

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

William Branum

Court of Appeals No. OT-10-019

Appellee

Trial Court No. 09DR036

v.

Connie Branum

DECISION AND JUDGMENT

Appellant

Decided: January 28, 2011

* * * * *

Shelly L. Kennedy, for appellee.

Connie Branum, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Connie Branum, appellant, appeals a March 31, 2010 judgment of the Ottawa County Court of Common Pleas, Domestic Relations Division. In the judgment, the trial court granted the parties a divorce, determined child custody, distributed separate

property and divided marital assets and debts. William Branum is appellee. The parties are parents to one child, Kara, age 12. They married on September 8, 2001.

{¶ 2} The final hearing in the case proceeded before a magistrate on November 4, 2009. The magistrate issued her decision on December 16, 2009. The trial court issued final judgment on March 31, 2010. A central issue on appeal is the trial court's award of child custody. The trial court granted legal custody of Kara to William, naming him the primary residential parent. The court awarded appellant visitation under a court established visitation schedule. The court also ordered appellant to pay child support.

{¶ 3} Connie appeals the judgment to this court. She asserts six assignments of error on appeal:

{¶ 4} "1. The Trial Court's Decision & Verdict were against the weight of the evidence.

{¶ 5} "2. The Trial Court's Decision & Verdict to award full custody to William Branum of the child Kara, was not in the best interest of the child or in accordance with ORC statutory guidelines.

{¶ 6} "3. The Trial Court erred in the appointment [sic] Guardian Ad Litem, John Klaehn due to his conflict of interest; this created an unfair bias in his report and testimony.

{¶ 7} "4. The Trial Court erred in allowing Judge Winters to preside over any matters in the case due to his conflict of interest; this created an unfair bias in the verdict.

{¶ 8} "5. The Trial Court erred in repeatedly engaging in ex-parte communication regarding the case between the Judge, Magistrate, Guardian Ad Litem, Plaintiff and his counsel, unlawfully prejudicing the Defendant.

{¶ 9} "6. The Trial Court erred in the computation of child support without sufficient income to justify the amount, the retroactive assignment date of the order and the failure to preserve arrears accrued over the pendency of the case."

{¶ 10} Under Assignment of Error No. 1, appellant argues that the trial court judgment is against the weight of the evidence with respect to child custody as well as division of marital assets and debts. Under Assignment of Error No. 2, appellant argues that the trial court erred in concluding that it was in the best interests of Kara to award William legal custody and for him to serve as the primary residential parent. As these two assignments of error interrelate, we consider them together.

Custody

{¶ 11} The nature of appellate review in civil cases where it is claimed that a verdict is against the manifest weight of the evidence is governed by the Ohio Supreme Court decision in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279. Civil "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* at syllabus; *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 26.

{¶ 12} Additionally, in domestic relations matters, a "trial court must have discretion to do what is equitable under the facts and circumstances of each case." *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. A trial court's judgment on custody is subject to review on appeal on an abuse of discretion standard. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. A trial court's judgment with respect to child custody is to be guided by the terms of R.C. 3109.04. *Id.* at 74-75.

{¶ 13} R.C. 3109.04 governs the allocation of parental rights and responsibilities in actions for divorce. When making the allocation, "the court shall take into account that which would be in the best interest of the children." R.C. 3109.04(B). The best interests of the child "should be the overriding concern in any child custody case." *Miller v. Miller*, 37 Ohio St.3d at 75. R.C. 3109.04(F)(1) outlines factors to be considered in determining the best interest of a child:

{¶ 14} "(F)(1) In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

{¶ 15} "(a) The wishes of the child's parents regarding the child's care;

{¶ 16} "(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

{¶ 17} "(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;

{¶ 18} "(d) The child's adjustment to the child's home, school, and community;

{¶ 19} "(e) The mental and physical health of all persons involved in the situation;

{¶ 20} "(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶ 21} "(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;

{¶ 22} "(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense

was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

{¶ 23} "(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

{¶ 24} "(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

{¶ 25} Although appellant was granted temporary custody of Kara during the pendency of the divorce, the trial court determined that it was in the best interest of the child that appellee be given custody in the final divorce decree. At the final hearing, the court magistrate interviewed Kara in chambers pursuant to R.C. 3109.04(B) as to her wishes and concerns. The guardian ad litem testified as to his investigation and recommendations. Both parents sought custody. The parties, family members, and friends testified.

{¶ 26} The guardian ad litem testified that the school principal stated: "I wish I had all students like her." The evidence at the final hearing was that Kara is an excellent student in the seventh grade with a 4.0 g.p.a. She is active in soccer and enjoys 4-H activities. She owns a horse that is kept behind father's home, which had been the marital residence.

{¶ 27} The guardian ad litem testified to a concern over uprooting Kara from the community, schools, and nearby relatives. William continues to reside at the marital residence in Oak Harbor. The marital residence setting was described in the magistrate's findings of fact: "the property is surrounded by the homes of Kara's paternal grandmother and her great grandmother and her great aunt and uncle. This is a very concentrated and hands-on support system for Kara as she is extremely close to her great aunt and uncle." The magistrate also found that William's relatives assist with Kara when he is at work and that Kara's great aunt and great uncle assist both with the care of her horse and her involvement in 4-H activities.

{¶ 28} The guardian ad litem testified that there was no concern as to either the physical or mental health of either parent.

{¶ 29} The magistrate found that appellant had failed to comply with the temporary orders of the court regarding visitation for consecutive days of visitation of three days one week followed by four the next on a rotating basis. The guardian ad litem and William testified to a pattern of appellant not getting Kara to soccer and 4-H practices and meetings on a regular basis. Appellant disputed the claim and testified that she cooperated in securing Kara's attendance at activities and that there were other reasons Kara missed soccer or 4-H activities occasionally.

{¶ 30} Appellant argues under R.C. 3109.04(F)(1)(g) that William had failed to make all child support payments and remained in arrears on his child support obligation under the temporary order. The magistrate addressed the issue in her decision and

concluded that the evidence was that William denied appellant's claim as to arrearages as to child support at the hearing and that "neither party presented any further testimony and/or documentation whatsoever regarding a child support arrearage of lack thereof." The record fully supports the magistrate's conclusion as to a lack of evidence in the record supporting appellant's claim on the issue.

{¶ 31} Appellant testified of a plan to move from Oak Harbor to Troy, Michigan shortly after the final hearing. Appellant's boyfriend resides there and appellant testified to a significant employment opportunity there. The move would also place appellant in closer proximity to certain of her family members.

{¶ 32} The guardian ad litem recommended that the trial court name William as the primary residential parent with appellant granted visitation under a court visitation schedule. The magistrate's decision followed that recommendation. The trial court adopted the magistrate's decision as to custody in its final judgment.

{¶ 33} We find competent, credible evidence in the record to support the trial court's determination that it is in the best interests of Kara that legal custody should be awarded William and that he serve as the primary residential parent. The change in custody to William as primary residential parent serves to maintain Kara's home, school, and community ties to Oak Harbor and relationship with supporting relatives. Appellant testified that she planned to move out of state.

{¶ 34} We conclude that the trial court acted properly within its discretion in determining the change is in the best interest of the child and that the grant of legal custody of Kara to William is not against the manifest weight of the evidence.

Division of Marital Assets and Debts

{¶ 35} Appellant argues under Assignment of Error No. I that the trial court erred in its division of marital assets and liabilities. "In reviewing the equity of a division of property, one of the basic guidelines an appellate court is bound to follow is that the trial court's judgment cannot be disturbed on appeal absent a showing that the common pleas court abused its discretion in formulating its division of the marital assets and liabilities of the parties." (Citations omitted.) *Martin v. Martin* (1985), 18 Ohio St.3d 292, 294-295. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 36} The findings of the trial court were that the parties held one bank account—a joint checking account with a negative balance of approximately \$600 due to an overdraft. The trial court judgment refers to one other debt—an Alltel phone bill of \$694.58. The trial court ordered that the parties were equally responsible for one-half of the two debts.

{¶ 37} Appellant argues that sufficient evidence was lacking in the record to establish these debts. William testified as to both debts at the final hearing. He testified to the debt to the bank of about \$600 for an overdraft and to outstanding charges owed to Alltel for cell phone service for both him and appellant before he terminated the Alltel

contract in September 2008. In our view there was sufficient evidence in the record to identify the existence and nature of the debts to support the trial court's order the parties share equally in payment of charges owed the bank and Alltel.

{¶ 38} The parties held no other checking or savings accounts. They owned no real estate. William owned no life insurance, IRAs, 401(k)s, pension-profit sharing or retirement plans, nor any stocks, bonds, or certificates of deposit.

{¶ 39} The trial court judgment awarded the 1994 Ford Ranger used by appellant to her. It awarded a 2002 Ford Explorer to William. The trial court also awarded each party as his or her own separate property household goods currently in his or her possession.

{¶ 40} Appellant asserts that the trial court erred in distributing the 2002 Ford Explorer to William as separate property and that the property was a marital asset subject to division. Appellant asserts that the evidence was insufficient to establish a gift within the meaning of R.C. 3105.171(A)(6)(a)(vii) by clear and convincing evidence.

{¶ 41} William testified that his mother gave him the vehicle in November 2007 during the marriage. It replaced William's 1996 Crown Victoria that had been extensively damaged in a collision. William testified that the car had been totaled and that he would have been out of pocket for the cost of substantial repairs. His mother was concerned that he would repair the vehicle using junk parts. She gave him the 2002 Ford Explorer to use instead. William's mother also testified that the vehicle was a gift to William.

{¶ 42} A trial court's classification of property as marital or separate property is reviewed on appeal based upon the manifest weight of the evidence standard. *Charlton v. Charlton*, 6th Dist. No. WD-05-017, 2005-Ohio-7004, ¶ 51; *James v. James* (1995), 101 Ohio App.3d 668, 684. Under the civil manifest weight of the evidence review, an appellate court does not reweigh the evidence but upholds a trial court's finding where supported by competent, credible evidence in the record. *State v. Wilson*, supra, at ¶ 26; *Fletcher v. Fletcher* (1994), 68 Ohio St.3d 464, 468.

{¶ 43} R.C. 3105.171(A)(6)(a)(vii) defines separate property to mean "[a]ny gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse." Upon review of the record, we find that the trial court's determination that the 2002 Explorer was separate property of William is supported by competent, credible evidence in the record.

{¶ 44} Appellant asserts that the trial court erred in failing to divide as marital property a family horse, unspecified equipment used by William in his work as a DJ, and the family dog. Although appellant argues that Kara's horse should be treated as a marital asset, the testimony at the final hearing was that the horse was a gift from Sharon Branum to Kara.

{¶ 45} Appellant raised no specific objection to the magistrate's decision on the basis that it failed to treat the family dog or DJ equipment as subject to division as marital property. We find the issue as waived under Civ.R. 53.¹

{¶ 46} We find that appellant's Assignments of Error Nos. 1 and 2 are not well-taken.

Claimed Bias of Guardian ad Litem

{¶ 47} The guardian ad litem testified at the final hearing that he shares an office building with five other attorneys including the attorney for appellee. This fact was known to appellant as it was raised by appellant on cross-examination at the final hearing. Appellant now argues under Assignment of Error No. 3 that the shared building presents a conflict of interest and demonstrates unfair bias of the guardian ad litem against her.

{¶ 48} The guardian ad litem recommended that William be awarded legal custody of Kara and testified adversely to appellant with respect to the results of his investigation as to the best interests of Kara and allocation of parental rights and responsibilities.

{¶ 49} Appellant did not move to disqualify the guardian ad litem prior to the final hearing in the case or at the hearing. Appellant also did not object to the magistrate's decision based upon any claim of a conflict of interest or unfair bias of the guardian ad

¹We discuss at length waiver under Civ.R. 53 in our consideration of Assignment of Error No. 3.

litem within the time constraints under Civ.R. 53 by objection to the magistrate's decision.²

{¶ 50} William argues that appellant's claims with respect to the guardian ad litem are barred under Civ.R. 53. Civ.R. 53(D)(3)(b)(i) requires that objections to a magistrate's decision be made within 14 days of the filing of the decision. Objections are to be "specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). Where objections are made, the trial court may elect to hear additional evidence in an "independent review as to the objected matters." Civ.R. 53(D)(4)(d).

{¶ 51} Civ.R. 53(D)(3)(b)(iv) provides that "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)."

{¶ 52} This court has held that the failure to make a timely and specific objection to a magistrate's decision as required under Civ.R. 53 results in a waiver of error by the trial court in adopting the magistrate's findings of fact or conclusions of law. *Foos v. Foos*, 6th Dist. No. WD-08-049, 2009-Ohio-3398, ¶ 16; *Burns v. Burns*, 6th Dist. No. S-07-019, 2008-Ohio-2483, ¶ 15.

²In her reply brief appellant argues that additional time was necessary to file detailed objections but that the trial court overruled a request for an extension of time. Appellant, however, has not asserted any error in overruling the request as part of this appeal.

{¶ 53} Accordingly, we deem appellant's objection to the guardian ad litem on the basis of claimed conflict of interest and bias waived by failure to raise it in the trial court, within the time objections to the magistrate's decision were due. We do not view this case as presenting error rising to "the level of challenging the legitimacy of the underlying judicial process itself" as appellant certainly could have moved to disqualify and remove the guardian ad litem at the final hearing but failed to do so. We find no plain error. See *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 122; *Burns* at ¶ 17.

{¶ 54} We find Assignment of Error No. 3 is not well-taken.

Claimed Judicial Bias

{¶ 55} Under Assignment of Error No. 4, appellant argues that the trial court judgment must be reversed because of judicial bias. Appellant argues that the trial judge held a conflict of interest that created unfair bias against her. This is based upon the fact that appellee coached the judge's daughter's soccer team. Appellant argues that the trial judge should have withdrawn from the case because his impartiality and fairness was drawn into question by the relationship.

{¶ 56} An appellate court lacks jurisdiction to disqualify a common pleas judge or to vacate a common pleas court judgment on the basis of judicial bias. *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 441-442; *State v. Valenti*, 6th Dist. No. WD-05-046, 2006-Ohio-3380, ¶ 25. The Chief Justice of the Ohio Supreme Court hears such matters under an affidavit procedure provided under R.C. 2701.03. *Id.*

{¶ 57} Appellant's Assignment of Error No. 4 is not well-taken.

Ex Parte Communications

{¶ 58} Under Assignment of Error No. 5, appellant argues that the trial court judgment should be reversed because the trial court judge and magistrate engaged in ex parte communications with the guardian ad litem, opposing counsel and appellee. In her brief, appellant makes a general allegation of ex parte communications and makes no claim as to the circumstances or the subject matter of the communications. Appellant did not raise the issue in the trial court. Therefore, evidence in the record is lacking as to the occurrence of ex parte communications, and if they did occur, their substance.

{¶ 59} Canon 2 of the 2009 Code of Judicial Conduct provides: "[a] judge shall perform the duties of judicial office impartially, competently, and diligently." Rule 2.9 of the Code prohibits a judge from ex parte communications with others with six listed exceptions. One exception permits ex parte communications for scheduling and administrative purposes under specified circumstances:

{¶ 60} "Rule 2.9 *Ex Parte* Contacts and Communications with Others

{¶ 61} "(A) A judge shall not initiate, receive, permit, or consider *ex parte* communications, except as follows:

{¶ 62} "(1) When circumstances require it, an *ex parte* communication for scheduling, administrative, or emergency purposes, that does not address substantive matters or issues on the merits, is permitted, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication;

{¶ 63} "* * *."

{¶ 64} As a practical matter, as appellant failed to object to claimed ex parte communications in the trial court, there is no evidence in the record to support her claims under Assignment of Error No. 5. As an appellate court, our review of claimed trial court error is "limited to what transpired in the trial court as reflected by the record made of the proceedings." *State v. Ishmail* (1978), 54 Ohio St.2d 402, 405-406. An appellant bears the burden on appeal of demonstrating error by reference to matters in the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶ 65} There being no evidence in the record to support appellant's claims of trial court error based upon claimed ex parte communications, we find appellant's Assignment of Error No. 5 is not well-taken.

Computation of Child Support

{¶ 66} Under Assignment of Error No. 6, appellant argues that the trial court erred in its award of child support because the amount was improperly calculated, the order requiring payment of child support was made effective on the date of the final hearing (months before the court issued its final judgment), and the award failed to credit appellant for claimed arrearages owed appellant by appellee under the trial court's prior orders for child support and spousal support. Appellee argues that the claimed errors were waived under Civ.R. 53 due to appellant's failure to object to the magistrate's decision on that basis.

{¶ 67} The magistrate's recommended award of child support in the magistrate's decision of December 16, 2009, was for monthly payments for child support and processing fees totaling \$531.23 per month where private health insurance was provided for the child. Where no private insurance coverage was afforded, the magistrate recommended a required payment of \$596.92 a month consisting of a payment of child support, an additional processing fee, and a monthly cash medical support payment. In the final judgment issued on March 31, 2010, the trial court imposed the child support obligations recommended by the magistrate.

{¶ 68} Appellee argues that appellant is barred under Civ.R. 53 from asserting the claimed error under Assignment of Error No. 6 as these issues were not raised by objection to the magistrate's decision in the trial court. We agree and find Assignment of Error No. 6 is not well-taken.

{¶ 69} We conclude that substantial justice was done the party complaining and affirm the judgment of the Ottawa County Court of Common Pleas, Domestic Relations Division. Appellant is ordered to pay the court costs, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.