.

IV.

{¶40} Appellant argues that the court erred in failing to grant her visitation during the pendency of the proceedings.

{¶41} The trial court's order denying appellant visitation during the pendency of the case is a temporary order, which has merged into the final order, and is now moot. E.g., *Kimbler v. Kimbler*, 4th Dist. Scioto App. No. 05CA2994, 2006-Ohio-2695, ¶26.

{¶42} Appellant argues that the temporary visitation order is a final order because it is a special proceeding affecting a substantial right. In declining to reach the issue of whether a temporary visitation order is a final order, the First District found that all issues related to the temporary order are rendered moot by the final order in the case:

> But we need not reach that issue. All issues related to the order suspending visitation and the ensuing orders prior to the order reinstating visitation are now moot. The duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect. An appellate court need not render an advisory opinion on a moot question or rule on a question of law that cannot affect matters at issue in a case. Thus, when, without the fault of either party, circumstances preclude an appellate court from granting effectual relief in a case, the mootness doctrine preludes consideration of those issues. *State ex rel. Eliza Jennings, Inc. v. Noble* (1990), 49 Ohio St.3d 71, 74, 551 N.E.2d 128; *Hamilton Cty. Comm. Mental Health Bd. v. Wells* (Nov. 8, 1995), 1st Dist. No. C–940716.
>
> In this case, we can grant no relief to the Baileys from the order suspending visitation and the intervening two-year delay. We cannot give them the time back to spend with their daughter. The trial court has

> already granted them the relief they seek, which is the resumption of visitation. Whether the conditions that the court has imposed effectively prevent visitation is a separate question, which we address in the Baileys' other assignments of error. The mootness doctrine precludes consideration of the issues raised in their first two assignments of error. *In re Bailey*, 1st Dist. Hamilton App. No. C–040014, C–040479, 2005-Ohio-3039, ¶9-10.

{¶43} Similarly, in the instant case, the order denying appellant visitation during the pendency of the action is now moot. We cannot give appellant back the time to spend with her children, and visitation has resumed under the final order. Whether the order denying temporary visitation is a final, appealable order is not an issue in the instant case, as appellant did not appeal that order.

{¶44} The fourth assignment of error is overruled.

{¶45} The judgment of the Coshocton County Common Pleas Court, Juvenile Division, is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Farmer, P.J. and

Delaney, J. concur.