[Cite as *Didonato v. Didonato*, 2016-Ohio-3164.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STEPHEN J. DIDONATO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2015 AP 10 0058
	:	
CHRISTINA HUTH DIDONATO	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas, Case No. 2013 TC 07 0288
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	May 23, 2016

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
DEBORAH E. GREENHAM P.O. Box 711 New Philadelphia, OH 44663	MICHELA HUTH P.O. Box 17 Bolivar, OH 44612

Delaney, J.

{¶1} Defendant-Appellant Christina Huth DiDonato appeals the October 2, 2015 judgment entry of the Tuscarawas County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} This is the appeal of a judgment entry arising out the same set of facts established in *DiDonato v. DiDonato*, 5th Dist. Tuscarawas Nos. 2015 AP 07 0042, 2015 AP 09 0051, 2016-Ohio-1511, -- N.E.3d – ("*DiDonato I*"). The following are the facts as stated in *DiDonato I,* ¶ 2-37:

{¶3} Defendant-Appellant Christina Huth DiDonato is biological mother of two minor children, D.D., born November 22, 2004, and P.D., born May 5, 2007. Plaintiff-Appellee Stephen DiDonato is the biological father of the children. On July 2, 2013, appellee filed a complaint for divorce. On April 8, 2014, the parties entered an agreed judgment entry of divorce. The parties agreed appellant would be the sole residential and legal custodian of the children, subject to visitation and parenting rights of appellee. Further, the agreed entry specifically provided as follows, "the parties agree that they will discuss and cooperate on matters relating to the children's welfare, health and education, and each party will encourage the child to respect, honor, and love the other party."

{¶4} On May 7, 2014, appellee filed a motion to modify parental rights and responsibilities, requesting that he be named the residential and legal custodian based upon a change in circumstances. On May 23, 2014, the magistrate issued an interim order ordering no texting between the parents and ordering any non-emergency contact be done through the court's Family Wizard Program.

{¶5} The parties then filed numerous motions, including: appellee's motion for designation of public place for exchange of children, appellant's motion for right of first refusal to watch children, and appellee's motion for immediate oral hearing on motion that appellant not be permitted to contact appellee's childcare provider and motion for designation of public place for exchange. The magistrate set the motions for a hearing on July 17, 2014. On July 17, 2014, appellant filed a motion to continue the hearing due to the death of her significant other's sister. However, both of the parties' attorneys appeared in front of the magistrate on July 17, 2014.

{¶6} On July 18, 2014, the magistrate entered an interim order stating that both parties may not contact the other party's childcare provider unless there is an emergency and finding there is no right of first refusal for child care. Appellant filed a motion to set aside the July 18th magistrate's order. The magistrate issued an order on August 15, 2014 ordering the exchange of the children between the parties at the Marathon Station in Strasburg and ordering appellant to deliver the children to Burger King for football practice or games. The magistrate further ordered appellee to give appellant, through the Family Wizard, the name and number of the childcare providers and stated appellant was not to contact them except in an emergency. Finally, the magistrate ordered that neither party should make any doctor's appointments that would occur during the other party's possession of the children.

{¶7} On August 19, 2014, appellee filed an ex parte, emergency motion regarding school for the children. Appellee sought an emergency order for the children to remain in New Philadelphia schools rather than transfer to Tusky Valley schools. The motion indicated appellee was notified of this intended transfer of schools by appellant on

Friday, August 15, 2014, and was an emergency because school started on Wednesday, August 20, 2014. After conducting a phone conference with the attorneys of both parties and the guardian ad litem of the children, the magistrate issued an order on August 19, 2014 ordering the children to remain in New Philadelphia School System. The magistrate further set the motion for a full hearing on August 25, 2014.

{¶8} Appellant filed an emergency motion for stay and objection to the ex parte decision on August 22, 2014. Appellant argued the court order effectuated a modification of parental rights without a notice and opportunity to be heard. The magistrate denied appellant's motion for emergency stay on August 25, 2014. The magistrate conducted a full hearing on August 25, 26, 27, and September 4 of 2014.

{¶9} The magistrate issued an order on September 17, 2014. The magistrate found appellant admitted she unilaterally made the decision to transfer schools, in violation of the agreed judgment entry which required the parties to “discuss” and “cooperate” about the children's education. Further, the magistrate found the guardian ad litem “emphatically” recommended the children continue in the New Philadelphia School System. The magistrate noted P.D. has an individualized education program (“IEP”). The magistrate found the disruption that would be caused by the change of school district, combined with the IEP, would not be in the best interest of the children. The magistrate further found since the matter was set on a motion to modify parental rights in October, it would be in the best interest of the children to stay in the same school system until the court ruled on the motion to modify parental rights. The magistrate thus ordered the children to remain in the New Philadelphia School System pending the resolution of the

motion to modify parental rights. Appellant filed a motion to set aside the September 17, 2014 order; however, she withdrew the motion on October 14, 2014.

{¶10} Beginning in October of 2014, the magistrate held a hearing on appellee's motion to modify parental rights. The hearing continued to several dates in November and concluded on December 9, 2014.

{¶11} Christine Stewart (“Stewart”), the babysitter appellee hired to watch the children during his parenting time, testified she obtained a CPO against appellant. Stewart testified that, prior to her baby-sitting, appellant was concerned and told Stewart no one but family watches the children. On Stewart's first day watching the children, appellant called her several times and, in one call, screamed at Stewart and told her she was calling the police and taking Stewart to court. Stewart stated that, even after the children left, appellant continued to text her. Stewart stated the next time she watched the children, appellant called her six times in three hours and texted her multiple times. Stewart testified that when she took P.D. to a track meet, appellant, while the children were around, told Stewart she was an unfit caregiver, yelled at her, and cussed her out. Stewart stated she never hit the children or left them unattended. Stewart testified D.P.'s behavior changed from well-behaved to agitated and arguing when appellant called.

{¶12} John Frank (“Frank”), the guardian ad litem appointed for the children, testified he believes there has been a fundamental change from the time of the agreed judgment entry, including the relocation of appellant and the potential change of school district. Frank testified any skepticism or rebuttable presumption about the timing of appellee's motion has been overcome.

{¶13} Frank testified the conflict between appellant and appellee is ripping the children up and taking a huge toll on them. Further, the children love both their parents, but, if this conflict does not subside, the children are not going to love either parent. Frank testified the children are well aware of the conflict between the parents. Frank stated the children never mentioned any abuse to him, and they are not afraid of either parent. Frank testified there is nothing to suggest the children are traumatized. The children's interactions with each parent is loving, natural, and comfortable. Frank stated the parties' communication on the Family Wizard court program perpetuates the conflict.

{¶14} Frank testified the difficulties appellee has with appellant are not carrying over to his other relationships; however, some behavior appellant exhibits toward appellee she exhibits with others as well, as evidenced by the CPO and work documents. Frank is concerned her behavior is more pervasive than just the custody situation. Frank testified appellant is fixated on the idea that she is the custodial parent. Frank stated appellant's inconsistencies of saying one thing and then saying the opposite, presents challenges in this custody situation. Frank saw more behavior at appellant's home that leads him to believe there is spillover from her negative emotions towards appellee than with appellee at appellee's home. Frank testified appellant calls appellee “Mr. DiDonato” in front of the children and the children pick up on this. Frank described the relationship between appellant and appellee as win-loss and one side versus the other, even with extended family.

{¶15} Frank recommended the parties have shared parenting. However, Frank testified if he had to decide which parent has a somewhat better chance of honoring and respecting the other parent's role, it would be appellee because appellant's impairment

to honor and facilitate the other parent's role is more significant than appellee's impairment. Frank recommended the children remain in the New Philadelphia School System. Frank stated appellant's sleeping arrangement with the children is unhealthy because P.D. sleeps in her bed.

{¶16} Frank testified the pattern of medical appointments made by appellant for the children is driven by animosity and acrimony of litigation and now rises to the level of actually harming the children. Frank again stated the conflict between the parties is “absolutely” detrimental to the children. Frank recommended appellant not be the sole medical-decision making authority for the children.

{¶17} On cross-examination, Frank testified the following had a bad impact on the children: fighting, conflict, acrimony, and the parties' arguing over everything. Frank stated post-decree conflict between the parties goes on and on. Frank testified he spoke with the children and the conflict is highly distressing to them. Frank could tell this from the children's words and manner of speaking. Frank testified appellant called appellee “Mr. DiDonato” during Frank's home visit and it was her routine to call him that.

{¶18} Anita Exley (“Exley”), a psychologist at Chrysalis Counseling Center, did a psychological evaluation of appellant and appellee. Exley testified appellant may become easily overwhelmed by complex situations and goes for the quick solution rather than tolerating distress to see through multiple solutions to problems. Exley stated appellant has an inflated sense of self-worth, shows self-satisfying and self-dramatizing behavior, is emotionally reactive, and it is difficult for her to reason through things. Exley testified appellant relies so heavily on her family enmeshment that it appears to reinforce her skewed belief system. Exley found it odd when appellant said she was abused, but could

not definitively answer what she meant by abuse and domestic violence. Due to appellant's poor eye contact and failure to provide full responses, Exley did not feel like appellant was being upfront and honest with her.

{¶19} Exley testified the general effect of enmeshment on children is that they are raised in an environment closed to outside influences. Further, it would be difficult for appellant to co-parent and work collaboratively. Exley stated if appellant referred to appellee as “Mr. DiDonato,” or “the perpetrator,” she would have concerns about her doing this in front of the children. Exley testified appellant was barely able to hold herself together emotionally and if someone has difficulty managing her own emotions, it is hard to be able to address a child's needs. Further, Exley stated it will be difficult for appellant to see things other than the way she currently sees things and dealing with the challenges of parenting would be difficult as she is likely to become angry and frustrated.

{¶20} Exley testified it is not healthy for parents to engage in verbal altercations in front of the children, as this could emotionally affect them.

{¶21} Exley stated appellee seems rushed and gets caught up in minutia. Further, he may have ADHD and is passive-aggressive and overly reactive. Exley testified appellee has borderline personality features with negativistic features. However, he is aware of his health issues and is attempting to improve them via counseling.

{¶22} Exley testified appellant's strengths are intelligence and the ability to research. Appellee's strengths are genuineness and sincerity.

{¶23} Wendy Roberts (“Roberts”), a counselor, testified she became involved with the children in July or August of 2014 for behavioral problems such as anger management, frustration, and disrespect. Roberts stated the children did not make as

much progress as she would have liked because they still have problems with anger and acting up. Roberts felt the children have adjustment disorder due to the divorce and witnessing the conflict between the parents.

{¶24} The majority of the remainder of the testimony at the hearing was the testimony of appellant and appellee. Each testified extensively. Much of the testimony included various incidents between the parties, with each having a different and contrary view on how these events were caused, how they unfolded, their result, and their impact. This Court need not restate that voluminous testimony of each of those events. The balance of the parties' testimony can be summarized as follows:

{¶25} Appellee stated that, at the time of the divorce decree, he believed they could agree and cooperate regarding the kids' health, welfare, and education. He did not expect things to get worse or expect the CPO against Stewart. Appellee testified he is seeing a counselor and intends to continue with counseling. After the divorce, appellee stated appellant texted him 30–40 times per day. He was getting calls from the children, hysterical, wanting him to come and get them. Appellee testified he cannot get a straight answer from appellant. Further, that she calls him “Mr. DiDonato” in front of the children. Appellee testified that, since the divorce, D.P. has become more defiant, it is hard to get him to focus, and is now getting into fights.

{¶26} Appellant testified P.D. sleeps in a queen bed with her because she will not force him to sleep in his own bed. Appellant stated she made the decision to send the children to Tusky Valley on her own. Appellant denies the allegations in Stewart's CPO. Appellant testified the children are aware of the CPO as she told D.P. she could not come to his games because she cannot be within five hundred feet of Stewart's home. Appellant

stated the issues with the children appeared before the divorce decree. Appellant testified she is seeing a counselor, but has not gotten to any issues involving parenting and improving her parenting skills as she is seeing the counselor due to domestic violence. Appellant denies calling appellee “Mr. DiDonato” in front of the children.

{¶27} Appellant testified she cannot communicate with appellee and appellee cannot communicate with her; otherwise, it escalates. When asked on cross-examination why there are frequent conversations from her requesting appellee meet her someplace other than the Burger King or the Marathon Station as ordered by the trial court, appellant stated “for certain situations, why not?” Appellant admitted counselors have told her the children's issues are not due to domestic violence.

{¶28} The magistrate issued an order on February 13, 2015. The magistrate issued forty-one (41) findings of fact. The magistrate found a change of circumstances due to: appellant moving out of the children's school district to a studio cottage; a CPO issued against appellant to protect one of appellee's childcare providers; and the significant escalation of the animosity between the parties.

{¶29} The magistrate also detailed each factor contained in R.C. 3109.04(F) as to best interests of the children. Both parents want custody of the children and neither supports the parenting skills of the other. The magistrate did not interview the children, but the guardian ad litem did interview the children and reports the children are very disturbed by the constant volatility between the parents, but otherwise are well-adjusted and found no evidence of the “trauma” suggested by appellant. The magistrate found credible evidence showed the children are reluctant to talk to a parent in public when out with the other parent or the other parent's family. D.D. was suspended for fighting with

another child. P.D. has an IEP in school and D.D. is taking Zoloft. The children's counselor states the children do not have post-traumatic stress disorder, despite appellant's contention that they do. The magistrate found both parties have issues that need addressed with counseling. The magistrate further found appellee was more likely to honor court visitation. The magistrate found there was not a denial of companionship time; however, appellant insisted on the “Family Wizard” that appellee pick up the children at places other than the court-ordered meeting place.

{¶30} The magistrate determined that, while both parties engaged in behavior that is not in the best interest of the children in the past, appellee has decreased the frequency of those behaviors and appellant has increased the frequency of those inappropriate behaviors. The magistrate found the children are well integrated into both homes and any change in the amount of time with appellee will have benefits for the children which outweigh any harm from a change of environment.

{¶31} In the “conclusions of law” section of the magistrate's order, the magistrate stated appellee's home should be the residential home for school purposes and he should make all educational decisions for the children. Further, appellant should not be the sole decision-maker regarding the children's medical care.

{¶32} The magistrate issued a clarification of her February 13th decision on February 19, 2015. The magistrate stated each parent shall be the residential parent for the week the children are with them; appellee is the custodial parent for school purposes; and appellant is not the custodial parent for medical purposes.

{¶33} Appellant filed objections to the magistrate's decision on February 27, 2015. Appellee filed objections to the magistrate's decision, arguing the order does not say who

has custody. On March 12, 2015, appellee filed a motion for contempt regarding the public exchange of the children and the doctor's appointments of the children. On July 10, 2015, appellant filed supplemental objections to the following magistrate's decisions: February 13, 2015, August 19, 2014, and September 17, 2014.

{¶34} The trial court issued a decision on the parties' objections on July 22, 2015. The trial court vacated the magistrate's February 19, 2015 order. The trial court also found: appellant's objections to the August 19, 2014 and September 17, 2014 magistrate's orders were untimely; appellant's constitutional rights were not violated; and the evidence appellant argues is hearsay was supported by the testimony of several witnesses. The trial court modified several of the magistrate's findings of fact, including the fact that the guardian ad litem's recommendation regarding shared parenting is not realistic based upon the parties' inability to cooperate or communicate with each other.

{¶35} The trial court also modified the magistrate's conclusions of law, adding the law for change of circumstances and best interest of the child. Based upon the findings of fact and conclusions of law, the trial court granted appellee's motion to modify and found appellee shall be named the residential parent and legal custodian of the children. The trial court further found appellee should make all educational and medical decisions for the children.

{¶36} On July 27, 2015, appellee filed an appeal of the trial court’s July 22, 2015 judgment entry. *See DiDonato I, supra*.

{¶37} On August 17, 2015, appellee filed a motion for clarification of the July 22, 2015 judgment entry regarding sports, activities, and right of first refusal. Appellee requested the trial court provide the parties with more clarification regarding the sports

and activities of the minor children, specifically, whether appellant can refuse to permit the children to participate in sports and other activities during her companionship time, to clarify how the children will be transported to these activities, and to clarify whether there is a right of first refusal if a parent is working.

{¶38} Appellant opposed the motion and argued the trial court did not have jurisdiction to consider the motion while the appeal of the July 22, 2015 judgment entry was pending before this Court. The trial court ruled on the motion and found the matters contained in appellee's motion for clarification were not directly involved in or essential to the resolution of the issues raised in appellant's appeal of the July 22, 2015 judgment entry.

{¶39} In the September 2, 2015 judgment entry, the trial court found appellant should make arrangements for the children to attend their practices and games during her companionship time and has the option of changing her mid-week visitation to Tuesdays during football season with notice to appellee via the Family Wizard. The trial court further ordered the parties do not have a right of first refusal to care for the children when the other parent is working.

{¶40} Appellant appealed the September 2, 2015 judgment entry. That appeal was consolidated with her appeal of the July 22, 2015 judgment entry. *See DiDonato I, supra*.

{¶41} On September 8, 2015, appellant filed an emergency motion for clarification of the July 22, 2015 judgment entry. In the motion, appellant asked the trial court to clarify three specific questions: (1) whether appellee was permitted to schedule medical appointments during appellant’s companionship time; (2) whether the parties were

obligated to discuss and cooperate on matters relating to the children's welfare, health, and education as stated in the parties' agreed judgment entry decree of divorce; and (3) whether appellee was required to provide appellant with the practice and game schedules of the children's activities and contact information of the children's coaches.

{¶42} The trial court ruled on appellant's emergency motion for clarification on October 2, 2015. The trial court held:

> Respecting Branch One of the Defendant's motion filed September 8, 2015, the Court FINDS that this matter has been addressed in the Judgment Entry dated September 2, 2015 at 2:28 p.m. Specifically, the Order at ¶3 states:
>
> > "Plaintiff shall take Defendant's companionship time into consideration when scheduling future activities for the children and avoid scheduling activities during Defendant's companionship time whenever possible. However, Plaintiff is not prohibited from scheduling activities that may conflict with Defendant's companionship time if he finds it to be in the best interest of the children."
>
> Respecting Branch Two of the Defendant's motion filed September 8, 2015, the Court FINDS that this issue is addressed in the Judgment Entry dated July 22, 2015. Specifically, the attachment of Standard Parenting Orders and Incidental Rules addressed rules governing companionship time at pages 4-7.

> Respecting Branch Three of the Defendant's motion filed September 8, 2015, the Court FINDS that the information attached by the Defendant indicates a good faith attempt made by the Plaintiff to share sports information.
>
> The Court further FINDS that nothing prevents the Defendant from independently requesting information from the coaches or sports organizations.

The trial court finally found that no further clarification was necessary.

{¶43} Appellant appealed the trial court's October 2, 2015 judgment entry to this Court in *DiDonato v. DiDonato*, 5th Dist. Tuscarawas No. 2015 AP 10 0058 ("*DiDonato II*").

{¶44} On April 11, 2016, this Court affirmed the trial court's July 22, 2015 and September 2, 2015 judgment entries in *DiDonato I*. *Id.* at ¶ 82.

ASSIGNMENTS OF ERROR

{¶45} Mother raises two Assignment of Error:

{¶46} "I. THE COURT OF COMMON PLEAS ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S EMERGENCY MOTION FOR CLARIFICATION OF THE COURT'S JULY 22, 2015 JUDGMENT.

{¶47} "II. THE COURT OF COMMON PLEAS ERRED AND ABUSED ITS DISCRETION WHEN IT VOIDED THE DIVORCE DECREE CLAUSE REQUIRING THE PARTIES TO DISCUSS AND COOPERATE REGARDING MATTERS RELATED TO THE CHILDREN."

ANALYSIS

I.

{¶48} Appellant argues in her first Assignment of Error that the trial court abused its discretion by denying her emergency motion for clarification. We disagree.

{¶49} As we stated in *DiDonato I*, our standard of review in assessing the disposition of child custody matters is that of abuse of discretion. *Id*. at ¶ 44 citing *Miller v. Miller*, 37 Ohio St.3d 71, 523 N.E.2d 846 (1988). Furthermore, as an appellate court reviewing evidence in custody matters, we do not function as fact finders; we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent, and credible evidence upon which the fact finder could base his or her judgment. *Dinger v. Dinger*, 5th Dist. Stark No. 2001 CA 00039, 2001–Ohio–1386. The trial court is "best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). Deferential review in a child custody determination is especially crucial "where there may be much evidence by the parties' demeanor and attitude that does not translate to the record well." *Davis v. Flickinger*, 77 Ohio St.3d 415, 674 N.E.2d 1159 (1997).

{¶50} In its October 2, 2015 judgment entry, the trial court considered appellant's requests for clarifications and found the issues she raised were disposed of by the terms of the July 22, 2015 and September 2, 2015 judgment entries. In *DiDonato I*, we affirmed the trial court's decisions in the July 22, 2015 and September 2, 2015 judgment entries. The record in this case is very detailed and demonstrates there were few issues as to the

care and maintenance of the children that the parties did not raise and the trial court did not touch upon. As to the matters raised in appellant's emergency motion for clarification, we find no abuse of discretion by the trial court to refer to its previous judgment entries to resolve the matter.

{¶51} Appellant's first Assignment of Error is overruled.

II.

{¶52} Appellant argues in her second Assignment of Error that the trial court's judgment entries on September 2, 2015 and October 2, 2015 negate the terms of the April 8, 2014 agreed judgment entry decree of divorce that required the parties to discuss and cooperate on matters relating to the children's welfare, health, and education. We disagree.

{¶53} The court in which a decree of divorce is originally rendered retains continuing jurisdiction over matters relating to the custody, care, and support of the minor children of the parties. *Loetz v. Loetz*, 63 Ohio St.2d 1, 2, 406 N.E.2d 1093 (1980) citing *Hoffman v. Hoffman* (1864), 15 Ohio St. 427 (1864). The decree of divorce in this case was filed on April 8, 2014. On May 7, 2014, appellee filed a motion to modify parental rights and responsibilities. Thereafter, the parties filed numerous motions, including: appellee's motion for designation of public place for exchange of children, appellant's motion for right of first refusal to watch children, and appellee's motion for immediate oral hearing on motion that appellant not be permitted to contact appellee's childcare provider and motion for designation of public place for exchange. The record in this case shows the parties sought the trial court's assistance with resolving matters relating to the children's welfare, health, and education.

{¶54} We find the trial court's judgment entries do not void or modify the term of the decree of divorce requiring the parties to discuss and cooperate on matters relating to the children's welfare, health, and education. Rather, the language of the trial court's judgment entries enforces the decree of divorce by creating a practical framework through which the parties can attempt to fulfill their agreed goal of discussing and cooperating on matters relating to the children's welfare, health, and education. We find no abuse of discretion by the trial court to exercise its jurisdiction over matters relating to the custody, care, and support of the minor children of the parties.

{¶55} Appellant's second Assignment of Error is overruled.

CONCLUSION

{¶56} The judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Delaney, J.,

Gwin, P.J. and

Wise, J., concur.