

[Cite as *Fluitt v. Fluitt*, 2014-Ohio-4442.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KRISTEN FLUITT	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
CHRISTOPHER FLUITT	:	Case No. 14 CAF 04 0026
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 12 DRA 10-532

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT: September 29, 2014

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Farmer, J.

{¶1} On November 21, 2009, appellant, Christopher Fluitt, and appellee, Kristen Fluitt, were married. One child was born as issue of the marriage, Presley, born March 11, 2011. On October 31, 2012, appellee filed a complaint for divorce.

{¶2} Hearings before a magistrate commenced on September 6, 2013. By decision filed February 11, 2014, the magistrate recommended shared parenting, a child support obligation for appellant, and a division of the parties' property. The magistrate amended appellant's proposed shared parenting plan, and ordered the plan to be retyped, filed, approved, and incorporated into a final shared parenting decree. The revised plan was filed on March 10, 2014 via a judgment entry decree of shared parenting.

{¶3} By judgment entry decree of divorce filed March 18, 2014, the trial court, finding no objections had been filed, adopted the magistrate's decision which included the revised plan.

{¶4} On March 21, 2014, appellant filed a motion for new trial pursuant to Civ.R. 59 and a motion to set aside entry or alternatively for leave to file objections. The trial court did not rule on the motions.

{¶5} On April 17, 2014, appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ENTERING AND ADOPTING THE MAGISTRATE'S DECISION AS A FINAL

APPEALABLE ORDER IN CONTRAVENTION OF THE PROVISIONS OF OHIO CIVIL RULES 53 AND 59."

II

{¶7} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ITS DIVISION OF MARITAL AND SEPARATE PROPERTY, PURSUANT TO THE PROVISIONS OF ORC 3105.171."

III

{¶8} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ITS CALCULATION OF GUIDELINE CHILD SUPPORT AND ORDERS REGARDING HEALTH INSURANCE."

IV

{¶9} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ITS AWARD OF UNEQUAL PARENTING TIME."

I

{¶10} Appellant claims the trial court erred in adopting the magistrate's decision as a final order in contravention of Civ.R. 53 and 59. We agree in part.

{¶11} Appellant breaks down this assignment into two parts: the first part pertains to Civ.R. 53 and the second part pertains to Civ.R. 59. Civ.R. 53 governs magistrates. Subsection (D)(3)(b)(i) governs the time to file objections to magistrate's decision and states the following in pertinent part:

A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has

adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed.

{¶12} Subsection (D)(4) governs action of court on magistrate's decision and states the following in pertinent part:

(b) *Action on magistrate's decision.* Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

(c) *If no objections are filed.* If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

(i) *Judgment.* The court may enter a judgment either during the fourteen days permitted by Civ.R. 53(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by Civ.R. 53(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution

of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

{¶13} Subsection (D)(5) governs extension of time and states: "For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. 'Good cause' includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

{¶14} Civ.R. 59 governs new trial and states the following in pertinent part:

(A) Grounds

A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

(B) Time for motion

A motion for a new trial shall be served not later than twenty-eight days after the entry of the judgment.

{¶15} In his decision filed February 11, 2014, the magistrate stated the following:

2. The Plan for shared parenting filed by Christopher (as amended in writing by the Magistrate) is in the best interest of Presley and should be retyped and filed and be approved and incorporated into a Section 3109.04 (D)(1)(d), Final Shared Parenting Decree. All issues with respect to the allocation of the parental rights and responsibilities for the care of Presley be as determined in said plan and be set forth in said Final Shared Parenting Decree. All issues with respect to support, medical insurance, uninsured medical expenses, and income tax dependency be as determined herein.

{¶16} The decision informed the parties of Civ.R. 53(D)(3):

20. The Parties have 14 days from the date of the filing of this Decision to file written objections with the Clerk of Court's office with respect to the Decision. Any such objections must be served upon all Parties to this action. A Party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law in this Decision

unless the Party timely and specifically objects to that finding or conclusion as required by Civil Rule 53(D)(3).

If either Party files an objection, each Party has 14 days to contact the Court Reporter (Rebecca LeFever 740-833-2536) to make arrangements for the preparation and payment for a transcript. If the Reporter is not contacted in said period, this matter shall be immediately submitted to the Judge of this Court.

The objecting party shall file the transcript with the court within 30 days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause.

{¶17} The revised plan on shared parenting was signed by the magistrate and attached to and incorporated into the judgment entry decree of shared parenting filed on March 10, 2014. Eight days later, on March 18, 2014, the trial court filed a judgment entry decree of divorce, adopting the magistrate's decision and stating the following: "Neither Party filed objections thereto. There is no error of law or other defect on the face of the magistrate's decision."

{¶18} On March 21, 2014, appellant filed a motion for new trial, claiming the magistrate's decision was incomplete at the time of filing on February 11, 2014 given the need for the revised shared parenting plan. Because the revised plan was filed on March 10, 2014, the magistrate's decision was complete on said date and the deadline to file objections was March 24, 2014. Also on March 21, 2014, appellant filed a motion

to set aside entry or alternatively for leave to file objections. Without a ruling on the motions, appellant filed his notice of appeal on April 17, 2014.

{¶19} Pursuant to App.R. 4(A)(1), "a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry." Exceptions to this appeal time period are listed in subsection (B), and include a motion for a new trial under Civ.R. 59. See, App.R. 4(B)(2)(b). If any of the listed post-judgment motions are filed, "then the time for filing a notice of appeal from the judgment or final order in question begins to run as to all parties when the trial court enters an order resolving the last of these post-judgment filings." Subsection (B)(2) continues:

If a party files a notice of appeal from an otherwise final judgment but before the trial court has resolved one or more of the filings listed in this division, then the court of appeals, upon suggestion of any of the parties, shall remand the matter to the trial court to resolve the post-judgment filings in question and shall stay appellate proceedings until the trial court has done so. After the trial court has ruled on the post-judgment filing on remand, any party who wishes to appeal from the trial court's orders or judgments on remand shall do so in the following manner: (i) by moving to amend a previously filed notice of appeal or cross-appeal under App.R. 3(F), for which leave shall be granted if sought within thirty days of the entry of the last of the trial court's judgments or orders on remand and if sought after thirty days of the entry, the motion may be granted at the

discretion of the appellate court; or (ii) by filing a new notice of appeal in the trial court in accordance with App.R. 3 and 4(A). In the latter case, any new appeal shall be consolidated with the original appeal under App.R. 3(B).

{¶20} Upon review, we find the appeal is premature as to the second part of this assignment pertaining to Civ.R. 59. The matter is remanded to the trial court for ruling on the Civ.R. 59 motion.

{¶21} In addition, given the instructions in the magistrate's decision regarding the revised shared parenting plan and the contradictory and ambiguous orders, we grant the first part of this assignment pertaining to Civ.R. 53 to permit objections to be filed within fourteen days of service of this opinion and judgment entry.

{¶22} Assignment of Error I is granted as to the arguments relative to Civ.R. 53 and is premature relative to Civ.R. 59.

II, III, IV

{¶23} Consistent with this court's opinion in Assignment of Error I, these assignments are moot.

{¶24} The judgment of the Court of Common Pleas of Delaware County, Ohio, Domestic Relations Division is hereby reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

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