

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

TRAVIS RICE

Appellant

v.

ALYSHA SOBEL

Appellee

C.A. No. 27458

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2012-10-3186

DECISION AND JOURNAL ENTRY

Dated: June 10, 2015

WHITMORE, Judge.

{¶1} Appellant Travis Rice (“Father”) appeals from the order of the Summit County Court of Common Pleas, Domestic Relations Division, establishing custody, parenting time, and child support for his daughter. We affirm.

I

{¶2} Father and Alysha Sobel (“Mother”) are the parties in this case. They are parents to a daughter born January 22, 2012. Father and Mother were never married.

{¶3} Father and Mother lived together in Medina, Ohio until the child was six months old. In July 2012, Mother moved to Pennsylvania with daughter, where Mother and daughter continue to reside.

{¶4} Mother testified that she moved due to Father’s alcohol use and threat of domestic violence. She testified that, beginning when she was eight months pregnant, Father would drink excessively two or three times a week, and would “get angry and throw things.” In July 2012,

Father and Mother were at home with the child. Father had been drinking. He told Mother, “[Y]ou’re lucky I don’t slap the f*** out of you.” Father refused to leave the residence at Mother’s request. Mother then “picked up the baby, grabbed some things, and left [herself].” The next day she obtained a civil protection order and moved to her Mother’s house in North Wales, Pennsylvania.

{¶5} Subsequent to Mother’s departure, Father moved into the home of his paternal grandmother, Barbara Rice, in Norton, Ohio. Father continues to live at this residence. It is at least a six hour drive between the parents’ residences.

{¶6} Father filed a complaint to establish paternity and allocation of parental rights and responsibilities in the Medina County Court of Common Pleas, Domestic Relations Division. The matter was transferred to the Summit County Court of Common Pleas, Domestic Relations Division.

{¶7} A magistrate issued a provisional order establishing parenting time for Father in Ohio on one weekend a month when both parents were off work. The order stated, “Father is not to have the child in the presence of smoking.” Subsequently, the magistrate issued an order requiring that Father’s parenting time “shall take place at his maternal grandmother’s house, his cousin Ashley’s house, or other [nonsmoking] house that the parties can agree on.” Father’s residence at his paternal grandmother’s house was not a court-approved location for Father’s parenting time. Both Father’s paternal grandmother and her husband smoked.

{¶8} The magistrate also issued an order appointing a guardian ad litem (“GAL”), Elisabeth Holmes, for the child.¹

¹ Ms. Holmes testified that she is a psychologist. She has a doctoral degree in clinical psychology from Ohio University with an emphasis on children, adolescents, and families. Since

{¶9} Father submitted a shared parenting plan for the trial court’s consideration. That plan included a progressive parenting time schedule that would eventually allow him more contact with his daughter.

{¶10} An evidentiary hearing took place before the magistrate. Father, Mother, Father’s paternal grandmother, and the GAL testified, among others.²

{¶11} At the hearing, the GAL testified that she had observed the child at the parents’ residences, and conducted interviews of both parents and the child’s maternal grandmother. She also observed the child at her daycare. Further, the GAL reviewed the child’s medical records, and spoke to her pediatrician.

{¶12} The GAL testified to her belief that Father loves his child very much, and seems to want to interact with her. However, she indicated several concerns. She testified that Father needs ongoing counseling to address anger issues. She stated that, “[P]arenting requires more of [Father] emotionally and involves personal sacrifices and compromises that are over and above what he is presently able to do.” The GAL testified that, when spending time with extended family, Father needs to spend more time interacting with the child and focusing on her, and not as much on the greater family. The GAL further expressed that Father does not understand the child’s level of cognitive development.

{¶13} The GAL also testified that Father is not involved in the child’s medical care, and does not express a desire to become involved. She was concerned that Father “will not be

obtaining her license in 2001, she has been providing psychological services in connection with families, parenting, and children’s issues.

²A chemical dependency counselor testified at the evidentiary hearing that she had assessed Father and determined that he did not need chemical dependency counseling. The counselor also testified that Father completed the requirements for an anger management course. A parenting coordinator testified that Father had completed a parenting program.

capable of making [medical] decisions” for the child because he “has not stepped in to even get information on that.” Indeed, Father testified that he had not made an effort to be involved in the child’s medical care. He also admitted that he refused to reimburse Mother for a portion of the child’s out-of-pocket medical expenses.³

{¶14} The GAL learned from the child’s pediatrician that the child suffers from respiratory problems and related health issues. The child has a respiratory reactive disorder and at one point developed bronchiolitis.⁴ According to the GAL, the physician “felt very strongly” that the child should not be around secondhand cigarette smoke “at all” due to the child’s history of multiple respiratory problems and inner ear infections.⁵

{¶15} The GAL testified that the child also has been diagnosed with an allergy to egg. According to Mother, the child’s other health conditions include acid reflux and skin irritation.

{¶16} The GAL recommended that Mother should retain full residential custody of the child as well as full rights to make medical and educational decisions.

{¶17} Initially, the GAL recommended that Father receive visitation on a graduated schedule of increasing duration. However, at the evidentiary hearing, the GAL heard for the first time Father’s admission during his testimony that he had violated court orders to exercise

³ The GAL observed that Mother had been the primary caregiver to take the child to medical professionals and interact with daycare professionals. Mother testified that she made available to Father contact information for the child’s healthcare providers, and that she shared information about the child’s health issues with father via a website, although she occasionally had to make treatment decisions for the child without first obtaining approval from Father.

⁴ The parents, who are both nurses, agree that the child has not been diagnosed with asthma, and that an asthma diagnosis cannot take place before age two. The child was not yet two when the evidentiary hearing was held.

⁵ The child’s pediatrician initially told the GAL that exposure to cigarette smoke should be minimal. Subsequently, the pediatrician expressed to the GAL concern that her initial opinion had not been worded strongly enough. According to the GAL, the pediatrician told the GAL that the child should not be exposed to cigarette smoke at all.

parenting time only in smoke-free homes. In light of Father's admission, the GAL qualified her recommendation for a progressive visitation schedule for Father by stating that supervised visitation might be appropriate for him. She suggested supervised visitation because it did not "appear that [Father was] going to keep [the child] in a nonsmoking environment."

{¶18} The GAL recommended that Father's visitation with the child occur in smoke-free homes due to the child's allergies and respiratory problems, as explained to her by the child's physician. She did not think that it would be appropriate, in light of the pediatrician's recommendation to avoid any exposure to cigarette smoke, to make a distinction between types and degrees of smoking. She recommended that "all of [Father's] visitations need to occur in the smoke-free residence of family members." The GAL observed that Father had four local family members with nonsmoking residences that could provide locations for parenting time. She testified, "He has two aunts, a cousin and a maternal grandmother who reportedly do not smoke in their homes." The GAL expressed concern about Father's paternal grandmother being able to care for the child because Father's paternal grandmother testified that she did not believe that the child had asthma, and did not know that she had an egg allergy.

{¶19} Father admitted at the evidentiary hearing that he violated the court's orders regarding not having the child at a smoking home. On at least two occasions he took the child to his paternal grandmother's home, where both Father's paternal grandmother and her husband smoked. Father claimed that he "[h]ad no choice" but to ignore the court orders. He claimed that he believed that the orders allowed him to keep the child outside the home, and that she played outside but did not enter the home. Father's paternal grandmother testified that she did not smoke while the child was visiting. Her husband apparently was not present during the visits.

{¶20} Mother testified at the hearing that she placed a GPS locator in the child's diaper bag during her visits to Ohio after the child came home from parenting time with Father with clothes that smelled like smoke. Mother testified that the child returned from her visits with Father in Ohio coughing at night. She also "had a pretty significant rash every time and had bouts of diarrhea." As a result, the child could not go to daycare. Mother testified that the Father knew about the GPS locator. The GPS locator confirmed that the child had been at the paternal grandmother's house. It also showed that she had been at a bar and a cousin's house that was not a court-ordered or agreed-upon parenting time location.

{¶21} Mother filed a motion for contempt with notice of hearing, asking the court to find that Father had violated court orders. She attached an affidavit to the motion. In the affidavit, Mother testified that, during an April 2014 visit with Father, the child had again been in an environment where there was significant secondhand smoke. Mother stated that the exposure to smoke resulted in medical implications for the child. It does not appear that a hearing was held on the motion prior to the filing of this appeal.

{¶22} Father and Mother both are registered nurses. Father works for a home health care agency in Massillon, Ohio. His rate of pay is \$26.00 per hour. He earns \$54,080.00 annually. Mother works in the emergency room of a medical center in Pennsylvania. Her rate of pay is \$28.79 per hour. She makes \$53,895.00 annually. Mother provides health insurance for the child at an annual cost of \$1,814.00.

{¶23} The child attends daycare while Mother is at work. The daycare facility costs \$235.00 weekly. Mother testified that a nanny sometimes cares for the child in the evenings after daycare and when Mother works on weekends. The nanny costs \$12.00 per hour.

{¶24} Following the evidentiary hearing, the magistrate ordered, among other things, that: (1) Mother shall remain residential parent and sole custodian of the child; (2) Father shall continue to have parenting time in Ohio one weekend a month, when both parties are off work, and in Pennsylvania as his schedule permits with seven days' notice to Mother; (3) Father shall not have the child in a smoking residence at any time during his parenting time in Ohio, including his paternal grandmother's house; (4) Father shall get involved with the child's doctors and familiarize himself with her medical conditions; and (5) Father shall pay child support of \$1,089.67 per month to Mother, plus a 2% processing charge.

{¶25} Father filed objections to the magistrate's decision. He objected to: (1) Mother being named the sole custodial parent of the child; (2) the order that visitation occur in a nonsmoking home; (3) the magistrate's decision not to adopt a progressive visitation schedule; and (4) the magistrate's failure to award Father a deviation on his child support obligation. The trial court overruled Father's objections.

{¶26} Father now appeals. In his statement of the assignments of error, he listed five assignments of error for our review. In the body of his appellate brief, however, he withdrew assignments of error four and five. The Court now considers the remaining three assignments of error.

II

Assignment of Error Number One

THE COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DID NOT FIND THAT THE SHARED PARENTING PLAN SUBMITTED BY FATHER WAS IN THE BEST INTEREST OF THE MINOR CHILD AND NAMED MOTHER SOLE RESIDENTIAL PARENT PURSUANT TO ORC 3109.04(B)(1). MOTHER ADMITTED THAT SHE REMOVED THE CHILD FROM THE JURISDICTION OF THE COURT TO CREATE DISTANCE BETWEEN FATHER AND THE CHILD AND WITHIN A MONTH AFTER THE HEARING (FATHER HAD ONLY ONE VISIT SINCE THE HEARING)

FILED TO TERMINATE FATHER'S VISITATION. IT IS CLEAR MOTHER WISHES FATHER AND THE MINOR CHILD NOT TO HAVE ANY COMPANIONSHIP TIME TO ESTABLISH A RELATIONSHIP AND SHE IS NOT THE PARTY WHO WILL MOST LIKELY FOLLOW COURT ORDERS.

{¶27} In his first assignment of error, Father argues that the trial court erred in naming the Mother sole residential parent and in not adopting the shared parenting plan with a progressive parenting schedule submitted by the Father. We disagree.

{¶28} We review a trial court's decision regarding child custody for abuse of discretion. *Goad v. Goad*, 9th Dist. Medina No. 13CA0097-M, 2014-Ohio-3534, ¶ 8; *Donovan v. Donovan*, 110 Ohio App.3d 615, 618 (12th Dist.1996). "The trial court is vested with broad discretion to decide matters regarding the allocation of parental rights and responsibilities for the care of minor children ***." *Id.* This is so because a trial court must have the discretion to do what is equitable based upon the particular facts and circumstances of each case. *Booth v. Booth*, 44 Ohio St.3d 142, 144 (1989). An abuse of discretion means more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Additionally, when applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67 (1990). Therefore, an appellate court must be guided by the presumption that the findings of the trial court are correct. *In re Jane Doe 1*, 57 Ohio St.3d 135, 138 (1991).

{¶29} The "best interest of the child" is the overriding concern in any child custody case. *See Miller v. Miller*, 37 Ohio St.3d 71, 75 (1988). The factors to be considered by a court when allocating parental rights and responsibilities to serve the child's best interest are found in R.C. 3109.04(F)(1). The factors relevant to the instant case include:

- (a) The wishes of the child's parents regarding the child's care;
- ***
- (c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;
- (d) The child's adjustment to the child's home, school, and community;
- (e) The mental and physical health of all persons involved in the situation;
- (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;
- (g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;
- ***
- (j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

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

{¶30} When deciding whether shared parenting is in the best interest of the child, the court must consider the additional factors listed in R.C. 3109.04(F)(2). These factors are:

- (a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;
- (b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;
- (c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;
- (d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;
- (e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem.

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

{¶31} Father first claims that the court erred in awarding Mother sole residential custody because she removed the child from the jurisdiction of the court. However, Mother testified that she removed the child due to Father's threat of domestic violence against Mother while the child was present. Father threatened to strike Mother and refused to leave the shared residence when asked. Under the circumstances of potential domestic violence, Mother's decision to leave the residence and move with the child to the child's maternal grandmother's house in Pennsylvania does not weigh against an award of sole residential custody to Mother.

{¶32} Father further argues that Mother is not the parent most likely to follow court orders. However, there was no evidence presented at the evidentiary hearing to indicate that Mother is prone to ignore court orders. On the other hand, Father admitted to having violated court orders to keep the child out of smoking environments. Contrary to Father's assertion, Father's own testimony shows that he is the parent least likely to follow court orders.

{¶33} In arguing that the court erred in awarding sole residential custody to Mother, Father ignores the GAL's many concerns about his ability to parent the child. She expressed concern that Father: (1) has failed to get involved with the child's medical care; (2) violated court orders related to the child's health; (3) does not understand the child's level of cognitive development; (4) does not interact extensively enough with the child in the presence of extended family; (5) lacks understanding of sacrifices and compromises required to raise a child; and (6) needs ongoing anger management counseling. The GAL opined that the child should primarily reside with Mother. The trial court did not err in taking these opinions of the GAL into account in awarding sole residential custody to Mother.

{¶34} Father claims also that the trial court erred in refusing to adopt the GAL's recommendation for a progressive parenting schedule. Father is mistaken. He ignores that the GAL modified her recommendation for a progressive parenting schedule at the hearing, after learning there for the first time that Father had violated court orders to exercise his parenting time at nonsmoking residences. The GAL expressed concern that Father does not appear willing to keep the child out of smoking environments. She then qualified her recommendation for a progressive parenting schedule, recommending that supervised visitation might be appropriate for Father. The court did not err in declining to order progressive parenting time to Father as the GAL initially had proposed.

{¶35} Also, to the extent that the GAL continued to recommend a progressive parenting schedule after learning that Father violated court orders (and it is not clear that this continued to be her recommendation), her recommendation is only one of many factors that the court was required to consider in determining the best interest of the child. Under R.C. 3109.04(F), a trial court is not required to place emphasis upon any one factor in reaching a determination. The trial court does not err in making an order contrary to the recommendation of the GAL, nor is the trial court bound by a GAL's recommendation. *Lumley v. Lumley*, 10th Dist. Franklin No. 09AP-556, 2009-Ohio-6992, ¶ 46. Because assessment of the credibility and weight of the evidence is reserved for the trial court, an appellate court will not second guess the trial court's decision to disregard the guardian ad litem's recommendation. *Id.*, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 419 (1997).

{¶36} There is no basis to determine that the trial court abused its discretion in awarding sole residential custody to Mother, or in refusing to adopt the progressive parenting schedule initially recommended by the GAL. Father's first assignment of error is overruled.

Assignment of Error Number Two

THE COURT FURTHER ERRED BY RULING THE CHILD CANNOT BE IN A SMOKING HOUSE AT ANY TIME WHEN WITH FATHER. THE COURT FOUND THAT THE MINOR CHILD HAD ASTHMA, HOWEVER THERE WAS NOT ANY MEDICAL EVIDENCE OR TESTIMONY SUBMITTED THAT THE CHILD HAD EVER BEEN DIAGNOSED WITH ASTHMA. ALSO THE HOME THAT FATHER RESIDES HAS FAMILY MEMBERS WHO SMOKE [SIC]. IN ESSENCE, THE COURT RULED THAT FATHER CAN NEVER TAKE THE MINOR CHILD TO HIS HOUSE, WHICH IS AGAINST THE CHILD'S BEST INTEREST. FATHER'S FAMILY WHO SMOKE, DO NOT SMOKE IN THE PRESENCE OF THE MINOR CHILD. FURTHER THE TESTIMONY REVEALED THAT MOTHER USED TO BRING THE MINOR CHILD TO THE SAME HOME AND ALLOW THE SMOKERS IN THE HOME TO PROVIDE CHILD CARE UNTIL SHE DECIDED TO ALIENATE THE CHILD FROM FATHER AND HIS FAMILY BY MOVING THE CHILD TO PENNSYLVANIA.

{¶37} In his second assignment of error, Father argues that the trial court abused its discretion in holding that he could not exercise parenting time at a smoking residence, including the one where he resides with his paternal grandmother. We disagree.

{¶38} Under R.C. 3109.04(F)(1)(e), a trial court is required to consider the “mental and physical health of all persons involved in the situation” when determining the best interest of the child. This includes the physical health of the child.

{¶39} In the instant case, and under the specific circumstances present here, there is sufficient evidence to show that avoiding all secondhand smoke, whenever possible, is in the best interest of this child. The child has been diagnosed with a respiratory reactive disorder, for which she takes breathing medication as needed. She has suffered from bronchiolitis and chronic ear infections. According to Mother, the child's respiratory and health problems are exacerbated after spending time with Father, when he takes the child to smoking residences. Significantly, the child's pediatrician informed the GAL that it is the pediatrician's strong opinion that this child should not be exposed to any cigarette smoke due to her health issues. In

light of the pediatrician's opinion, the GAL did not feel it appropriate to distinguish between types and degrees of smoking in making a recommendation that the Father exercise parenting time only in smoke-free environments. The GAL was concerned by Father's admission at the evidentiary hearing that he did not keep the child in smoke-free environments. As a result of Father's testimony, the GAL modified her recommendation for a progressive parenting time schedule to allow for the possibility that supervised visitation might be appropriate for Father.

{¶40} Thus, under the specific circumstances of this case, there is no basis to hold that the trial court abused its discretion in ordering that Father's parenting time take place at a nonsmoking residence. As discussed, the specific facts of this case are that: (1) the child has been diagnosed by a pediatrician with a respiratory reactive disorder and other health problems linked to exposure to secondhand smoke; (2) the pediatrician specifically recommended to the GAL that the child should avoid all exposure to secondhand smoke because of her health issues; (3) based upon the pediatrician's strong opinion that the child avoid exposure to all environmental smoke, the GAL recommended that Father's parenting time occur in nonsmoking environments; and (4) according to Mother's testimony, the child has experienced specific adverse health consequences following visits to a smoking residence. Moreover, it is important that this is not a situation where Father has no feasible option but to exercise his parenting time at a smoking home. The GAL testified that Father has at least four local relatives in Ohio who live in nonsmoking homes, where Father potentially could take the child. Although it might be inconvenient for Father to exercise parenting time at locations apart from the home where he resides, any inconvenience to Father is outweighed by the best interest of the child under this particular set of facts.

{¶41} This Court is mindful of the potential Orwellian dangers of permitting courts broad authority to penalize parents in child custody matters for their own personal health habits, or the habits of the people with whom the parents reside. However, under the abuse of discretion standard applicable here, we may not merely substitute our judgment for that of the trial court. The trial court based its decision to prohibit visitation at smoking residences on the pediatrician's medical opinion, the GAL's recommendation, and Mother's testimony that cigarette smoke caused the child to suffer adverse health effects. Under the particular facts of this case, there is no basis to find that the trial court abused its discretion in holding that Father may not take the child to smoking residences, including the home where he lives. Father's second assignment of error is overruled.

Assignment of Error Number Three

THE COURT ERRED AND ABUSED HER DISCRETION WHEN IT DIDN'T GRANT FATHER'S REQUEST FOR A DEVIATION IN HIS CHILD SUPPORT WHEN SEVERAL OF THE FACTORS OF ORC 3119.22 [SIC]. FATHER'S CHILD SUPPORT ORDER DOES NOT ALLOW HIM TO MAINTAIN AN INDEPENDENT STANDARD OF LIVING. ALSO MOTHER'S CHOSE [SIC] A DAYCARE WHOSE FEES ARE HIGHER THAN AVERAGE, WHICH GREATLY RAISES FATHER'S CHILD SUPPORT OBLIGATION. AS MOTHER UNILATERALLY MOVED THE CHILD TO PENNSYLVANIA AND ENROLLED THE CHILD IN THAT DAYCARE, FATHER IS UNJUSTLY BEARING THE FINANCIALLY [SIC] BURDEN OF MOTHER'S DECISION TO UPROOT HER FROM OHIO.

{¶42} In his third assignment of error, Father argues that he should be entitled to a deviation from the child support guidelines. He maintains that the child support ordered by the court does not allow him to maintain an "independent standard of living." He claims that Mother spends too much money on childcare, and that he should not be penalized for Mother's choices.

{¶43} The amount of child support calculated pursuant to the basic child support schedule and applicable worksheet is "rebuttably presumed" to be the correct amount of child

support due. R.C. 3119.03. A trial court's decision regarding support obligations will not be disturbed absent an abuse of discretion. *Fields v. Fields*, 9th Dist. Medina No. 04CA0018-M, 2005-Ohio-471, ¶ 20.

{¶44} While Father's argument refers to considerations that a trial court may take into account under R.C. 3119.23 regarding a potential deviation from the child support guidelines, he fails to explain how any of the statutory considerations apply here. Although he claims that Mother has selected childcare that is too expensive, he does not provide any facts or argument regarding the typical costs of childcare where Mother lives, or other options that Mother might have elected to pursue. As such, there is no basis to say that the trial court abused its discretion, or that the child support award was unreasonable, arbitrary, or unconscionable. Accordingly, Father's third assignment of error is overruled.

III

{¶45} Father's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is affirmed.

Judgment affirmed.

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 Summit, 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(C). 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 Appellant.

BETH WHITMORE
FOR THE COURT

HENSAL, P. J.
MOORE, J.
CONCUR.

APPEARANCES:

TRAVIS RICE, pro se, Appellant.

GARY M. ROSEN and JOSHUA A. LEMERMAN, Attorneys at Law, for Appellee.