[Cite as *Wallace v. Wallace,* 2015-Ohio-1617.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SARA WALLACE

Plaintiff-Appellee

-vs-

JEFFREY WALLACE

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2014 CA 00182

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2012DR00652
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 27, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN E. HAUPT, JR. 950 South Sawburg Alliance, Ohio 44601	JEFFREY R. JAKMIDES 325 East Main Street Alliance, Ohio 44601

Wise, J.

{¶1}. Appellant Jeffrey Wallace appeals the decision of the Stark County Court of Common Pleas, Domestic Relations Division, which suspended his visitation time with his minor son, T.W. The relevant facts leading to this appeal are as follows.

{¶2}. Appellant Jeffrey and Appellee Sara were married in 1996. The marriage produced two children, R.W. (born in 1998) and T.W. (born in 2004). On May 30, 2012, Appellee Sara filed a complaint for divorce in the trial court. On September 10, 2012, Appellant Jeffrey filed an answer and counterclaim.

{¶3}. On April 3, 2013, subsequent to a contested final hearing, the trial court issued a decree of divorce. Among other things, the decree named appellee as the residential parent and legal custodian of R.W. and T.W., with appellant receiving the court's "Schedule A" visitation.

{¶4}. On December 27, 2013, appellee filed a motion to terminate appellant's visitation schedule, alleging *inter alia* that appellant had committed an act of domestic violence against T.W. on or about September 21, 2013 by pushing the child and causing his head to strike a door. The matter proceeded to an evidentiary hearing before a magistrate on May 20, 2014. In addition, on May 29, 2014, the magistrate conducted an *in-camera* hearing with R.W., T.W., and the guardian ad litem, Attorney Jacob Will.

{¶5}. On July 16, 2014, the magistrate issued his decision. The magistrate found, among other things, that appellant "mistreats the children emotionally and psychologically[,] becoming physical at times." Decision at 4. He also determined that

appellant's visitation with R.W. would continue at the choice of said child, and that visitation with T.W. would be suspended, with the following additional orders:

> If Father and [T.W.] receive neutral third-party counseling, Father may exercise theraputic [sic] visitation with [T.W.] on alternating weekends with no overnites upon such conditions as the counselor may deem appropriate; supervision by Father's family members in any fashion is prohibited until the neutral third-party counselor for Father and [T.W.] recommends such visitation, Father's visitation with [T.W.] must be supervised by [a] court-approved individual through Rosemary Diamond on alternating weekends for two hours with no overnites [sic].

{¶6}. Magistrate's Decision at 4-5.

{¶7}. On July 18, 2014, appellant filed an objection to the aforesaid magistrate's decision.

{¶8}. On September 16, 2014, the trial court issued a judgment entry overruling appellant's objections and adopting the magistrate's decision.

{¶9}. On October 2, 2014, appellant filed a notice of appeal. He herein raises the following two Assignments of Error:

{¶10}. "I. THE MAGISTRATE'S DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, GIVEN THE ONLY TESTIMONY SUGGESTING ANY WRONGDOING BY THE APPELLANT WAS PROVIDED BY THE APPELLANT'S EX-WIFE, WHO WAS NOT PRESENT AT THE TIME OF THE ALLEGED INCIDENT, AND A MINOR CHILD WHO HAS BEEN SUBJECT TO HER INFLUENCE AND ATTEMPTS TO POISON HIM AGAINST HER. THE TRIAL COURT ABUSED ITS DISCRETION IN

ADOPTING SAID DECISION IN THE FACE OF THE WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL.

{¶11}. "II. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO HEAR THE TESTIMONY OF A WITNESS WHO WAS UNEXPECTEDLY UNABLE TO TESTIFY BEFORE THE MAGISTRATE DUE TO DISABILITY."

I.

{¶12}. In his First Assignment of Error, appellant argues the trial court's decision limiting his visitation with T.W. was against the manifest weight of the evidence. We disagree.

{¶13}. Initially, we consider the question of the final appealability of the judgment entry in question. An appellate court's jurisdiction over trial court rulings extends only to "judgments or final orders." Ohio Constitution, Art. IV, Section 3(B)(2). This Court has long questioned whether a judgment entry solely addressing visitation is a final appealable order. *See Lightfoot v. Pierre-Skillern*, 5th Dist. Stark No. CA-7795, 1989 WL 137227. Furthermore, as a general rule, a judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order. *See Moscarello v. Moscarello*, 5th Dist. Stark No. 2014CA00181, 2015-Ohio-654, ¶ 11, quoting *Rice v. Lewis,* 4th Dist. Scioto No. 11CA3451, 2012–Ohio–2588, ¶ 14 (additional citations omitted). The judgment entry under appeal in the case sub judice adopts the decision of the magistrate, the language of which at certain points suggests to us an interim and/or conditional order regarding the specifics of appellant's visitation rights. However, no definitive time frames were spelled out as far as duration of the order, and no follow-up hearing was scheduled by the magistrate. Therefore, in the

interest of justice, we will proceed to the merits of the present appeal. *Cf. Eichar v. Eichar*, 5th Dist. Richland No. 99 CA 11, 2000 WL 1601.

{¶14}. As a second initial matter, we note appellee raises the point that appellant herein has raised a "manifest weight" challenge, even though he never requested findings of fact and conclusions of law. While we have expressed caution about an appellant's use of this approach (*see*, *e.g.*, *Pettet v. Pettet* (1988), 55 Ohio App.3d 128, 130, 562 N.E.2d 929), in this instance appellant's counsel's strategy should not be faulted, as the magistrate had already provided a five-page decision with, *inter alia*, substantial factual analysis. Even where the request for findings of fact and conclusions of law *is* made, however, "[a] magistrate's decision substantially complies with Civ.R. 53(D)(3)(a)(ii) when the contents of the decision, considered together with other parts of the record, form an adequate basis upon which to decide the narrow legal issues presented." *Larson v. Larson,* 3rd Dist. Seneca No. 13–11–25, 2011–Ohio–6013, ¶ 16.

{¶15}. We therefore now proceed to the merits of this assigned error.

{¶16}. A divorced non-custodial parent generally has a “natural right” to reasonable visitation. *See Pettry v. Pettry* (1984), 20 Ohio App.3d 350, paragraph one of the syllabus; *Lash v. Lash* (July 22, 1987), Delaware App.No. 86-CA-42, 1987 WL 14479. Nonetheless, decisions on visitation lie within the trial court's sound discretion. *Day v. Day,* 5th Dist. Ashland No. 04 COA 74, 2005–Ohio–4343, ¶ 28 (additional citations omitted). *See, also, Quint v. Lomakoski,* 167 Ohio App.3d 124, 854 N.E.2d 225, 2006–Ohio–3041, ¶ 12. There is generally no need to make a showing that there has been a change in circumstances in order for a court to modify visitation. *See Luther v. Luther,* 5th Dist. Stark No. 2007CA00047, 2008-Ohio-1368, f.n. 1. Also, the trial

court's discretion must be exercised in a manner which best protects the interests of the child. *In re: Whaley* (1993), 86 Ohio App.3d 304, 317, additional citations omitted. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶17}. In the case sub judice, at the evidentiary hearing before the magistrate, appellee first called Kristine M. Shamberg, a licensed professional clinical counselor, who testified that T.W. has been diagnosed with post-traumatic stress disorder. According to Shamberg, T.W. has repeatedly stated he does not want to talk about the "incident with dad." *See* Tr. at 18, 21. During her sessions with T.W., Shamberg would ask questions pertaining to how the child could feel safer and what would happen if appellant apologized, to which T.W. has replied: "I don't know, he'll just do it again." Tr. at 24. T.W. has expressed fear both in a "universal fashion" and as it pertains to appellant. *Id*.

{¶18}. The guardian ad litem in this matter, Attorney Jacob Will, testified that T.W. had disclosed to him that appellant, "in some kind of angry response," pushed him such that he struck his head on a door knob. Tr. at 40. While the GAL indicated he did not have an opinion as to whether the event in question had actually occurred, he expressed doubt that T.W. had been coached to report such an incident. *Id.* The GAL recommended family therapy as a prerequisite to unsupervised visits between appellant and T.W. Tr. at 41-42.

{¶19}. Appellee Sara also testified at the hearing before the magistrate, stating that after T.W. was taken to the hospital on the Wednesday after the weekend incident,

the child was diagnosed with a head contusion. Tr. at 68. At that time, according to appellee, T.W. told police that appellant had "put his big hand on my face and pushed me." *Id.*

{¶20}. Contrary to the foregoing testimony, appellant and two witnesses, Bob Wallace and Karen Wallace (appellant's father and stepmother), testified that they observed nothing unusual regarding T.W. on the weekend in question (Tr. at 130, 141), although appellant indicated that T.W. had attempted to "bury" his own head into an ice cream cake, apparently as a means of celebrating his birthday. Tr. at 100. According to appellant's testimony, the hardness of the frozen cake at first "shocked" T.W., but the child thereupon laughed at his stunt. *Id.*

{¶21}. The magistrate specifically found the testimony of appellant and his witnesses not to be credible. *See* Decision at 2.

{¶22}. As an appellate court, we are not the trier of fact; instead, our role is to determine whether there is relevant, competent, and credible evidence upon which the factfinder could base his or her judgment. *Tennant v. Martin–Auer,* 188 Ohio App.3d 768, 936 N.E.2d 1013, 2010–Ohio–3489, ¶ 16, citing *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA–5758, 1982 WL 2911. A reviewing court, in addressing a civil manifest weight challenge, must determine whether the finder of fact, in resolving conflicts in the evidence, clearly lost his or her way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *See Hunter v. Green,* Coshocton App.No. 12–CA–2, 2012–Ohio–5801, 2012 WL 6094172, ¶ 25. In this instance, upon review of the record and the sealed transcript of the trial

court's *in camera* interview,[1] we find no basis to disturb the trial court's findings and conclusions in this matter in regard to the suspension and modification of appellant's visitation with T.W.

{¶23}. Appellant's First Assignment of Error is overruled.

II.

{¶24}. In his Second Assignment of Error, appellant contends the trial court abused its discretion in disallowing an appellant's witness, Gina Snyder, to testify at the objection hearing, following the witness's alleged inability to appear at the magistrate's hearing. We disagree.

{¶25}. As a general rule, a trial court has the inherent authority to manage its own proceedings and control its own docket. *See Love Properties, Inc. v. Kyles,* Stark App.No. 2006CA00101, 2007–Ohio–1966, ¶ 37, citing *State ex rel. Nat. City Bank v. Maloney,* Mahoning App.No. 03 MA 139, 2003–Ohio–7010, ¶ 5. A trial court clearly has discretion under Civ.R. 53(D)(4) to take additional evidence before ruling on objections. *Rafeld v. Sours*, Ashland App.No. 14 COA 006, 2014-Ohio-4242, ¶ 21, quoting *Parrick v. Parrick,* 3rd Dist. Hancock No. 5–12–12, 2013–Ohio–422, ¶ 34. Civ.R. (D)(4)(d) states in pertinent part as follows: "If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. *** Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate."

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[1] This Court has interpreted sections B(2)(c) and (3) of R.C. 3109.04 such that *in camera* interviews are to remain confidential. *See Myers v. Myers,* 170 Ohio App.3d. 436, 2007–Ohio–66, ¶ 46; *Linger v. Linger* (June 30, 1993), Licking App. 92–CA–120, 1993 WL 274318.

{¶26}. Appellant asserts that it is "undisputed" that the testimony of Ms. Snyder, who was purportedly present on the night T.W. was injured, "could not have been presented to the magistrate with reasonable due diligence ***." Appellant's Brief at 7. At the objection hearing, appellant's counsel told the court that Ms. Snyder had unspecified "physical limitations" that prevented her from being present at the earlier magistrate's hearing. *See* Tr., Objection Hearing, at 3. Appellant's counsel also proffered that "[s]imply all she's going to say is that she was up all night and no such event took place." *Id.* Nonetheless, in addressing appellant's Civ.R. 53 objections, the trial court ruled as follows regarding this issue:

{¶27}. "[Appellant's] oral motion to supplement the record with additional witness testimony is denied for the reason that those witnesses were available for the original trial and not called."

{¶28}. Judgment Entry, September 16, 2014, at 1.

{¶29}. Based on our review of the confines of the record before us, we are not persuaded the trial court's aforesaid decision to hear only the arguments of counsel at the objection hearing pursuant to Civ.R. 53(D)(4) constituted an abuse of discretion.

{¶30}. Appellant Second Assignment of Error is therefore overruled.

{¶31}. For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

JWW/d 0415