[Cite as *Recny v. Finley*, 2013-Ohio-5349.]

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

Marissa C. Recny	Court of Appeals No. S-12-047
Appellant	Trial Court No. 09DR001033
v.	
Markus J. Finley	**DECISION AND JUDGMENT**
Appellee	Decided: December 6, 2013

* * * * *

Joseph F. Albrechta and John A. Coble, for appellant.

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JENSEN, J.

{¶ 1} This is an appeal from the November 26, 2012 judgment of the Sandusky County Court of Common Pleas, terminating the shared parenting plan that plaintiff-appellant, Marissa Recny, and defendant-appellee, Markus Finley, entered into when they divorced on May 20, 2010. Recny assigns the following errors for our review:

Assignment of Error One: The trial court's decision should be reversed for its failure to find that terminating the shared parenting plan is in the children's best interest.

Assignment of Error Two: The trial court's decision should be reversed for its failure to issue findings of fact and conclusions of law on appellant's timely motion.

Assignment of Error Three: The trial court's decision should be reversed as the GAL's report was not admitted into evidence and is unavailable for appellate review.

Assignment of Error Four: The trial court violated appellant's due process rights through the ex-parte order, resulting in material prejudice at the hearing to terminate the shared parenting plan.

Assignment of Error Five: No evidence showed that shared parenting was not in the children's best interests.

{¶ 2} For the reasons that follow, we find Recny's first, second, and fifth assignments of error well-taken and remand this matter to the trial court with instructions that it apply R.C. 3901.04(E)(2)(c) and address the factors enumerated in R.C. 3901.04(F) as to whether shared parenting is in the best interest of the children, and to issue separate findings of fact and conclusions of law under Civ.R. 52. We find Recny's third and fourth assignments of error not well-taken.

I. Background

{¶ 3} Recny and Finley divorced on May 20, 2010. As part of their consent judgment entry of divorce, they entered into a shared parenting plan with respect to their two young daughters, Makaela and Makaiya. Under that plan, each of them was designated the residential parent and legal custodian for the periods during which they had care and custody of the children. Recny was designated the residential parent for school and medical purposes. Finley was allocated parenting time on his weekly days off from work with provisions for overnight stays. He was also allowed an additional midweek visit, dictated by his work schedule, and additional visitation at other times as he and Recny would agree. All other time was allocated to Recny. For holidays and summer parenting time, they agreed to follow the court's standard order for parenting time and for that purpose, Recny was designated the residential parent and Finley was designated the nonresidential parent. Recny was entitled to midweek visitation and alternating weekend visitation during Finley's summer parenting time. Provisions were also made for child support and health insurance.

{¶ 4} Recny and Finley operated under the shared parenting plan until approximately March of 2011. From March 11, 2011 until April 4, 2011, Recny was incarcerated after being convicted of attempted theft. Finley cared for the children while Recny was in prison. On March 16, 2011, Finley filed an ex-parte motion for a temporary order requesting immediate custody of the children. He asserted that Recny had a pattern of being incarcerated; that she had been charged with a third DUI, with the

children in her car at the time of the traffic stop; that Recny abused alcohol and drugs; and that he feared for his children's safety due to Recny's lifestyle, her relationship with her boyfriend, Damere Lockett, who had a criminal record, and because Recny allowed numerous people to reside with her, her residence effectively functioning as "a flophouse." The trial court granted the motion that day without notice to Recny. On March 26, 2011, Finley filed a motion to terminate the shared parenting plan.

{¶ 5} On April 4, 2011, Recny moved to vacate the ex-parte temporary order and moved for the appointment of a guardian ad litem ("GAL"). On May 12, 2011, the trial court appointed Ruth Moreland to serve as GAL. The motion to vacate the ex-parte temporary order was not ruled upon or set for hearing.

{¶ 6} On May 18, 2011, Finley filed a motion requesting that Recny have supervised visitation only, at Village House, a community center where parents can conduct court-ordered supervised visitation. The trial court granted the motion on May 19, 2011, again without notice to Recny. From that point until May 31, 2012, Recny's visitation with her daughters was limited to one hour per week at Village House and was videotaped. On May 31, 2012, she filed a second motion to terminate the ex-parte temporary order. Her motion was granted and the parties went back to operating under the terms of their May 20, 2010 shared parenting plan.

{¶ 7} The court conducted hearings on August 29, 2012 and October 29, 2012, on Finley's motion to terminate the shared parenting plan. At those hearings, a number of witnesses testified including: Recny; Finley; Ruth Moreland; Mary Jo Foos, Makaela's

kindergarten teacher; Cassandra Anderson, Finley's mother; Mark and Viola Recny, Recny's parents; Marlene Ellis, the children's counselor; Daniel Sanchez, Recny's probation officer; Toni Harris, an associate pastor at Recny's church; Vanessa Friday, Recny's cousin; Detective Jason Kiddey, from the Fremont Police Department; Jennifer Schumacher, from Sandusky County Children Services; and Beverly Sue Pedrosa, a case manager from Sandusky County Treatment Alternatives to Street Crime program ("TASC").

{¶ 8} The witnesses who testified at those hearings consistently expressed that Recny and Finley love their children and that the children love their parents and grandparents very much. With respect to Recny, however, evidence was presented calling into question whether her living situation, her choice in acquaintances, her prior incarcerations, and her history of substance abuse were conducive to sharing parenting of her two young children.

{¶ 9} Concerns about Recny stemmed primarily from her behavior during 2011. Following her April 4, 2011 release from the Sandusky County Jail, she was placed on probation. She violated the terms of her probation in May of 2011 after testing positive for cocaine and was incarcerated again for 39 days in June and July of 2011. In November of 2011, she committed another probation violation by consuming alcohol and she spent a little less than a day in jail. She had no contact with her children during her several periods of incarceration, other than receipt of a picture they had drawn for her.

{¶ 10} When Finley testified, he described that the shared parenting arrangement had been working well until Recny became involved with Lockett. Recny became unreliable, showing up late or early or altogether missing drop-offs and pick-ups of the girls. He testified that he was concerned for his daughters' safety. He said that Recny was arrested in front of them several times. He also expressed that Recny's parents disparaged him and made false allegations that Finley's grandfather had inappropriately touched the girls and that Finley had exposed them to pornography. These allegations led to investigations by Children's Services and the Fremont police, but they found no evidence to substantiate the allegations. The allegations also led to a deterioration in Finley's relationship with the Recny family, whom he believed asserted considerable influence over Recny.

{¶ 11} Recny and others testified that she was determined to make positive changes in her life. From May 20, 2011 until May 29, 2012, she voluntarily submitted to weekly drug screens at her own expense, passing all 53 of them. Her case manager and probation officer were pleased with her progress. Recny also passed a hair follicle test ordered by the court on July 20, 2012, upon a motion by the GAL. She stopped dating Lockett, whom witnesses consistently testified was a bad influence in her life. Recny and other witnesses described that she had made great strides in turning her life around. She had recently moved out of her parents' home and into her own apartment and was determined to gain independence from her family.

{¶ 12} The third party professionals who worked with the children also testified. Marlene Ellis, the girls' counselor, began working with them in June of 2010. She testified that the children were upset, fighting with each other, having difficulties in school, and not following directions. She said that around September of 2011, the girls expressed fear of Recny's boyfriend, which subsided after a few months when Recny and Lockett stopped seeing each other. She sensed a lot of negativity from the girls and identified the girls' maternal grandmother, Viola Recny, as the source of much of this negativity. The girls told Ellis that their grandmother told them that Finley and his family were "bad" and "mean" and she promised the children toys and fun activities if they would indicate a preference to live with their mother. Although the evidence adduced at trial was that Recny herself was very positive when speaking to the girls about their father, Ellis believed that the kids were in a push-pull situation because of Recny's parents' manipulation. Ellis stated that she was impressed with Finley's parenting and the way he remained calm despite being made aware of Recny's mother's attempts to influence his daughters.

{¶ 13} Ellis sensed nervousness from the girls when Recny was with them, mainly because they were not used to interacting with Recny in front of Ellis. She described that the children were active and hard to control. She also indicated that she had received a call from the girls' former Head Start school, WSOS, expressing concern about the girls, seeing a difference in their behavior on days they visited their mother. When Recny's visits with the girls moved to her parents' home instead of the Village House, Ellis

opposed that change because she did not know if Recny was still abusing substances and because she was concerned with what Recny's mother was saying to the children about their father.

{¶ 14} By mid-2012, the girls were doing well, but she saw some backward movement between May and July 2012. Ellis offered steps for improvement and stressed the need for positivity and conflict resolution. She expressed the importance of Recny and Finley being independent, acknowledging that Finley had always been independent but that Recny had resided with her parents. Ultimately, Ellis conveyed that the children loved both of their parents and their extended family very much and that it was important for them to stay connected.

{¶ 15} Mary Jo Foos, Makaela's kindergarten teacher, also testified. She indicated that Makaela is among her top five students from an intelligence standpoint and had mastered all required academics for the first grading period; however, she said that Makaela is one of her worst five students from a disciplinary standpoint. She described Makaela as strong-willed, pushy, talkative, sometimes non-compliant, and a bit of a bully.

{¶ 16} Foos testified that the family is involved in her schooling, and sometimes come to eat lunch with Makaela. But she also called into question the parents' ability to communicate and cooperate with one another. They sometimes failed to turn in paperwork that she expected them to complete. She said that she receives frequent communication from Recny, keeping her advised of Makaela's visitation schedule.

Finley, on the other hand, often failed to provide advance notice of Makaela's transportation schedule. She described one incident where the school had to call the police because both parents came to get their daughter. She said that it was upsetting to Makaela and uncomfortable for Foos and the principal. She expressed hope that Recny and Finley would resolve their differences to the point that they could both attend school functions and conferences together.

{¶ 17} Ruth Moreland was appointed as the children's GAL in May of 2011. When Moreland was first appointed, Recny had only supervised visits with the children. Moreland viewed the Village House videotapes and believed that Recny's interaction with her children was appropriate. She eventually recommended that Recny transition to unsupervised visitation at her parents' home because the Village House environment was stressful for the children.

{¶ 18} Moreland does not believe that Recny and Finley are able to work together. She believes that one parent needs to be the custodial parent because Recny and Finley are unable to communicate and to make joint decisions. In the first of three reports she filed with the court, she expressed that with time to heal, the parents could determine whether co-parenting is possible. But since that time, Recny's family made unsubstantiated allegations of sexual abuse that has further harmed the relationship. Although she commented that Makaela seems "over-sexualized," an investigation by Children's Services and the Fremont police uncovered no wrongdoing. Moreland believes that Recny's mother put these ideas in the girls' heads. She also believes that

Finley needs to cope with his anger toward Recny's family stemming from the sexual abuse allegations.

{¶ 19} Moreland said that the children were flourishing at Head Start, but Recny dis-enrolled them from that program. She agreed that Recny has made strides in rehabilitating herself, but believes Recny has lied to her on several occasions about things such as her relationship with Lockett and where she was residing. She asked that Recny submit to a hair follicle test because of concerns that Recny was abusing drugs again. As far as Finley's conduct, she acknowledged that Finley spends an inordinate amount of time reporting what he perceives to be mistakes by Recny, such as how the children were dressed, how they wore their hair, and other insignificant issues. She conveyed that Finley and Recny should be focusing their attention on their more significant problems.

{¶ 20} Moreland acknowledged that the girls love both parents and that both of their homes are safe. But she believes that Recny needs to supervise her parents' interaction with the children. She is encouraged that Recny has found an apartment independent of her parents. She recommended, however, that the shared parenting plan be terminated because Recny's absences during incarceration harmed the children, the children need consistency, and Recny has demonstrated instability over the last year. She believes that Finley has provided the children with stability and structure.

{¶ 21} Ultimately, the trial court granted Finley's motion, terminated the shared parenting plan, and appointed Finley to be the girls' residential parent and legal custodian. It held that there had been a change in circumstances since the shared

parenting plan was entered into and that the girls' best interests will be served through an award of sole custody to Finley. The court was persuaded by the testimony of Ellis, Foos, and Moreland, "coupled with the drug abuse, jail sentences and boyfriend * * * and flophouse testimony." It also acknowledged that it had conducted in-camera interviews of Moreland and the children. The court indicated that although family members spoke of wanting to cooperate, their conduct "betrayed the notion of cooperation." The trial court was also bothered by the unsubstantiated allegations of sexual abuse made by the Recny family against Finley and Finley's grandfather. It designated Finley the sole residential and custodial parent with visitation granted to Recny under the court's standard order for visitation, and addressed child support obligations, tax exemptions, and insurance obligations.

{¶ 22} Recny appeals from the trial court's judgment. Finley did not file a brief in support of his position.

II. Law and Analysis

A. Recny's First, Second, and Fifth Assignments of Error

{¶ 23} Recny's first, second, and fifth assignments of error are somewhat intertwined, so we will address them together. In those assignments of error, she claims that the trial court's decision should be reversed because it failed to find that terminating the shared parenting plan was in the best interest of the children, that no evidence showed that shared parenting was not in the best interest of the children, and that the trial court failed to issue findings of fact and conclusions of law despite her timely request.

{¶ 24} Because this action was before the trial court upon a motion to terminate a shared parenting plan, the trial court was required to apply R.C. 3109.04(E)(2)(c) in making its determination. Under that provision, "[t]he court may terminate a prior final shared parenting decree that includes a shared parenting plan * * * if it determines * * * that shared parenting is not in the best interest of the children."

{¶ 25} R.C. 3109.04(F)(1) sets forth a non-exclusive list of factors that the court must consider in determining the best interest of the children and (F)(2) sets forth additional factors to consider in determining whether shared parenting is in the best interest of the children. Those factors include:

- The parents' wishes;
- The children's wishes as expressed to the court;
- The children's interaction and interrelationship with their parents, siblings, and others;
- The children's adjustment to their home, school, and community;
- The mental and physical health of all persons involved in the situation;
- The parent more likely to honor and facilitate court-approved parenting time rights;
- Whether either parent has failed to make all child support payments;

- Whether either parent or a member of the household has been convicted of or pleaded guilty to any criminal offense involving the abuse or neglect of a child;
- Whether either parent has interfered with the other parent's court-ordered parenting time;
- Whether either parent has established a residence, or is planning to establish a residence, outside this state.
- The parents' ability to cooperate with one another and to make joint decisions with respect to the children;
- The parents' ability to encourage the sharing of love, affection, and contact between the children and the other parent;
- Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;
- The geographic proximity of the parents to each other as it relates to the practical considerations of shared parenting; and
- The recommendation of the children's GAL.

{¶ 26} The trial court applied R.C. 3109.04(E)(1)(a) and determined in its November 6, 2012 decision that there had been a change in circumstances and that an award of sole custody to Finley was in the best interest of the children. The court's

November 26, 2012 judgment entry makes no mention that the court had found that termination of the shared parenting plan was in the best interest of the children.

{¶ 27} Within seven days of the trial court's November 6, 2012 decision, Recny moved the court for findings of fact and conclusions of law. Under Civ.R. 52, upon the timely request of a party, "the court shall state in writing the conclusions of fact found separately from the conclusions of law." But Civ.R. 52 also provides that "[a]n opinion or memorandum of decision filed in the action prior to judgment entry and containing findings of fact and conclusions of law stated separately shall be sufficient to satisfy the requirements of this rule * * *." In addressing Recny's motion, the trial court, in a December 26, 2012 ruling, concluded that its November 6, 2012 decision sufficed to satisfy Civ.R. 52. We disagree.

{¶ 28} The court in its November 6, 2012 decision recited the statute under which it analyzed Finley's motion. It then provided the facts upon which it based its conclusion: (1) the GAL's recommendation that the shared parenting plan be terminated; (2) the testimony of the family counselor and the kindergarten teacher who both testified as to the girls' behavioral issues; (3) Recny's drug abuse, incarceration, relationship with Lockett, and tendency to allow others to reside with her; (4) its observation that although the family agreed that cooperation was necessary and possible, cooperation had not, in fact, occurred; (5) its concern that Recny's family had made false allegations of sexual abuse by Finley's grandfather and exposure of the children to pornography by Finley;

(6) its impressions from the in-camera interview of the children; and (7) its overall conclusion that the children would be safer in their father's care.

{¶ 29} What's missing in the trial court's decision is any indication that it considered the factors enumerated in R.C. 3109.04(F). Although the record is very developed—14 witnesses testified and a number of exhibits were admitted into evidence—this does not relieve the trial court of its obligation to demonstrate, in writing, that it considered each of the factors set forth in R.C. 3109.04(F).

{¶ 30} The Seventh District recently considered a similar issue in *Mogg v. McCloskey*, 7th Dist. Mahoning No. 12 MA 24, 2013-Ohio-4358. The case was before the court on a motion to terminate a shared parenting plan. The motion was heard by a magistrate who issued 87 findings of fact directly addressing each of the statutory factors enumerated in R.C. 3109.04(F). *Id.* at ¶ 22. The trial court restated and adopted the rulings in the magistrate's decision, but it did not make its own factual findings, did not make any findings concerning the best interest of the child, and did not specifically adopt or incorporate the magistrate's findings of fact in its judgment entry. *Id.* at ¶ 17. The court, therefore reversed the trial court's decision in its entirety and remanded the matter so that the trial court could apply R.C. 3109.04(E)(2)(c) and make the required R.C. 3109.04(F) determinations.

{¶ 31} We agree with the Seventh District's holding in *Mogg* and we hold that the court's November 6, 2012 decision did not adequately set forth findings of fact and conclusions of law to support a finding that shared parenting is not in the best interest of

the children. We, therefore, find Recny's first, second, and fifth assignments of error well-taken. We remand this matter to the trial court so that it can issue findings of fact and conclusions of law addressing, under R.C. 3109.04(E)(2)(c), whether termination of the shared parenting plan is in the best interest of the children applying the factors enumerated in R.C. 3109.04(F).

B. Recny's Third Assignment of Error

{¶ 32} In her third assignment of error, Recny complains that the trial court's decision should be reversed because the GAL's report was not admitted into evidence and is unavailable for appellate review. It is clear from the hearing transcript that Recny objected at the time of trial to Finley's failure to admit the GAL report into evidence. The trial court's reasoning for declining to do so was that the report was part of the court record and that it could take judicial notice of the report.

{¶ 33} Although the file contains notices indicating that the GAL filed her report and two supplements to that report, the reports themselves are not contained in the record before us. Having said this, we do not find error in the failure to admit the reports into evidence for the following reasons.

{¶ 34} First, it is clear that the reports were made available to Recny and that she had an opportunity to review the GAL's report and recommendation in advance of the hearing.

{¶ 35} Second, although the trial court's November 26, 2012 judgment entry states that the court reviewed the report and recommendation of the GAL, the November 6,

2012 decision indicates that it was the *testimony* of the GAL that the trial court found most persuasive. The GAL was examined and cross-examined by both parties concerning her recommendation and the reasons for her recommendation. Having testified, her recommendations were properly considered by the court.

{¶ 36} Finally, as argued by Recny, Sup.R. 48(F)(2) does provide that "[t]he court shall consider the recommendation of the guardian ad litem in determining the best interest of the child only when the report or a portion of the report has been admitted as an exhibit." We agree that this is the best practice for trial courts to follow. However, as we have held before, the "Rules of Superintendence are only general guidelines for the court to follow at its discretion and do not give rise to substantive rights." *In re K.V.*, 6th Dist. Lucas No. L-11-1087, 2012-Ohio-190, ¶ 27.

{¶ 37} In *In re K.V.*, the appellant assigned as error the guardian ad litem's failure to issue a written report, in violation of Sup.R. 48(F)(1)(c). We found the assignment of error not well-taken, in large part, because the GAL participated in all stages of the proceedings, including calling and examining witnesses. *Id.* at ¶ 25. We also noted that the recommendation of the GAL was clear to the parties and that appellant was not prejudiced by the GAL's failure to file a written report. *Id.* at ¶ 28. Here, too, we find no prejudice to Recny. The GAL was present at the hearing, she was examined by both parties, and she herself examined witnesses. She expressed her recommendations through her testimony and the contents of her reports were well-known to both parties.

{¶ 38} We, therefore, find Recny's third assignment of error not well-taken.

C. Recny's Fourth Assignment of Error.

{¶ 39} In her fourth assignment of error, Recny complains that the trial court violated her due process rights by issuing the March 18, 2011 ex-parte order granting temporary custody to Finley, and the May 19, 2011 order restricting Recny's visitation with her children to weekly one-hour videotaped sessions held at the Village House. She argues not only that her due process rights were violated, but also that she was severely prejudiced because of the effects that this order produced. More specifically, she argues that to the extent that the court found that there was a change in circumstances warranting termination of the shared parenting plan, that change was caused, in large part, by the restrictions that were placed on her parenting time.

{¶ 40} The interim ex-parte order having been terminated, Recny's assignment of error concerning the issuance of that order is moot and we will not consider it. *Nolan v. Nolan*, 4th Dist. Scioto No. 11CA3444, 2012-Ohio-3736, ¶ 1. We recognize, however, that the GAL, in her testimony, testified about how the children were impacted by Recny being absent for multiple days in a row. The GAL was referring to the time that Recny was away from the children during her period of incarceration, but Recny urges that the 14 months that her visitation with the children was severely restricted also negatively impacted the children. We understand Recny's position and we recognize that much of the GAL's observation of Recny's interaction with her children was in an unnatural environment and for small amounts of time. However, our place is not to second-guess the trial court's factual conclusions. Having said this, to the extent that these factors

played a role in the court's conclusion that there had been a "change in circumstances," the provision of the statute that we have ordered the trial court to apply on remand—R.C. 3901.04(E)(2)(c)—does not include change in circumstances as a basis for terminating the shared parenting plan.

{¶ 41} Recny's fourth assignment of error is not well-taken.

III. Conclusion

{¶ 42} We find Recny's first, second, and fifth assignments of error well-taken and remand this matter to the trial court with instructions that it apply R.C. 3901.04(E)(2)(c), addressing the factors enumerated in R.C. 3901.04(F) as to whether shared parenting is in the best interest of the children, and to issue separate findings of fact and conclusions of law under Civ.R. 52. We find Recny's third and fourth assignments of error not well-taken. Judgment of the Sandusky County Court of Common Pleas is reversed, in part, and affirmed, in part. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed, in part,
and affirmed, in part.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE