[Cite as *Young v. Young*, 2010-Ohio-3658.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

BRIAN A. YOUNG Appellant v. RACHEL C. YOUNG Appellee	C. A. No. 09CA0067 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 07-DR-0297

DECISION AND JOURNAL ENTRY

Dated: August 9, 2010

CARR, Judge.

{¶1} Appellant, Brian Young, appeals the judgment of the Wayne County Court of Common Pleas, Domestic Relations Division. This Court reverses.

I.

{¶2} On June 27, 2007, Brian Young ("Father") filed a complaint for divorce (case no. 07-DR-0297) from Rachel Young ("Mother"). Father appended a shared parenting plan signed, but not dated, by Father, and signed by Mother in the presence of a notary on February 13, 2007. Father conceded in his complaint that the joint shared parenting plan was originally filed in connection with a dissolution case (case no. 07-DI-0151) on March 27, 2007. The shared parenting plan bears a time-stamp to that effect. Father admits that Mother dismissed the dissolution case prior to his filing a complaint for divorce. In his complaint, Father requested, alternatively, (1) that he be named the sole residential parent of the parties' three children and that he be awarded child support in the amount of $287.15 per month, or (2) that the parties'

shared parenting plan be adopted by the court, in which case Father would be designated the primary residential parent, Mother would have certain companionship rights, and Father would receive no child support from Mother.

{¶3} On July 10, 2007, the magistrate issued a journal entry granting Father's ex parte motion for temporary orders. Father was designated as the primary residential parent for the children pursuant to the terms enunciated in the shared parenting plan appended to Father's complaint.

{¶4} On July 19, 2007, Mother filed an answer and counterclaim for divorce. She asserted that she was no longer in agreement with the terms of the shared parenting plan signed in relation to the earlier dismissed dissolution case. She prayed for an order allocating parental rights and responsibilities, naming her legal custodian and residential parent of the minor children, and awarding her child support.

{¶5} Counsel for the parties approved an agreed journal entry issuing temporary orders, filed on August 6, 2007, in which Father was designated as the primary residential parent for the children, while Mother was granted companionship.

{¶6} After a status conference on January 17, 2008, the magistrate issued two temporary orders on February 22, 2008. In the first, the magistrate designated Father as the primary residential parent and granted Mother companionship with the children. In the second temporary order, the magistrate adopted the parties' separation agreement which was attached to Father's complaint with the exception of the provision regarding the allocation of parental rights and responsibilities. The magistrate stated: "The parties have represented that they do not agree to the Allocation of Parental Rights as set forth in the Shared Parenting Plan also filed with this Court on [June 27, 2007]." Neither party moved to set aside the magistrate's order.

Accordingly, the only pending requests regarding the allocation of parental rights and responsibilities as of February 22, 2008, were the parties' respective requests to be designated as the sole residential parent and legal custodian of the children.

{¶7} On March 6, 2008, Mother filed a motion to adopt her proposed shared parenting plan, which she appended to her motion. Her proposed plan designated her as the primary residential parent and granted Father companionship as the parties would agree. Father did not file a motion to adopt a shared parenting plan or submit a proposed shared parenting plan to the trial court. Immediately before the hearing on the parties' divorce, Father filed a trial memorandum in which he argued that the trial court must determine the allocation of parental rights and responsibilities pursuant to the best interest of the child standard and factors enumerated in R.C. 3109.04. Father asserted that he was willing to enter into a shared parenting plan, although he did not attach a proposed plan.

{¶8} The divorce hearing took place over the course of three days in May 2008. On June 5, 2008, Father filed a supplemental trial memorandum in which he asserted that he should be named the primary residential custodian of the children. He did not, however, request the adoption of a shared parenting plan. Finally, on June 10, 2008, Father filed a second supplemental trial memorandum including a "statement of current law." Father argued that the parties had entered into a shared parenting plan on March 27, 2007, and that the court had adopted it on July 10, 2007. He argued, therefore, that the trial court could only modify custody upon a finding that there had been a change of circumstances.

{¶9} On June 11, 2008, Mother filed a trial brief in which she acknowledged signing a joint shared parenting plan relevant to the prior dissolution case. She asserted that, upon realizing that the plan was neither working nor in the best interest of the children, she dismissed

the dissolution case. Mother argued for adoption of her proposed shared parenting plan in which she would be designated as the children's primary residential parent, that Father would have visitation pursuant to court local rule, and that Father would pay child support.

{¶10} On June 11, 2008, the magistrate issued a decision noting that Mother had filed a proposed shared parenting plan on March 6, 2008. The magistrate asserted that, in determining the allocation of parental rights and responsibilities, he would accord primary weight to (1) events and circumstances occurring since February 2007, when the parties executed a shared parenting plan, and (2) the recommendation of the children's guardian ad litem. The magistrate further asserted that, in making his determination, he referred to R.C. 3109.05 which addresses child support orders and the medical needs of the children. The magistrate did not reference R.C. 3109.04, the statutory provision regarding the allocation of parental rights and responsibilities, including shared parenting plans.

{¶11} The magistrate noted his concerns about designating either party as the residential parent, whether within the context of a shared parenting plan or not. The magistrate then delineated numerous shortcomings of both parents, while frequently dismissing them as merely "offsetting penalties." After concluding that "neither party would have a clear cut advantage over being designated the residential parent[,]" the magistrate deferred to the recommendation of the guardian ad litem and recommended the designation of Mother as the residential parent for the children. Although the magistrate expressed a "feel[ing]" that the parties' level of communication and maturity would not allow a shared parenting plan to work, he indicated that a shared parenting plan might yet be approved if the parties and guardian ad litem were all able to come to an agreement prior to the trial court's issuance of a final order. The magistrate cautioned Mother not to take his recommendation that she be designated as the residential parent

as a victory, advising: "This decision is made primarily on the recommendation of the guardian ad litem because the Magistrate finds the factors in the revised code result in no clear cut determination as residential parent."

{¶12} The magistrate's decision consists of 23 pages. Page 24 of the same document is captioned "Judgment Decree of Divorce" and is signed by the trial court judge. The decree references a magistrate's decision of an unspecified date. The decree of divorce orders that the separation agreement submitted by the parties on February 22, 2008, regarding economic issues and the division of assets and debt is adopted and made an order of the court. The decree further designated Mother as the residential parent of the children and awarded Father parenting time pursuant to Wayne County Loc.R. 14, attached to the decree. The separation agreement, however, which is also adopted and attached to the decree, states that the parties would share custody pursuant to a shared parenting plan, although no such plan is attached to the decree. The portion of the separation agreement addressing the allocation of parental rights and responsibilities has not been edited to effect the trial court's purported final order regarding that issue, although the magistrate's February 22, 2008 order adopted the same separation agreement with the exception of the provisions regarding the allocation of parental rights and responsibilities. The magistrate, too, failed to edit or delete that portion of the separation agreement, instead appending the agreement in toto.

{¶13} Father filed timely objections to the magistrate's decision. Notwithstanding his earlier argument in his trial memorandum that the court must determine whether a modification of an earlier adopted shared parenting plan was warranted, Father argued in his objections that the magistrate erred by treating the matter as a modification hearing in lieu of an initial determination as to the allocation of parental rights and responsibilities. Father further argued

that the magistrate failed to comply with the requirements of R.C. 3109.04(D)(1)(a) regarding shared parenting plans, that the magistrate erred by failing to enforce the parties' shared parenting plan, that the magistrate erred by misapplying the best interest factors enumerated in R.C. 3109.04(F)(1), and that the magistrate erred in ordering him to pay child support.

{¶14} Mother filed a memorandum in opposition to Father's objections. On November 21, 2008, the trial court issued an order finding that the objections should be overruled. Father appealed. This Court dismissed the appeal for lack of a final, appealable order because the trial court had failed to expressly rule on the objections. *Young v. Young*, 9th Dist. No. 08CA0058, 2009-Ohio-5050.

{¶15} On October 6, 2009, the trial court expressly overruled Father's objections. Father timely appealed, raising five assignments of error for review. This Court addresses the second assignment of error first as it is dispositive of the appeal.

II.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO PROPERLY APPLY R.C. 3109.04(D)(1)(a) AND IT IGNORED THE PARTIES' SIGNED SHARED PARENTING PLAN."

{¶16} Father argues that the trial court erred by failing to properly apply the law in regard to the allocation of parental rights and responsibilities. This Court agrees.

{¶17} When reviewing an appeal from the trial court's ruling on objections to a magistrate's decision, this Court must determine whether the trial court abused its discretion in reaching its decision. *Turner v. Turner*, 9th Dist. No. 07CA009187, 2008-Ohio-2601, at ¶10. "In so doing, we consider the trial court's action with reference to the nature of the underlying matter." *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. "Any

claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision." *Mealey v. Mealey* (May 8, 1996), 9th Dist. No. 95CA0093. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id. Where this Court is called upon to review a question of law, however, we apply the de novo standard of review. *Buttolph v. Buttolph*, 9th Dist. No. 09CA0003, 2009-Ohio-6909, at ¶7, citing *Porter v. Porter*, 9th Dist. No. 21040, 2002-Ohio-6038, at ¶5. Whether the trial court correctly applied the law to the facts presents a question of law. *Wertz v. Indiana Ins.*, 9th Dist. No. 21571, 2003-Ohio-5905, at ¶4.

{¶18} R.C. 3109.04(D)(1)(a) sets forth the procedure the trial court must utilize when at least one parent has requested the adoption of a shared parenting plan and has also filed a proposed plan. In this case, Mother filed a motion to adopt a shared parenting plan and she filed a proposed plan. The trial court, therefore, was compelled to consider the shared parenting plan.

{¶19} R.C. 3109.04(D)(1)(a)(iii) requires the trial court to "enter in the record of the case findings of fact and conclusions of law as to the reasons for the approval or the rejection or denial [of the proposed shared parenting plan]." In this case, the trial court made an allocation of parental rights and responsibilities which did not correspond with the proposed shared parenting plan. Nevertheless, the court made no findings of fact or conclusions of law regarding its rejection of the proposed plan. It made no findings of fact or conclusions of law regarding its decision to deny the motion for the adoption of a shared parenting plan.

{¶20} Moreover, R.C. 3109.04(A)(1) provides that, if the trial court finds that no proposed shared parenting plan is in the best interest of the children, the court 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[ren], and divide between the parents the other rights and responsibilities for the care of the children ***." In this case, the trial court designated Mother as the residential parent of the children but failed to further designate her as the legal custodian.

{¶21} Most troubling in this case is the internal inconsistency within the judgment decree of divorce. The decree adopts the parties' separation agreement which addresses the allocation of parental rights and responsibilities by asserting that it is in the best interest of the children that the parties enter into a shared parenting plan. The decree, however, does not approve the proposed shared parenting plan filed for its consideration. Rather, it names Mother as the residential parent, albeit without also designating her as the legal custodian of the children, as if having determined that the shared parenting plan is not in the best interest of the children. Such a determination, however, is inconsistent with its adoption and appendage of the parties' unedited separation agreement which states that a shared parenting plan is in fact in the best interest of the children. Although the trial court references the separation agreement approved by the magistrate on February 22, 2008, that appended agreement also retained the provision regarding the allocation of parental rights and responsibilities, specifically that it was in the best interest of the children that the parties enter into a shared parenting plan.

{¶22} Based on a thorough review of the record, this Court concludes that the trial court failed to properly apply the mandates of R.C. 3109.04 in determining the allocation of parental rights and responsibilities. Father's second assignment of error is sustained.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT DID NOT ENFORCE THE SHARED PARENTING PLAN."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT TREATED THE PROCEEDINGS AS A MOTION TO MODIFY PARENTAL RIGHTS AND RESPONSIBILITIES."

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT FAILED TO APPLY R.C. 3109.04(F)(1) IN DETERMINING THE CHILDREN'S BEST INTERESTS."

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT AWARDED CHILD SUPPORT BECAUSE APPELLANT, NOT APPELLEE, SHOULD HAVE BEEN DESIGNATED THE OBLIGEE PARENT."

{¶23} This Court's resolution of the second assignment of error is dispositive of this appeal. Accordingly, we decline to address the remaining four assignments of error. See App.R. 12(A)(1)(c).

III.

{¶24} Father's second assignment of error is sustained. This Court declines to address the remaining assignments of error. The judgment of the Wayne County Court of Common Pleas, Domestic Relations Division, is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

DICKINSON, P. J.
CONCURS, SAYING:

{¶25} I concur in the majority's judgment and all of its opinion except the first five sentences of Paragraph Seventeen. In Paragraph Seventeen, the majority uses 131 words, not including citations, talking about the abuse of discretion standard, which has no application to this case, before it finally gets to the standard of review properly applied to this matter: "Where this Court is called upon to review a question of law, however, we apply the de novo standard of review. . . . Whether the trial court correctly applied the law to the facts presents a question of

law. . . ." The trial court misapplied the law in this case and, accordingly, this Court, applying the de novo standard of review, reverses.

APPEARANCES:

JOHN E. SCHOONOVER, Attorney at Law, for Appellant.

PATRICIA A. RODGERS, Attorney at Law, for Appellant.

RACHEL C. O'NEAL, pro se, Appellee.