

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO**

NICOLLE M. WOOD,	:	<b>O P I N I O N</b>
Plaintiff-Appellant,	:	
- vs -	:	<b>CASE NO. 2009-T-0082</b>
BRIAN F. WOOD,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2003 DR 254.

Judgment: Affirmed.

*Robert L. Johnson*, 269 Seneca Avenue, N.E., P.O. Box 1706, Warren, OH 44481  
(For Plaintiff-Appellant).

*Robert M. Platt, Jr.*, Gessner & Platt Co., L.P.A., 212 West Main Street, Cortland, OH 44410  
(For Defendant-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Nicolle M. Wood appeals from a judgment of the Domestic Division of the Trumbull County Court of Common Pleas which overruled her objections to a magistrate’s decision concerning the allocation of parental rights and responsibilities regarding her son. For the following reasons, we affirm.

{¶2} **Substantive Facts and Procedural History**

{¶3} The Woods were married in 1999 and divorced in 2004. They have a child born in 1998; Mrs. Wood was designated the residential parent and legal

custodian of the child; and Mr. Wood enjoyed expanded standard rights of companionship with his son. Mr. Wood also retained and continued to live in the marital home located in the LaBrae School District.

{¶4} Since the divorce, the parties have required frequent judicial involvement to resolve their disagreement regarding the allocation of their parental rights and responsibilities. Their disagreement has centered on who should be the residential parent and where the child should attend school. The court docket reflects an extensive procedural history leading to the instant appeal.

{¶5} In 2006, Mr. Wood filed a Motion for Ex Parte Custody and Temporary Custody. According to his affidavit, Mrs. Wood was living in a tent in Mecca Township with no running water or electricity. The court granted Mr. Wood's motion and designated him the temporary residential parent. Mr. Wood then filed a Motion to Reallocate Parental Rights, requesting designation as the residential parent. After a hearing, Mrs. Wood was temporarily designated as the residential parent, but it was decided that their child should remain in the LaBrae School District where Mr. Wood lived. The court adopted the decision and ordered the parties to attend mediation to finally resolve the designation of residential parent issue, but Mrs. Wood filed a motion to permit a transfer to the school district where she resided. That motion was heard by the magistrate, who determined the child should remain in the LaBrae School District. An IEP assessment was also ordered.

{¶6} The magistrate held a hearing to review the matter two months later, and the court adopted the magistrate's finding that "child's performance during the First (1<sup>st</sup>) nine (9) weeks of school is under review. Child was tested for an IEP. and the results are yet to be determined." In January 2008, a mediation outcome report was filed

informing the court that the mediation was concluded without the parties reaching an agreement, thus Mrs. Wood's motion for change of school was set for trial.

{¶7} Prior to trial, Mr. Wood filed a pleading styled as "Motion for Ex Parte Order of Temporarily Designating Defendant as Residential Parent Until 09/30/08." The exhibits attached to this motion reflect that at a June 3, 2008 hearing, negotiations took place resulting in a proposed judgment entry reflecting the parties' agreement. The proposed judgment entry, prepared by Mr. Wood's counsel, set forth the parties' respective responsibilities and rights and designated both as residential parents and legal custodians with Mr. Wood as the residential parent for "purposes of school and companionship." Under the proposed shared parenting plan, the child would live with Mr. Wood instead of Mrs. Wood. Mrs. Wood, however, refused to sign the proposed entry.

{¶8} In his affidavit attached to his "Motion for Ex Parte Order of Temporarily Designating Defendant as Residential Parent," Mr. Wood alleged "Plaintiff has utilized the Court's last order which granted her temporary custody to disrupt the bussing of the minor child and has confronted the school with the older order forcing the school to prevent the child from riding the LaBrae School bus to [his] home which is contrary to the resolution reached on 6/3/2008."

{¶9} On September 8, 2008, the magistrate filed a judgment entry granting Mr. Wood's motion, temporarily designating him as the residential parent for purposes of school and companionship, "pending further order from the court on September 30, 2008."

{¶10} On September 19, 2008, Mrs. Wood filed objections to the magistrate's decision. She explained that she had been transporting the child to LaBrae School daily

from her residence without incident and, therefore, there was no reason for a change of her residential parent status. She further explained that she changed her mind about the agreement previously reached because the child “did not want to live with his father and was expressing reservations about residing with his father.”

{¶11} On September 30, 2008, the magistrate held a hearing on Mr. Wood’s ex parte motion. Both Mr. and Mrs. Wood and their respective counsel, as well as the child’s GAL, attended the hearing. The magistrate noted the parties had previously entered into an agreement to resolve all companionship issues, but Mrs. Wood now refused to execute the judgment entry. The magistrate decided that the September 8, 2008 judgment designating Mr. Wood as the temporary residential parent should remain effective until further order of the court, and that the matter should be scheduled for a full evidentiary hearing. On October 2, 2008, the court approved the magistrate’s decision. No objections were filed by Mrs. Wood.

{¶12} The full evidentiary hearing was held by the magistrate on three separate days between December 2008 and June 2009. The magistrate considered both Mrs. Wood’s motion to change schools and Mr. Wood’s motion to reallocate parental rights and designate him as the sole residential parent.

{¶13} In a detailed decision issued on June 26, 2009, the magistrate noted the child had completed the fourth grade at LaBrae School. The magistrate further noted that after struggling in the second grade and undergoing an IEP assessment and testing, an IEP was implemented in February of 2008. Since the implementation of the IEP, he has greatly improved during the latter part of third grade and the improvement continued into the fourth grade -- earning 4 A’s, 6 B’s, and 2 C’s. At the in-camera interview with the magistrate and his GAL, the child was “very talkative and [spoke]

openly when asked questions. He stated he liked LaBrae Schools and had friends there as well. Like most children his age, he did admit he did not always like school or the homework that came with school. He did not have an opinion when asked about going to Maplewood [where his mother resided].” The magistrate also stated he was informed by the GAL that the child “had been wavering between wanting to live with the Plaintiff and the Defendant.”

{¶14} The magistrate found that changing the school district at this time is not in the best interest of the child, finding that he is “adjusted to the LaBrae District, his special education needs are being addressed, and he has begun to thrive. There are even discussions to mainstream him in additional subjects in the upcoming year. As the child continues to mature and progress in his education, he may decide to change schools. At that time, the Court once again may address this matter.” Based on these findings, the magistrate denied Mrs. Wood’s motion to change schools.

{¶15} Regarding Mr. Wood’s motion to reallocate parental rights and to designate him as the residential parent, the magistrate noted Mr. Wood was currently the residential parent for school and companionship purposes. The magistrate found the child has continued to thrive with his father, but, noting his needs to have both parents participating in his life, the magistrate determined a complete change in parental rights is not in the best interest of the child at this time. The magistrate concluded Mr. Wood should continue to be the residential parent for purposes of school and companionship and Mrs. Wood would have visitation two days a week and on alternating weekends.

{¶16} On July 1, 2009, the court adopted the magistrate’s decision. On July 10, 2009, Mrs. Wood filed objections to the magistrate’s decision. The court overruled her objections and this appeal follows. Her assignments of error state:

{¶17} “[1.] Whether the trial court denied the appellant due process by failing to grant a timely hearing on the unwarranted ex-parte order.

{¶18} “[2.] The trial court failed to comply with the mandate set out in the Ohio Revised Code section 3109.04(E)(1)(a) which requires a change of circumstances in order to modify a prior decree or order of custody.”

{¶19} **Analysis**

{¶20} At the outset, we note that Mrs. Wood did not file a transcript or an App.R. 9(C) statement. “Upon appeal of an adverse judgment, it is the duty of the appellant to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review. App.R. 9(B) and 10(A); Section (1) of Rule IV of the Supreme Court Rules of Practice. It follows that where a transcript of any proceeding is necessary for disposition of any question on appeal, the appellant bears the burden of taking the steps required to have the transcript prepared for inclusion in the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Any lack of diligence on the part of an appellant to secure a portion of the record necessary to his appeal should inure to appellant’s disadvantage rather than to the disadvantage of appellee.” *Rose Chevrolet, Inc. v. Adams* (1998), 36 Ohio St.3d 17, 19. “Unless the record transmitted on appeal includes an App.R. 9(C) statement that affirmatively demonstrates error, we must presume the trial court committed no error despite the fact the record is not complete.” *State v. Hill* (Dec. 30, 1996), 4th Dist. No. 96 CA 4, 1996 Ohio App. LEXIS 6097, \*14. “[W]ithout a transcript or a substitute

statement of the evidence, an appellate court must presume the regularity of the trial court's proceedings and accept the validity of its judgment." *Rudinsky v. Eagle Reddie Mix Concrete* (June 28, 1996), 11th Dist. No. 96-T-5401, 1996 Ohio App. LEXIS 2730, \* 5.

{¶21} Furthermore, "[w]hen reviewing an appeal from a trial court's decision to accept or reject a magistrate's decision, an appellate court must determine whether the trial court abused its discretion. Where the court's decision is supported by a substantial amount of competent and credible evidence, the decision will not be reversed absent an abuse of discretion." *Hayes v. Hayes*, 11th Dist. No. 2005-L-138, 2006-Ohio-6538, ¶10 (citations omitted).

**{¶22} The Ex-Parte Order and Due Process Claim**

{¶23} Mrs. Wood first complains the trial court denied her due process "by failing to grant a timely hearing on the unwarranted ex-parte order." Our review of the record indicates otherwise.

{¶24} The record reflects that in 2007, the child attended LaBrae School while living with Mrs. Wood, who resided in a different school district. After the 2006-2007 school year ended, Mrs. Wood filed a motion seeking a change of school to the school district where she resided. The magistrate held a hearing and decided that for the time being the child should remain in LaBrae School and be assessed for an IEP. The court held another evidentiary hearing, negotiations took place on that day and a settlement was reached, but Mrs. Wood had a change of heart and refused to sign the proposed judgment entry.

{¶25} Because the new school year was approaching, Mr. Wood filed his ex parte motion for a temporary residential parent designation, which was granted until

another hearing could be set later in the month. With all parties in attendance, including the GAL, a hearing on the ex parte motion was held. Since Mrs. Wood did not present us with either a transcript or an App.R. 9(C) statement, we have no choice but to rely on the magistrate's decision regarding what transpired at this hearing.

{¶26} The magistrate stated: "This matter came on for status conference. The parties had entered into an agreement as to resolving all companionship issues herein. However, the Plaintiff-mother now refuses to execute the agreed entry. The decision of the magistrate is as follows: (1) That this matter shall be re-scheduled for a full day evidentiary hearing before Magistrate M. Horton; (2) that the ex-parte judgment entry granting father temporary residential parent as filed on 9-8-08 continue[s] as ordered until further order of the Court." The court adopted the decision on October 2, 2008, and no objections were filed. On a series of days from December 2008 to May 2009, the magistrate heard both Mrs. Wood's motion to change schools and Mr. Wood's motion to reallocate parental rights. He issued a decision on June 27, 2009, deciding the child should stay at LaBrae School but overruling Mr. Wood's motion to designate him alone as the residential parent, although designating him as the residential parent for school and companionship purposes.

{¶27} Based on this record, Mrs. Wood's claim that the trial court failed to grant a timely hearing on Mr. Wood's September 8, 2008 motion for an ex parte order is without merit. The magistrate *promptly* held a hearing on September 30, 2008, and determined Mr. Wood would be the residential parent until the matter was heard in a full evidentiary hearing. Mrs. Wood interposed no objections and, thus, her contention that no timely hearing was provided on the ex parte motion, is unfounded.

{¶28} Even if we were to construe her untimeliness claim as pertaining to the eventual full evidentiary hearing, we note that throughout the hearing over the ensuing months, Mrs. Wood made *no* request to expedite the hearing schedule. Since she never brought to the court’s attention the perceived untimeliness of the proceedings, she cannot be heard now to complain about it. *Oberlin v. Friedman* (1965), 5 Ohio St.2d 1, 6 (in order to be availed of as grounds for reversal of a judgment, errors of omission must generally be called to the trial court’s attention at a time when they could have been corrected).

{¶29} To support her claim under this assignment of error, Mrs. Wood cites *In re Knight*, 11th Dist. No. 2002-T-0158, 2003-Ohio-7222, for the contention that the court’s granting of Mr. Wood’s *ex parte* motion to temporarily designate him as the residential parent and its delay in resolving the matter “irreparably harmed” her.

{¶30} *Knight* does not support her contention. In that case, this court cautioned that generally “[o]nly extraordinary circumstances supported by affidavit or other evidence necessitating immediate action merit the issuance of an *ex parte* order.” *Id.* at ¶9. After reviewing the circumstances surrounding that case, we found no fault with the trial court, which conducted a hearing nine days after it granted the *ex parte* order. As we explained, “[u]nder the circumstances, a hearing was held with sufficient promptness such that appellee’s interests in the visitation and custody of his daughter would not have been irreparably prejudiced. That is, appellee’s interests would not be irreparably harmed by the nine day period between the issuance of the emergency order and the hearing wherein appellant sought to vacate said order.” *Id.* at ¶10.

{¶31} In the instant case, the magistrate conducted a hearing eleven days after Mrs. Wood filed objections to the magistrate’s granting of the *ex parte* motion. In the

absence of an App.R. 9(C) statement regarding what transpired at that hearing, we cannot but presume the regularity of the proceedings and accept the court's judgment, which adopted the magistrate's decision after hearing to continue the temporary designation of Mr. Wood as the residential parent, pending a full hearing. Mrs. Wood presumably agreed to a full hearing since she did not object to the court's judgment. Her reliance in *Knight* for an "irreparable harm" claim is misplaced. Finding no abuse of discretion by the trial court, we overrule the first assignment of error.

**{¶32} R.C. 3109.04(E)(1)(a)**

{¶33} In her second assignment of error, Mrs. Wood claims the magistrate's June 26, 2009 decision, which was adopted by the court, failed to comply with R.C. 3109.04(E)(1)(a).

{¶34} R.C. 3109.04 concerns the allocation of parental rights and responsibilities. "In matters relating to the allocation of parental rights and responsibilities for the care of minor children, the trial court is vested with broad discretion. A trial court's decision regarding these issues is subject to reversal only upon a demonstration of an abuse of that discretion." *In re Jacobberger*, 11th Dist. No. 2003-G-2538, 2004-Ohio-6937, ¶46 (citations omitted).

{¶35} Section (E)(1)(a) of the statute specifically addresses the modification of the designation of residential parent. Interpreting this statutory section, the Supreme Court of Ohio, in *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, held that "a modification of the designation of residential parent and legal custodian of a child requires a determination that a 'change in circumstances' has occurred, as well as a finding that the modification is in the best interest of the child, pursuant to R.C. 3109.04(E)(1)(a)." *Id.* at ¶37.

{¶36} Mrs. Wood alleges the magistrate’s June 26, 2009 decision, adopted by the trial court, failed to comply with R.C. 3109(E)(1)(a). She argues Mr. Wood did not demonstrate “a change of circumstances” as required by the statute. Her reliance on this statutory authority, unfortunately, is misplaced. At the time of the full hearing, Mr. Wood was the temporary residential parent pursuant to the court’s September 25, 2008 order. Two motions were before the court at the hearing: Mr. Wood’s motion to reallocate parental rights to him alone and Mrs. Wood’s motion to change the school. The court ruled *in Mrs. Wood’s favor* regarding the former motion, stating the child needs to continue to have both his parents participating in his development and therefore a complete change in parental rights and responsibilities is not in the child’s best interest. Given this procedural posture, Mrs. Wood’s claim of a failure to comply with R.C. 3109.04(E)(1)(a) is misguided, since the court *did* apply the statute and refused to grant *Mr. Wood* the sole residential parent status. The record does not demonstrate an abuse of discretion. The second assignment of error is without merit.

{¶37} The judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.