

[Cite as *In re J.C.P.*, 2016-Ohio-116.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103133

**IN RE: J.C.P.
A Minor Child**

[Appeal by C.N.P., Father]

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. CU-12-119409

BEFORE: Laster Mays, J., Jones, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: January 14, 2016

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ANITA LASTER MAYS, J.:

{¶1} Appellant C.N.P. (“Father”) appeals the decision of the Cuyahoga County Court of Common Pleas, Juvenile Division, allocating parental responsibilities on the grounds that the trial court erred in limiting the submission of certain photographs and the findings were against the manifest weight of the evidence. After a thorough review of the record, the juvenile court’s order is affirmed.

I. Procedural and Factual History

{¶2} In January 2013, the Father of minor male child J.C.P. born in March 2012 (“Child”), filed for determination of paternity, temporary visitation, and custody. On May 1, 2013, Father and K.H. (“Mother”) stipulated to a parenting plan and to the court’s jurisdiction because the Father resided in Cuyahoga County and the Mother in Crawford County. A visitation schedule was also arranged.

{¶3} Trial began April 17, 2014. The second day of trial was held on June 19, 2014, and the final day on June 30, 2014. The magistrate advised the parties prior to the start of trial to be “brief and concise” in their questioning, and to limit the questions to what is needed to determine the best interests of the Child pursuant to R.C. 3109.04. “A lot of people just become very verbose and ask a lot of questions that really don’t have anything to do with what I need to know, and I just really don’t feel like being here all day listening to a lot [sic] small nitpicky things.” Tr. 9.

{¶4} The parties sought a ruling on parenting allocation. The schedule for summers, weekends, and holidays had already been agreed to. The remaining issue was the designation of the residential parent for school purposes, which also involved a determination of who the Child would be with on weekdays between September and June.

{¶5} The Father and his witnesses testified that the Child had a close relationship with the Father and family members, including the Father's fiancée with whom he has an infant daughter, and that the Child seems happy and well-adjusted. There were allegations by family members that the Child was not being properly cared for by the Mother. According to the testimony, a number of times after being with Mother the Child had arrived for visits with diaper rashes of varying severities, not feeling well, unclean, and with scratches or cuts. A number of the Father's witnesses remarked that his fingernails were always long and filthy.

{¶6} The fiancée said that, when she went with the Father to transition the Child, there were individuals present who behaved in intimidating ways such as circling the Father's car and yelling inappropriate comments. The fiancée said that she took a picture and video out of concern that the events would not be believed.

{¶7} The fiancée, who is also a nurse, stated that, in addition to being dirty, the Child's toe nails were curled because his shoes were too small and that he "always has bumps and bruises and cuts and scrapes to all different extremities." The explanations received from the Mother were not consistent. The Child developed a fungal infection in

his hair and the Mother refused to get the prescription filled. The fiancée also said they had about 200 pictures of the Child's condition that were taken at various times.

{¶8} Several family members said the Child did not seem happy when it was time for him to return to the Mother. Testimony elicited by Mother's counsel established that the perceived lack of enthusiasm could have been due to fatigue since the return was usually at night and the drive took about 60 to 90 minutes. There was also testimony that the Child may have been dirty because he had been playing during the day before being given to the Father. None of the family members called an agency, the police, or other authorities to report suspected neglect.

{¶9} It was in relation to the allegations of neglect and intimidation by the Mother's friends that the Father sought to introduce into evidence approximately 60 photographs taken by the Father's mother. The Father argued the photos were relevant to the best interests of the Child. Twenty of the 60 photographs were admitted, the limitation of which is the subject of the first assigned error in this case.

{¶10} The Father testified that, during one visit, the Child was very ill and had a fever. He contacted the Mother who said that the Child had been lethargic all week and she planned to take him to the doctor by the end of the week if he wasn't feeling better. Tr. 246. The diagnosis was a double ear infection. The Father took the Child to the doctor on another occasion due to a bruise on the side of his face as well as a severe diaper rash. The Mother told him the Child sat back on his chair too hard. The Mother came to the hospital a couple of times when the Father notified her the Child was

receiving medical attention. On the other occasions, she contacted the doctors' offices to direct them to not allow the Father to obtain treatment.

{¶11} In April 2014, shortly before the trial, the Father took the Child to the Fairview Hospital emergency room due to a burn on the Child's ear. The Child was additionally diagnosed with infantigo (also known as impetigo) or ringworm, caused by poor hygiene. The Father testified he complained to the Mother a number of times about the Child's poor hygiene, severe diaper rash, dirty nails, and neck.

{¶12} The Father signed all paperwork requested by the Mother and her attorney for child support. He only recently learned that the child support agency does not make payroll deductions for temporary orders. The Father also informed the court that the Mother has sometimes failed to live up to the visiting arrangements.

{¶13} The Father agreed with parenting every other week until school started, but desired to be the custodial parent after that time with standard visitation for the Mother. His desire is that the Child have a normal, happy life and be properly cared for.

{¶14} The Mother and her witnesses testified that the Child has a close relationship with the Mother and extended family who also reside in the city, and that he has many family members to care for him and to play with. The Mother's sister and mother are preschool teachers so Mother would like for the Child to attend the preschool where they are employed.

{¶15} The Mother believed the Father would honor visitation but that he would not work to foster a good relationship between Mother and Child. She also said that he had failed to pay child support.

{¶16} On the question of the Child's physical condition, the Mother testified she grew up in a rural area and was very active in playing outside and sports activities. The Child is active also and she does not want to be over protective. He began walking at about ten months of age and would walk, run, and fall. He also played outside, got dirty, and received a nightly bath.

{¶17} The Child caught colds but rarely had fevers. He suffered from diaper rashes when taking antibiotics and had reactions to wearing Pampers, though her family usually used an ointment that worked well. The Mother emailed the Father to advise him of rashes or illnesses. On occasion, the Child returned from the Father's home with scrapes and bruises, but the Mother did not consider it evidence of neglect.

{¶18} The Mother said the Child fell against the leg of a table playing with a basketball, causing the bruise on the side of his face. After refreshing her recollection with deposition testimony, she said he was throwing a temper tantrum as a result of tripping and falling and that was when he suffered the bruise.

{¶19} The Mother said she sent an email to the Father in response to his inquiry about the burn, explaining that she thought that it was a scrape and had put something on it. She noticed later that day that the humidifier was beside the Child's toddler bed because the Child had a cold, so perhaps that was the source of the burn. The Mother

took the Child to the doctor due to the cold and the doctor did not see a problem with the burn.

{¶20} The day of the visit to Fairview Hospital, the Mother received a text from the Father that the Child was being taken to the emergency room but he did not tell her which one. She and her parents called various hospitals and finally located him. She went to the hospital where the nurse told her that child services had been called. When she entered the hospital room and asked the Father why he brought the Child to the emergency room, he told her that she would hear about it in court.

{¶21} The Child was released into her care and, to her recollection, the discharge summary said it was not possible to identify the source of the Child's rash. Child services talked only with the Mother's attorney. The sheriff visited the Mother, and it was her understanding there were no grounds and the case was dropped.

{¶22} The Mother also addressed the medical visit due to a high fever. She said the Child did not have a fever when she dropped him off and apparently it began about four hours later. She and her parents drove to hospitals in the area where the Father resided because the Father would not respond to her texts asking where they were.

{¶23} The Mother testified that she also felt intimidated by the behavior of the Father's mother during transitions. The Mother suggested that only she and the Father should be present during exchanges.

{¶24} The court diagnostic psychologist testified that both of the parents are invested in the Child and shared parenting allowed them to have equal rights. He

qualified that statement by saying that his recommendation was contingent on their ability to work the agreement to the Child's best interest by managing communication and tensions. The psychologist suggested that it would be appropriate to determine which parent would be appointed the residential parent when the Child reached school age.

{¶25} The GAL testified that both of the parents were good parents and that she would recommend shared parenting if the parties could get along. The GAL investigated the allegations of neglect including reviewing the Father's photographs, the Child's medical records and speaking with the Child's primary care physician. She concluded that the evidence did not support neglect.

{¶26} After witness testimony was completed and having reserved her final recommendation until the conclusion of the evidence, the GAL reiterated her desire for shared parenting but determined that the lack of communication between the parents prevented that arrangement. She recommended the Mother be appointed the residential parent for school purposes and the Father "have as close to 50/50 parenting time as absolutely possible." The GAL also considered the testimony by a psychologist recommending 50/50 parenting time, but she opined that the Mother was less extreme in her viewpoints and more cooperative than the Father.

{¶27} The magistrate determined in an October 21, 2014 decision that the Mother and Father would each be considered the residential parents and legal custodians of J.C.P. while the Child was in their respective possession. The Mother was designated

as the residential parent for school purposes and the Father's parenting time was pursuant to the schedule attached to the decision.

{¶28} The Father filed objections November 14, 2014, pending responses to his requests for: (1) findings of fact and conclusion of law, and (2) a copy of the transcript.

Findings of fact and conclusions of law were issued and the Father objected in March 2015. The Father requested that the court set aside the magistrate's findings and postpone determination of the residential parent while allowing the Child to transfer weekly to each parent, or hear the case de novo.

{¶29} The Father further argued that the decision was against the manifest weight of the evidence and that designating the Mother as the residential parent was against the recommendation of the psychologist. The court overruled the objections and adopted the magistrate's decision. This appeal ensued.

II. Assignments of Error

{¶30} Father poses two assignments of error: (1) the trial court erred in arbitrarily limiting his photographic exhibits to only 20 of the 60 proffered, and (2) the trial court's judgment is against the manifest weight of the evidence.

A. Photographic Evidence

{¶31} We begin with the Father's first assignment of error challenging the trial court's authority to limit the photographic evidence.

1. Standard of Review

{¶32} It is well established that “[t]he decision to admit or to exclude evidence is left to the sound discretion of the juvenile court and will not be reversed absent an abuse of that discretion.” (Citations omitted.) *In re C.A.*, 8th Dist. Cuyahoga No. 102675, 2015-Ohio-4768, ¶ 59. An abuse of discretion standard “connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). *Id.*

2. Law and Analysis

{¶33} This court has observed that:

“[R]elevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid.R. 401. Evid.R. 402 provides that evidence that is not relevant is inadmissible. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Evid.R. 403(A).

State v. Richard, 8th Dist. Cuyahoga No. 78813, 2002-Ohio-9, ¶ 23.

{¶34} Father argues that the trial court erred by limiting the introduction of the 60 photos taken by his mother during scheduled visits to only 20 photos. Though the limitation instruction is not reflected in the transcript, it also is not refuted by the Mother.

The record does reflect opposing counsel’s objection to the introduction of the photos into evidence on the ground that they were not provided to the Mother prior to trial.

{¶35} The trial court ultimately determined that the photos could be introduced. Prior to a five minute recess granted by the court for the Mother’s counsel to review the

photos, Father's counsel asserted that, rather than "simply entering them into evidence," he would remove the duplicate photos but wanted to present each photo to the trial court with an explanation. The court's response was "just do what I just asked you to do." Tr. 132.

{¶36} The record was paused for the review. Upon return to the record, Father's counsel objected,

[M]eaning no impertinence, but for the record we would object that we've been unable to present all of the pictures that we believe tell an important story to this Court. We have identified the 20 that are the most significant. We are prepared to proceed. Tr. 133.

{¶37} Father concedes that the "exclusion of evidence is normally in the purview of the trial court," and cites *O'Brian v. Angley*, 63 Ohio St.2d 159, 407 N.E.2d 490 (1980), to support the premise. However, as argued by Mother on appeal, *O'Brian* also provides that the trial court's determination to exclude evidence must affect the substantial rights of the complaining party in order to require reversal. *Id.* at 164:

Generally, in order to find that substantial justice has been done to an appellant so as to prevent reversal of a judgment for errors occurring at the trial, the reviewing court must not only weigh the prejudicial effect of those errors but also determine that, if those errors had not occurred, the jury or other trier of the facts would probably have made the same decision.

O'Brian at 164-165, quoting *Hallworth v. Republic Steel Corp.*, 153 Ohio St.349, 91 N.E.2d 690 (1950), paragraph three of the syllabus. *See also Ryerson v. White*, 8th Dist. Cuyahoga No. 100547, 2014-Ohio-3233, ¶ 46.

{¶38} According to the record, there were no complaints made or contacts with authorities by the Father or his family members alleging concerns regarding neglect or

abuse of the Child by the Mother. The Mother explained that she resides in a rural area and the Child would get dirty or suffer scratches while playing. Hospital and medical records from the Child's primary care physician do not support evidence of neglect or abuse.

{¶39} The testimony of the GAL is highly enlightening here. The role of the GAL is to protect the best interests of the Child by investigating the Child's situation and making recommendations to the court. *In re M.S.*, 2015-Ohio-1847, 34 N.E.3d 420, ¶ 33 (8th Dist.).

{¶40} The GAL testified that she reviewed "a lot" of medical records in the case due to the allegations that the Mother failed to properly care for the Child. She reviewed all of the photos and interviewed the Child's primary care pediatrician. Her opinion was that she had "never seen anything that made me think I need to make a referral to 696-KIDS or I would have done it." Tr. 186.

{¶41} On cross-examination, the GAL testified that the parents have different parenting styles. The Father is very conscientious while the Mother is more laid back. The Mother grew up in a more "country-oriented" area, playing outside, getting bumps and bruises, getting dirt under her fingernails. The GAL has never had any concerns that the Child was being abused and neglected by either parent.

{¶42} The GAL also testified about an incident in April 2014, a week or so before the scheduled trial date, where the Father took the Child to the emergency room due to illness. She reviewed the Fairview Hospital discharge records, Crawford County

Sheriff's well-check report, and talked with the Child's pediatrician.¹ The discharge records prescribed ointment for a blister on his ear and a suggestion to try a particular shampoo for his scalp. There was no notation about ring worm or fungal infection in the report and she did not recall hearing anyone say the Child had a fungal infection on the audio tape recorded at the end of the hospital visit. The GAL did not agree that the Child had been abused or neglected.

{¶43} Not only does a trial court enjoy broad discretion in determining whether to admit evidence, it also has the right to control its docket:

Evid.R. 611(A) provides that the trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to * * * (2) avoid needless consumption of time * * *". Further, a trial court has the discretion to limit questioning of witnesses if the "probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Evid.R. 403(B). Time limitations on evidence have been upheld where a party has not identified what additional evidence the party would have offered or how that evidence could have changed the court's judgment. *Readnower v. Readnower*, 162 Ohio App.3d 347, 833 N.E.2d 752 (2d Dist. 2005) (citation omitted).

Mathewson v. Mathewson, 2d Dist. Greene No. 05-CA-035, 2007-Ohio-574, ¶ 27. *See also McCabe v. Ransom*, 6th Dist. Lucas No. L-05-1267, 2006-Ohio-2926, ¶ 37, citing *Bird v. Young*, 56 Ohio St. 210, 46 N.E. 819 (1897). ("[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the considerations of undue delay, or needless presentation of cumulative evidence.").

¹ The primary care physician's notes reflect an April 14, 2014 conversation with the GAL and stated the GAL was advised that "no neglect was suspected and the Child is well kept and dressed at all visits. No concern for patient's well-being based on care mother provides."

{¶44} Based on our review of the record, we do not find that the trial court abused its discretion in electing to limit the number of photographs admitted into evidence with explanation as to each photograph. Further, there is no showing that the Father's substantial rights were impeded by the trial court's decision so that any asserted error is harmless. *O'Brian* at 164-165.

B. Manifest Weight of the Evidence

{¶45} Father argues that the trial court ignored the manifest weight of the evidence that the Father should be assigned as the residential parent for school purposes. We disagree.

1. Standard of Review

{¶46} When reviewing the manifest weight of the evidence in a civil case, we weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the jury or factfinder clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20.

{¶47} We are guided by a presumption that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). This presumption arises because the trier of fact had an opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Id.* Judgments

supported by competent, credible evidence going to all the essential elements of the claim will not be reversed on appeal as being against the manifest weight of the evidence. *Schneider v. Razek*, 2015-Ohio-410, 28 N.E.3d 591, ¶ 43 (8th Dist.).

2. Law and Analysis

{¶48} Father asserts that the trial court failed to adequately consider the statutory factors in R.C. 3109.04(F)(1) and (2) governing the allocation of parental rights and responsibility in shared parenting:

(A) In any divorce, legal separation, or annulment proceeding and in any proceeding pertaining to the allocation of parental rights and responsibilities for the care of a child, upon hearing the testimony of either or both parents and considering any mediation report filed pursuant to section 3109.052 of the Revised Code and in accordance with sections 3127.01 to 3127.53 of the Revised Code, the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage. Subject to division (D)(2) of this section, the court may allocate the parental rights and responsibilities for the care of the children in either of the following ways:

(1) If neither parent files a pleading or motion in accordance with division (G) of this section, if at least one parent files a pleading or motion under that division but no parent who filed a pleading or motion under that division also files a plan for shared parenting, or if at least one parent files both a pleading or motion and a shared parenting plan under that division but no plan for shared parenting is in the best interest of the children, the court, in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children, including, but not limited to, the responsibility to provide support for the children and the right of the parent who is not the residential parent to have continuing contact with the children.

(2) If at least one parent files a pleading or motion in accordance with division (G) of this section and a plan for shared parenting pursuant to that

division and if a plan for shared parenting is in the best interest of the children and is approved by the court in accordance with division (D)(1) of this section, the court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children in accordance with the approved plan for shared parenting. If the court issues a shared parenting order under this division and it is necessary for the purpose of receiving public assistance, the court shall designate which one of the parents' residences is to serve as the child's home. The child support obligations of the parents under a shared parenting order issued under this division shall be determined in accordance with Chapters 3119., 3121., 3123., and 3125. of the Revised Code. *Id.*

R.C. 3109.04(F)(1) and (2).

{¶49} Specifically, the Father contends that the magistrate minimized the injuries to the minor Child and frequent denial of visitation privileges by the Mother. The Father also moved to Medina from Middleburg Heights to be closer to Bucyrus and his son. He also asserts that the Child's injuries were serious enough to involve the Crawford County Department of Family Services.

{¶50} It is evident that a contentious relationship exists between the parents. Each argues that the other has failed to fulfill his or her duties regarding support and care of the Child, has missed or cancelled visits, and has been uncooperative. They do agree that they both have a good relationship with the Child.

{¶51} The trial court's judgment entry, findings of fact and conclusions of law set forth in detail the R.C. 3109.04(F)(1) and (F)(2) grounds that it considered in reaching a determination. The entry also sets forth the court's findings on those issues. Factors considered include: (1) the loving relationship between the Child and the parents, (2)

interrelationships with family members, (3) distance between the residences, (4) parents' employment schedules, (4) age of the Child, (5) health and safety of child, (6) mental health of the parents, (7) criminal or abusive history or behavior, (8) continuous and willful denial of parenting times, (8) wishes and concerns of parents, (9) ability of parents to cooperate and make joint decisions and encourage sharing, love, and contact, and (10) recommendations of the GAL.

{¶52} The trial court also listed additional factors it considered relating to the best interests of the Child and found:

The Father has been an active participant in the child's life and has been having regular visitations with the child. The Father claims that the child has been dropped off on occasion with a high fever, dirty diaper, diaper rash and scratches and burns on his body. Additionally, the Father believes that he lives in a better school district that offers a better curriculum and sports activities. The child was seen by a physician or the physical conditions noted above, however, the medical evidence does not suggest or support any abuse on the part of the Mother. The Mother reported that she lives on a farm and the child often runs around outside and gets dirt and scratches on his body from the rural environment of their home. Both parents have indicated that there have been incidents which have occurred during the pick up of the child whereby neither parent feels safe having pick ups that are not supervised or conducted other than at a police station or monitored environment.

The Diagnostic Court Psychologist believed that Shared Parenting would be the ideal situation with one week on and one week off until the child reached school age.

{¶53} We find that the trial court's entry was comprehensive and in accord with statutory requirements. Further, the trial court was not required to detail every factor of a best interest analysis if the court's judgment is supported by some competent, credible evidence. *Blakeman v. Blakeman*, 4th Dist. Pike No. 07CA768, 2008-Ohio-2948, ¶ 18.

Because the court's decision with respect to the allocation of parental responsibilities is supported in the record, this court will not disturb it. *Id.*

{¶54} We determine that there is competent, credible evidence supporting the trial court's conclusion that it is in the Child's best interest to designate the Mother as the residential parent for school purposes and schedule visitation with the Father as stated in the entry. Finding that the trial court's decision was not against the manifest weight of the evidence, we overrule the second assigned error.

{¶55} Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court, juvenile 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.

ANITA LASTER MAYS, JUDGE

LARRY A. JONES, SR., A.J., and
SEAN C. GALLAGHER, J., CONCUR