

[Cite as *Kong v. Kong*, 2010-Ohio-3180.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93120**

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**QINGWEI KONG**

PLAINTIFF-APPELLANT

vs.

**KARLA ANN KONG**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Domestic Relations Division  
Case No. D-302148

**BEFORE:** Stewart, J., Gallagher, A.J., and Boyle, J.

**RELEASED:** July 8, 2010

**JOURNALIZED:  
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} In this divorce action, appellant-father, Qingwei Kong, appeals from a domestic relations division order that denied his request for a shared parenting plan and made a downward deviation from the six-week summer visitation schedule set forth in the court's visitation guidelines. His four assignments of error collectively complain that the court had no evidence to support its decision to deny his request for shared parenting and extended summer visitation.

{¶ 2} At the time of their divorce, father and appellee-mother, Karla Ann Kong, were parents to an eight-year-old child. The parents stipulated to the division of marital assets, leaving issues relating to shared parenting for resolution by the court: father sought shared parenting; mother opposed it. A magistrate conducted a trial on those issues and made findings of fact that reflected poorly on the father's character and fitness as a parent. For example, the magistrate found that the father engaged in conduct constituting stalking. The father also refused to acknowledge the child's attention deficit disorder and dispense her medication. Other findings detailed the father's history of depression and false accusations that the mother had sexually abused the child. The magistrate concluded that it would be in the child's best interest for the mother to be declared the

residential parent. The magistrate granted the father weekend visitation during the school year (Friday afternoon through Sunday evening) and six weeks of vacation “pursuant to the Court’s standard guidelines,” provided that he express his willingness, by way of an entry filed with the court, to administer the child’s medication during his visitation with the child.

{¶ 3} Both parties objected to the magistrate’s decision. As relevant to the issues raised in this appeal, the father claimed that the magistrate erred by denying his request for shared parenting; erred by concluding that the child suffered from attention deficit disorder; and erred by admitting the wife’s exhibits even though they had not been offered into evidence. The mother objected on grounds that the evidence did not support a finding that the father should have visitation every weekend during the school year and custody for six weeks during the summer.

{¶ 4} In a judgment entry of divorce, the court adopted the magistrate’s recommendation that parental rights and responsibilities be allocated to the mother and named her the residential parent. The court modified the magistrate’s findings on visitation: it granted the father weekend visitation from Friday evening to Sunday evening on the first and third weekends and Friday evenings on the second and fourth weekends.<sup>1</sup> It also shortened the summer vacation period to three weeks.

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<sup>1</sup>The court’s visitation order also states “c. There shall be no parenting time on

{¶ 5} The father's first and third assignments of error are interrelated. He complains that the court abused its discretion by refusing to implement a shared parenting plan. As part of this argument, he maintains that there was no evidence to establish that the child suffered from attention deficit disorder.

{¶ 6} The allocation of parental rights and responsibilities are set forth in R.C. 3109.04, and the statute expresses a strong presumption that shared parenting is in the best interest of the child. *Dietrich v. Dietrich*, 8th Dist. No. 90565, 2008-Ohio-5740. The presumption in favor of shared parenting can be overcome, however, by evidence showing that shared parenting would not be in the child's best interest. See R.C. 3109.04(D)(1)(a). A "best interests" determination is at all times reposed in the court's discretion, and a decision that shared parenting is not in a child's best interest is reviewable only for an abuse of that discretion. *Braatz v. Braatz* (1999), 85 Ohio St.3d 40, 45, 706 N.E.2d 1218. We conclude that the court did not act in an unreasonable, arbitrary, or unconscionable manner by finding the presumption in favor of shared parenting was rebutted by evidence that called into question the father's emotional stability.

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the fourth weekend." This language conflicts with Section 1(b) of the weekend visitation order, but neither party appears to contest that the father is entitled to visitation every weekend, so we disregard the inconsistency.

{¶ 7} R.C. 3109.04(F)(1) sets forth a number of nonexclusive factors to guide the court's discretion when deciding whether a child's best interests favor the adoption of a shared parenting plan. Among these factors are the child's interaction and interrelationship with the child's parents and the "mental and physical health of all persons involved in the situation[.]" See R.C. 3109.04(F)(1)(c) and (e).

{¶ 8} In his findings of fact, the magistrate characterized the relationship between the parties as "tumultuous." The magistrate found that the father wrote "vile" messages on the walls of the residence ("trash, sluts, out of my sight" and "proud of being the mother of sluts" — apparently in reference to the mother's children from another relationship) and threw food at the wall of the family house. The magistrate found evidence that the father had been "stalking" the mother — he rigged a closed circuit video camera so that he could watch the mother on a television and sealed off the front door of the house by nailing boards across the door, supposedly to prevent intruders.

{¶ 9} These findings suggested that the father might have mental health issues. The father blamed his behavior on a bad temper, but said that he had recently learned to control his temper. He claimed that he did not suffer from any psychosis, but conceded that he had been diagnosed with

depression brought on by the divorce proceedings. Despite this diagnosis, he refused to take medication prescribed by his own physician.

{¶ 10} In a related matter, the court found that the father refused to give the child prescribed medicine for her diagnosed attention deficit disorder.

The father disputes whether the child actually suffered from attention deficit disorder, but he conceded that he had been aware that the child had seen a doctor for that diagnosis and that she had been prescribed medication for her condition. He unilaterally refused to give the child her medication, and likewise refused to speak with the doctor who prescribed it. Failing to offer any other medical opinion to rebut the diagnosis of attention deficit disorder, he claimed that he knew his daughter better than the child's doctor.

{¶ 11} The court did not abuse its discretion by adopting the magistrate's conclusion that shared parenting would not be in the best interest of the child because trial evidence raised valid concerns about the father's emotional stability. We recognize that much of the mother's evidence concerning the father's suitability for shared parenting related to events that occurred prior to the parties divorcing — some four years prior to the actual trial — and that the father's conduct at the time the parties separated, occurring as it did in the midst of an acrimonious separation, may not be indicative of his current, post-separation emotional state. But there was current evidence to support the magistrate's conclusions about the

father's emotional well-being and this evidence, moreover, suggested that the father had not received adequate treatment for emotional issues occurring at the time of separation. This could have caused the magistrate to conclude that the emotional causes of past issues continued without abatement and were thus relevant to the best interest determination.

{¶ 12} The court's Family and Conciliation Services issued a March 2006 report that raised a number of questions concerning the father's emotional well-being, indicating a "suggestion of depression." Testing showed that the father scored like people who are "self-centered and selfish" and who maintain "a bitter, cynical outlook and often have a brooding, negative manner that can make those around them feel miserable as well." The report concluded that "[c]areful clinical evaluation will be necessary to rule out deviant thoughts, feelings and experiences as well as to assess general coping and parenting skills."

{¶ 13} As a result of this report, the father said he engaged in counseling and received a diagnosis of "clinical depression as a result of the divorce situation." He saw three different mental health professionals, but only a handful of times each. A psychiatrist prescribed medication for the depression, and the father took it for three months before being told he was "cured" of his depression and ceasing all treatment.



{¶ 14} At best, the magistrate could have viewed the father's testimony as being indicative of the father's indifference to his mental health. At worst, the magistrate could have found the father's answers to questions about his mental health evasive or unbelievable. At no point did the father offer evidence to rebut the findings shown in the report issued by the Family Conciliation Service. The evidence the father did offer was conclusory and incomplete. He offered no testimony from any treating physician. Despite claiming to be "cured," he failed to recall even the most general details about his treatment, being unable to name two of the three doctors who treated him and the name of his prescribed medication. When confronted with questions that would challenge some past action or decision he made, he frequently claimed to be unable to remember details.

{¶ 15} The father's apparent denial of his own medical issues carried over to the child, with the father refusing to give the child her medication. In fact, the father showed a calloused indifference to the child's needs, claiming that he knew his daughter better than her doctor, that he made a sound decision not to give the child her medication, and that he "can not help" it if the mother was unhappy with that decision.<sup>2</sup>

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<sup>2</sup>We recognize that parents may philosophically disagree about whether their child should be medicated on a regular basis. However, we certainly cannot find that it was unreasonable for the magistrate to give more weight to a physician's determination that prescribed medication was necessary.

{¶ 16} A failure to appreciate the gravity of medical conditions bode poorly for the father's prospects in a shared parenting arrangement. The magistrate was justifiably concerned that a shared parenting arrangement would result in the child receiving only half of her prescribed dose of medicine — a result that would not be in the best interest of the child.

{¶ 17} We are sensitive to the father's desire to expose the child to her Chinese cultural heritage, but find insufficient evidence in the record of that desire to make it a compelling factor to justify reversing the court's decision. The father did not testify that the child currently participated in any cultural or heritage-based activities that would be curtailed as a result of an order denying shared parenting. And while the court's decision to make the mother the residential parent may have limited the father's time with the child, it did not deny him all access to the child, so he is not foreclosed from exposing the child to her cultural heritage.

## II

{¶ 18} The father next complains that the court erred by making a downward deviation from its own visitation guidelines by modifying the magistrate's initial decision to grant only three weeks of summer vacation. He claims the court made no findings to justify the downward departure.

{¶ 19} R.C. 3109.051(F)(2) states that each court of common pleas "shall adopt standard parenting time guidelines." Rule 18 of the Cuyahoga County

Court of Common Pleas, Domestic Relations Division, sets forth parenting time guidelines. Section (C)(5) of the rule addresses vacations and states: “Six (6) weeks of parenting time each year are to be arranged by the non-residential parent with not less than sixty (60) days advance notice.” These guidelines are not binding, however. R.C. 3109.051(F)(2) states: “A court shall have discretion to deviate from its standard parenting time guidelines based upon factors set forth in division (D) of this section.”

{¶ 20} The court’s deviation from the standard visitation guidelines did not expressly mention any of the factors contained in R.C. 3109.051(D), but that omission is not fatal. Among the factors that can justify the court’s deviation from the visitation guidelines is “[t]he mental and physical health of all parties[.]” See R.C. 3109.051(D)(9). This is the same factor set forth in R.C. 3109.04(F)(1)(e) and relied upon by the court to deny the father’s shared parenting plan. As detailed in our earlier discussion relating to the shared parenting plan, evidence established cause to question the father’s mental health in a manner sufficient to deny a shared parenting plan. That same evidence was sufficient to justify a deviation from the visitation guidelines. So we conclude that the court’s failure to mention the factors expressly is harmless.

{¶ 21} Finally, the father complains that the court erred by adopting portions of the magistrate's decision that relied on exhibits that were not formally admitted into evidence.

{¶ 22} While it is true that the magistrate did not formally admit the mother's exhibits into evidence, the magistrate heard enough testimony about the content of those exhibits that he could make factual conclusions. In that part of his decision describing the parties' relationship as "tumultuous," the magistrate noted that the mother's exhibits "consisted largely of photos and emails[.]" The photographs showed the "vile messages" the father wrote on the walls and the email messages contained similarly-worded content. The father conceded that he wrote the words depicted in the photograph and he conceded that he threw a bowl of food against the wall. He also acknowledged that he boarded the door.

{¶ 23} The only point of disagreement was over a number of email messages that contained language similar to that written on the walls of the house. The father conceded that the emails listed his email address, but stated that he could not remember sending any of them. But even if those emails were disregarded, the magistrate heard enough testimony from the father to substantiate the factual conclusions about the tumultuous relationship between the parties. Reliance, if any, on the emails was harmless beyond any doubt.

**Judgment affirmed.**

It is ordered that appellee recover of appellant her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas — Domestic Relations Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

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SEAN C. GALLAGHER, A.J., and  
MARY J. BOYLE, J., CONCUR