

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
HURON COUNTY

Christa L. Shaw

Court of Appeals No. H-09-023

Appellant

Trial Court No. DRA 20080933

v.

Mark A. Shaw

**DECISION AND JUDGMENT**

Appellee

Decided: September 17, 2010

\* \* \* \* \*

Deborah L. Wood, for appellant.

Reese M. Wineman, for appellee.

\* \* \* \* \*

HANDWORK, J.

{¶ 1} This appeal is from the October 8, 2009 judgment of the Huron County Court of Common Pleas approving and adopting the magistrate's decision naming appellee, Mark A. Shaw, as custodial parent of the minor children and overruling the objections of appellant, Christa Shaw. Upon consideration of the assignments of error,

we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

{¶ 2} "I. ASSIGNMENT OF ERROR NO. 1 THE MAGISTRATE ERRED IN FINDING THAT THE EVIDENCE SHOWS THE FACTORS OF R.C. 3109.04(f)(1) [sic] WEIGH IN FAVOR OF FATHER BEING DESIGNATED THE RESIDENTIAL PARENT AND LEGAL CUSTODIAN OF THE CHILDREN.

{¶ 3} "II. ASSIGNMENT OF ERROR NO. 2 THE MAGISTRATE ERRED IN HIS MANNER OF WEIGHING THE FACTORS TO COME TO THE CONCLUSION THAT IT IS IN THE BEST INTERESTS OF THE CHILDREN TO BE IN THEIR FATHER'S PRIMARY CUSTODY.

{¶ 4} "III. ASSIGNMENT OF ERROR NO. 3 IT IS IN THE BEST INTEREST OF THE CHILDREN TO REMAIN IN THEIR MOTHER'S PRIMARY CARE, AS THEIR 'PRIMARY CAREGIVER' AND AS A 'LOVING AND APPROPRIATE PARENT.'"

{¶ 5} The parties both sought a divorce from each other. The issue of custody of the couple's two young daughters went to trial before a magistrate, whose decision was entered on June 15, 2009. Appellant objected to the magistrate's decision arguing that the magistrate came to the wrong conclusion after misjudging the credibility of appellee's sister and appellant, giving excess weight to the facts in appellee's favor which were the result of his superior financial status and disobedience of support obligations, and giving insufficient weight to the facts that appellant has been the primary caregiver, the children

have strong relationship ties to appellant's other children and her extended family, appellee has anger management issues, and appellee is living with a woman of poor character. The trial court found the objections not well-taken and upheld the magistrate's decision on August 31, 2009. On October 8, 2009, the trial court issued a nunc pro tunc entry again overruling appellant's objections. Appellant sought an appeal from both decisions. Since all of the assignments of error are interrelated, we address them together.

{¶ 6} In her first assignment of error, appellant argues that the magistrate correctly found that she was the primary caregiver. However, she argues, the court did not properly consider all of the factors of R.C. 3109.04(F)(1) because the court awarded custody to appellee despite the fact that the factors weighed heavily in appellant's favor.

{¶ 7} Appellant argues that the court failed to properly weigh the following facts: 1) appellant has been the primary caregiver; 2) appellee admitted to having assaulted appellant; 3) appellee's current girlfriend who lives with him has a prior criminal record, formerly worked in a strip club, and blames her alcoholism on others; 4) appellee has failed to comply with court orders to pay child support and the mortgage on the marital residence; 5) the children have a close connection to appellant's family and older children; 6) appellant failed to comply with the order that appellee be given the first opportunity to babysit but that this was only when he was "watching" the children at his automotive repair shop where they were not being properly supervised; 7) any behavior problems appellant's older son was having diminished after appellee left the household;

and 8) appellant has sought to improve her employment opportunities by attending college and is working toward being able to provide a better home for her children in the near future. Appellant argues the trial court obviously favored appellee solely because he had the financial means to provide a better home for the children while appellant was forced to live in a trailer provided by her mother because she had not worked in 11 years and appellee did not pay child support as ordered.

{¶ 8} In her second assignment of error, appellant argues that the trial court unfairly weighed the evidence when it: 1) minimized appellee's anger issues because there was no physical harm proven yet considered appellant's unprovoked action of calling her husband's current girlfriend a derogatory name as something very serious; 2) failed to consider the fact that appellee failed to treat his own blood pressure problem, yet found that appellant has a mental health issue because she was depressed during the time appellee left home to live with another married woman and appellant took medication for adult attention deficit disorder; 3) found that appellant lives in a dangerous area because appellee had not paid child support as ordered but did not consider at all that her children were spending time in appellee's automobile repair shop while he "spent time" with the children; 4) considered appellant's filing of her income tax return pending the divorce against the order of the court more egregious than appellee's failure to pay child support when appellant needed money to support herself and her children; 5) did not consider the fact that appellant fully complied with visitation orders except for allowing her children to be left unsupervised at appellee's automotive repair

shop; 6) gave too much weight to the behavior problems of appellant's son, which she testified diminished after appellee left the household; 7) considered appellant immature for some unstated reason and yet did not consider appellee's violent behavior as immature; and 8) did not give sufficient weight to the fact that appellant had been the primary caregiver of the children during the marriage.

{¶ 9} Appellant also argues that the trial court erred in finding the testimony of appellee's sister credible that appellant allowed her children to put rocks in their mouth and found that appellant was not credible when she testified that her son's behavior issues stemmed from the relationship with appellee and that her son no longer needed depression medication once appellee left the household.

{¶ 10} In her third assignment of error, appellant argues that the trial court abused its discretion when it determined that the best interest of the children required that appellee be named as their custodial parent.

{¶ 11} R.C. 3109.04(A) authorizes the court in a divorce proceeding to "\* \* \* allocate the parental rights and responsibilities for the care of the minor children of the marriage," taking into consideration the best interest of the children pursuant to R.C. 3109.04(B)(1). Pursuant to R.C. 3109.04(F)(1), to determine the best interest of a child, "\* \* \* the court shall consider all relevant factors, including, but not limited to:

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

{¶ 13} "(b) If the court has interviewed the child in chambers \* \* \* the wishes and concerns of the child, as expressed to the court;

{¶ 14} "(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;

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

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

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

{¶ 18} "(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;

{¶ 19} "(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; \* \* \*.

{¶ 20} "(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;

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

{¶ 22} A trial court has broad discretion to issue a custody order that will be in the best interest of the child. *Trickey v. Trickey* (1952), 158 Ohio St. 9, paragraph two of the syllabus, and *Pater v. Pater* (1992), 63 Ohio St.3d 393, 396. That decision will only be reversed on appeal if the court abuses its discretion by rendering a decision which is

unreasonable, arbitrary or unconscionable. *Id.* and *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. A trial court must base its decision on the best interest of the child, which requires a consideration of the factors listed in R.C. 3901.04(F), as well as all other relevant factors. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 420-421, quoting *Pater v. Pater*, *supra*, at 403 (Resnick, J., dissenting). If the trial court's best interest findings are supported by some competent, credible evidence, the trial court's finding of best interest cannot be reversed as being contrary to the manifest weight of the evidence. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, syllabus, the original opinion was corrected by 51 Ohio St.3d 701, and *Ross v. Ross* (1980), 64 Ohio St.2d 203, 204-205. Weighing conflicting evidence and making credibility determinations are matters within the province of the trial court as trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881, and *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. If the evidence is susceptible to more than one interpretation, we must give it the interpretation consistent with the trial court's judgment. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 23} All of the issues raised by appellant involve either the trial court's determination of the credibility of the witnesses, weighing of the evidence, or the trial court's discretionary decision of who should be named as the custodial parent. We find that this was a very difficult case and that the entire case turns on the credibility of the witnesses, the weight of the evidence, and the subtle nuances of demeanor that only the trial court can observe. Therefore, finding that there was some evidence to support the

trial court's factual findings and that there is nothing in the record to indicate that the trial court abused its discretion by naming appellee as the custodial parent, we must affirm the trial court's decision. All of appellant's assignments of error are not well-taken.

{¶ 24} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Thomas J. Osowik, P.J.

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JUDGE

Keila D. Cosme, J.  
CONCUR.

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JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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