[Cite as *Sladek v. Sladek*, 2012-Ohio-529.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

ROBIN S. SLADEK,	:	**O P I N I O N**
Petitioner-Appellant,	:	
and	:	**CASE NO. 2011-P-0029**
DANIEL R. SLADEK,	:	
Petitioner-Appellee.	:	

Civil Appeal from the Portage County Court of Common Pleas, Domestic Relations Division, Case No. 2005 DR 0384.

Judgment: Affirmed.

Susan K. Pritchard, 231 Quaker Square, 120 East Mill Street, Akron, OH 44308 (For Petitioner-Appellant).

James P. Koerner, 10 West Erie Street, #106, Painesville, OH 44077 (For Petitioner-Appellee).

DIANE V. GRENDELL, J.

{¶1} Petitioner-appellant, Robin S. Sladek, appeals from the judgment of the Portage County Court of Common Pleas, Domestic Relations Division, granting Robin and Petitioner-appellee, Daniel R. Sladek's, Petition for Dissolution. The issues before this court are whether a trial court errs by failing to make a finding of best interests when adopting a parenting plan; whether a magistrate may conduct a hearing without an order of reference, and whether a trial court is required to make specific findings as to

the value of assets in a dissolution proceeding. For the following reasons, we affirm the decision of the court below.

{¶2} Robin and Daniel were married in 1988. They had two children together, A.S., born November 4, 1996, and N.S., born September 9, 1999.

{¶3} On June 24, 2005, the parties filed a Petition for Dissolution of Marriage. With the Petition, they also filed a Separation Agreement and a Shared Parenting Plan.

{¶4} A hearing was held in this matter on June 25, 2005, before a magistrate. At the hearing, Daniel was represented by counsel, but Robin testified that she wanted to proceed without counsel. Both parties stated that they had reviewed the Separation Agreement and the Shared Parenting Plan, they wished to dissolve their marriage, and the Agreement and Plan fully disposed of all the issues relating to their marriage. They also testified that the disposition of property and debts was fair and equitable.

{¶5} On October 5, 2005, the trial court issued a Judgment Entry Decree of Divorce.[1] The Separation Agreement and Shared Parenting Plan were incorporated into the Judgment Entry. The court found that the Separation Agreement was a "complete, fair and equitable allocation [of] rights, property, debt and all matters pertaining to the Petitioners[']termination of marriage," and ordered that the marriage be dissolved. The attached Agreement contained various clauses related to the petitioners, including the disposition of marital property and alimony. The Shared Parenting Plan contained provisions relating to custody of the children and child

1. Although the Judgment of the court was captioned "Judgment Entry Decree of Divorce," we note that no Complaint for Divorce was filed, only a Petition for Dissolution. The parties never sought to convert the action for dissolution into an action for divorce, pursuant to R.C. 3105.65(C). Moreover, the Judgment Entry noted that the trial court was dissolving the marriage and the testimony given at the hearing by both parties demonstrated that they were seeking a dissolution.

support. The Plan stated that Daniel was to be the residential parent and Robin was not required to pay child support.

{¶6} On April 3, 2009, Robin filed a Motion for Modification of Custody and Child Support. On August 5, 2009, the trial court issued a Judgment Entry, stating that the parties had resolved their issues through mediation and that Robin had withdrawn her Motion for Child Support. The court found that the parties agreed to the findings in the Judgment Entry and that the agreement was "reasonable, and fair and in the best interests of parties' children." The court ordered, among other things, that the parties communicate appropriately with their children and inform each other regarding scheduling issues. The Judgment Entry stated that the parties were to continue with the custody agreement set forth in the October 5, 2005 Judgment Entry.

{¶7} On October 21, 2010, Robin filed a Petition for Writ of Mandamus with this court, asserting that the Portage County Clerk of Courts failed to properly serve her a copy of the Judgment Entry Decree of Divorce issued by the trial court on October 5, 2005. Robin and the Clerk of Courts settled this matter and Robin was served with the requested Judgment Entry. Based on that settlement, this court dismissed the Petition on April 11, 2011. Also on April 11, 2011, the trial court added a notation to the docket, stating that "notice under Rule 58" had been issued to Robin by certified mail.

{¶8} Robin appeals from the October 5, 2005 Judgment Entry and raises the following assignments of error:

{¶9} "[1.] The Trial Court erred as a matter of law with prejudice to the Appellant, Robin Sladek, when it failed to issue a Magistrate's Decision as required by Civ. R. 53 following a final hearing before the Magistrate.

{¶10} "[2.] The Trial Court erred as a matter of law with prejudice to the Appellant, Robin Sladek, when the Magistrate heard and decided Robin's case without an order of reference.

{¶11} "[3.] The Trial Court erred with prejudice to the Appellant, Robin Sladek, when the Court issued a final decree of divorce that contains so many errors regarding the allocation of parental rights and responsibilities as to be fundamentally unenforceable.

{¶12} "[4.] The Trial Court erred as a matter of law with prejudice to the Appellant, Robin Sladek, when the Court issued a Judgment Entry Decree of Divorce that does not include the values of any assets nor the amount of any liabilities, thereby preventing any meaningful review.

{¶13} "[5.] The Trial Court erred with prejudice to the Appellant, Robin Sladek, when it failed to review the Shared Parenting Plan pursuant to R.C. 3109.04(D)(1)(a)(i).

{¶14} "[6.] The Trial Court erred as a matter of law in the prejudice of the Appellant, Robin Sladek[,] when it failed to determine the amount of child support pursuant to R.C. 3119.22.

{¶15} "[7.] The Trial Court erred as a matter of law with prejudice to the Appellant, Robin Sladek, when it adopted a Separation Agreement prepared in violation of R.C. 3105.63."

{¶16} Initially, we must address the issue of the timeliness of the appeal and this court's jurisdiction. Daniel asserts that Robin's appeal was not timely because the notice of appeal was not filed within the required thirty day time period after the issuance of the October 5, 2005 Judgment Entry Decree of Divorce.

{¶17} App.R. 4(A) requires that a party "file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure."

{¶18} Civ.R. 58(B) provides: "When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties * * * notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. * * * The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A)."

{¶19} "In those cases in which both Civ.R. 58(B) and App.R. 4(A) are applicable, * * * if the appellants are not served with timely notice, the appeal period is tolled until the appellants have been served." *State ex rel. Sautter v. Grey*, 117 Ohio St.3d 465, 2008- Ohio-1444, 884 N.E.2d 1062, ¶ 16, citing *In re Anderson*, 92 Ohio St.3d 63, 67, 748 N.E.2d 67 (2001).

{¶20} In the present case, the trial court did not endorse upon its Judgment Entry the "direction to the clerk to serve upon all parties * * * notice of the judgment and its date of entry upon the journal," as required by Civ.R. 58(B). In addition, there is no indication on the trial court's docket that Robin herself was served in 2005 with notice of the Judgment Entry, but instead, only Daniel's counsel was served with such notice. Robin received proper notice only after she filed her Writ of Mandamus and the Entry was served on her on April 11, 2011, as was then noted on the trial court's docket.

Since the time for filing a notice of appeal did not begin to run until April 11, 2011, due to the trial court's failure to comply with Civ.R. 58(B), Robin's appeal was timely filed under App.R. 4(A). *Anderson* at 67*; Blair v. Wallace*, 9th Dist. No. 24819, 2010-Ohio-2734, ¶ 12-16. Accordingly, this court has jurisdiction to consider the appeal.

{¶21} "Decisions of a trial court involving the care and custody of children are accorded great deference upon review. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, * * *. Thus, any judgment of the trial court involving the allocation of parental rights and responsibilities will not be disturbed absent a showing of an abuse of that court's discretion. *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260." (Citation omitted.) *In re Dissolution of Marriage of Spence*, 11th Dist. No. 2009-P-0004, 2010-Ohio-972, ¶ 10.

{¶22} "The highly deferential abuse of discretion standard is particularly appropriate in child custody cases, since the trial judge is in the best position to determine the credibility of the witnesses and there 'may be much that is evident in the parties' demeanor and attitude that does not translate well to the record. * * * In so doing, a reviewing court is not to weigh the evidence 'but must ascertain from the record whether there is some competent evidence to sustain the findings of the trial court.'" (Citations omitted.) *Id.* at ¶ 11.

{¶23} In Ohio, an action for dissolution under R.C. 3105.61 is a form of no-fault divorce where the court can terminate a marriage pursuant to the mutual request of both parties. *Knapp v. Knapp*, 24 Ohio St.3d 141, 144, 493 N.E.2d 1353 (1986). "Agreement between spouses is the linchpin of the procedure," and the petition must incorporate a separation agreement, which "delineate[s] the disposition of all property,

set[s] forth the terms and amount of alimony (if any) and, if there are minor children * * * provide[s] for child custody, visitation, and support." *In re Adams*, 45 Ohio St.3d 219, 220, 543 N.E.2d 797 (1989); R.C. 3105.63.

{¶24} "Once the separation agreement is executed, both parties must appear before the court, verify that each entered into the agreement voluntarily and that both are satisfied with the terms of the agreement, and that they seek dissolution of the marriage. *Adams*, 45 Ohio St.3d at 220; R.C. 3105.64. The court may validate a dissolution and grant a decree, '[o]nly if both parties are completely in accord' in assenting to the dissolution and the terms of the agreement." (Citation omitted). *In re Means*, 11th Dist. No. 2004-T-0138, 2005-Ohio-6079, ¶ 19.

{¶25} The assignments of error will be considered out of order for ease of discussion.

{¶26} In her first assignment of error, Robin asserts that the Judgment Entry Decree of Divorce issued by the trial court should be vacated in its entirety because no Magistrate's Decision was issued, as required by Civ.R. 53.

{¶27} Civ.R. 53(D)(3)(a)(i) requires that "a magistrate shall prepare a magistrate's decision respecting any matter referred under Civ.R. 53(D)(1)." "A trial court's failure to comply with Civ.R. 53 constitutes grounds for reversal only if the appellant shows the alleged error has merit and the error worked to the prejudice of the appellant." *In re Estate of Hughes*, 94 Ohio App.3d 551, 554, 641 N.E.2d 248 (9th Dist.1994).

{¶28} It is apparent from the record that the magistrate held a hearing in this case but did not issue a Magistrate's Decision. However, in order for this to be

reversible error, some prejudice to the appellant must be shown. Although Robin cites *Swain v. Swain*, 9th Dist. No. 20048, 2000 Ohio App. LEXIS 5421 (Nov. 22, 2000), to support the proposition that she was prejudiced by being unable to object to the Magistrate's Decision, we note that such prejudice was limited by the fact that this was an uncontested dissolution proceeding, unlike the divorce proceeding in *Swain*. In the present matter, both parties signed the Separation Agreement and stated that they agreed with the disposition of their property, support, and custody matters. The magistrate made no factual findings, the Judgment Entry issued by the trial court merely incorporated the parties' Agreement, and no findings were made that conflicted with the Agreement signed by Robin. Therefore, we cannot find that Robin was prejudiced by the magistrate's failure to issue a decision, as the Separation Agreement was adopted precisely as Robin herself agreed to.

{¶29} The first assignment of error is without merit.

{¶30} In her second assignment of error, Robin asserts that the entire hearing before the magistrate was a nullity, and, therefore, the judgment of the trial court should be reversed, since no order of reference was issued referring the case to the magistrate.

{¶31} Former Civ.R. 53(C)(1)(b), applicable in the present case, required that an order of reference be issued for a magistrate to have authority to conduct a hearing on a motion filed by a party. Regarding former Civ.R. 53(C)(1)(b), courts have found that the rule did "not specify the form of the order nor does it require the court to journalize an individual order of reference for each issue submitted," and found that either issuing a specific order of reference or a blanket order of reference for particular types of cases

fulfilled the requirement. *White v. White*, 50 Ohio App.2d 263, 267, 362 N.E.2d 1013 (8th Dist.1977).

{¶32} There is no evidence in the record that either a specific order of reference was issued in this case or that a blanket order of reference was present in the domestic relations court allowing all dissolution matters to be heard by magistrates. However, in the present case, there is no indication that Robin objected to having the hearing before a magistrate. The failure to object to the lack of an order renders this argument inapplicable, as "[a]n appeal is not the appropriate place to raise procedural issues regarding the magisterial assignment for the first time." *Ramos v. Khawli*, 181 Ohio App.3d 176, 2009-Ohio-798, 908 N.E.2d 495, ¶ 63-64 (7th Dist.) (the failure to object to a hearing before a magistrate without an order of reference eliminates the ability of the parties or the court to produce the relevant order of reference and the issue is waived if not raised); *Kirtland v. Andrews*, 11th Dist. No. 98-L-137, 1999 Ohio App. LEXIS 3983, *3, fn.1 (Aug. 27, 1999) (the issue of the failure to file an order of reference was waived when the appellant did not object to the referral of a hearing to the magistrate); *Stewart v. Stewart*, 2nd Dist. Nos. 16649 and 16769, 1998 Ohio App. LEXIS 1590, *7-9 (Apr. 17, 1998) (where no order of reference was filed, the magistrate's hearing and order were at most "voidable," and since the appellant failed to object at the hearing, the magistrate's order could not be set aside).

{¶33} The second assignment of error is without merit.

{¶34} In her fourth assignment of error, Robin asserts that the trial court erred by failing to make specific findings as to the value of the parties' assets and liabilities.

{¶35} We initially note that the cases cited by Robin in support of this argument involve contested divorces, not dissolutions incorporating a separation agreement. "In a contested divorce proceeding, the record must contain sufficient evidence of the value of the marital assets to support a determination that the division was reasonable." *Perko v. Perko*, 11th Dist. Nos. 2001-G-2403, 2002-G-2435, and 2002-G-2436, 2003-Ohio-1877, ¶ 28.

{¶36} However, when the parties reach an agreement resolving the ownership of their property, it is not necessary for the court to make specific findings as to its value. *Id.* at ¶ 29 (when parties reached a mutual agreement as to how property would be divided, "the trial court did not have to * * * value each marital asset or determine if an equitable division of property was achieved because the matter was no longer contested by the parties"); *Means*, 11th Dist. No. 2004-T-0138, 2005-Ohio-6079, at ¶ 20 (where the parties had obtained a dissolution based on a settlement agreement, in which the parties included certain provisions regarding martial debt and property, the trial court was under no duty to assess the value of the property or whether the terms of the settlement agreement were equitable).

{¶37} In the present case, the Separation Agreement, incorporated by the trial court into its Judgment Entry, included provisions determining the ownership of various property, including real property, household furnishings, and retirement benefits. It also addressed the issue of marital debt. Since the parties did not contest this issue and resolved it in the Agreement, the trial court was not required to make specific findings of the value of the marital assets.

{¶38} The fourth assignment of error is without merit.

{¶39} We will consider Robin's third, fifth, sixth, and seventh assignments of error jointly, as they all relate to matters dealing with child custody and support under the Shared Parenting Plan. Robin asserts that the trial court erred by failing to review the Shared Parenting Plan pursuant to R.C. 3109.04(D)(1)(a)(i) and that the trial court failed to make a determination that the Plan was in the children's best interests. She also argues that there are various errors throughout the Parenting Plan regarding the allocation of parental rights and responsibilities. Finally, Robin asserts that the trial court failed to determine the amount of child support owed, pursuant to R.C. 3119.22.

{¶40} Regarding these issues, we initially note that Robin filed her notice of appeal five and a half years after the issuance of the October 2005 Decree of Divorce, allocating the rights of the parties related to the dissolution, including their rights to custody and child support. The failure to file an appeal sooner raises concerns about the finality of the dissolution proceedings and the fairness of vacating the 2005 judgment, as requested by Robin. *See Meyer v. Meyer*, 17 Ohio St.3d 222, 225, 478 N.E.2d 806 (1985) (stating the importance of finality in judgment, while recognizing that such finality does not prevent the modification of the custody or child support agreement in the future). While both parties are entitled to modify the custody and child support agreements, to vacate the Decree of Divorce and Shared Parenting Plan entirely, over six years after their issuance, would completely alter the rights of the parties.

{¶41} In addition, subsequent to the filing of the 2005 Judgment Entry Decree of Divorce, but prior to filing the original action in order to receive service of the 2005 Entry, on April 3, 2009, Robin filed a Motion for Modification of Custody and Child Support. Subsequently, on August 5, 2009, the trial court issued a Judgment Entry. In

that Entry, the court noted that the parties had voluntarily reached an agreement through mediation and that the Entry documented the terms of this agreement. Pursuant to the Entry, the parties were to "continue their Shared Parenting of the children as set forth in the Decree of Divorce filed on October 5, 2005." Therefore, we note that in 2009, Robin agreed, while represented by counsel, to continue under the terms of the 2005 Decree of Divorce, including the Shared Parenting Plan. She also agreed to follow the orders in the 2009 Judgment Entry, which included making arrangements regarding babysitting of the children, scheduling activities during appropriate times, and communicating with Daniel regarding their children. Robin never appealed from this 2009 Judgment Entry or disputed its terms.

{¶42} To allow Robin to now prevail on the merits of an appeal on the 2005 Judgment Entry would disregard the fact that it was superseded by the subsequent Entry of the court in 2009. *See Marshall v. Marshall*, 4th Dist. No. 06CA9, 2007-Ohio-3041, ¶ 8 (where multiple judgment entries were rendered, with subsequent entries modifying the terms of the original decree of dissolution, the trial court must consider all of the terms agreed to by the parties and must not give weight to aspects of original agreement that are superseded by the subsequent actions of the parties or entries of the court); *Patterson v. Patterson*, 2nd Dist. No. 2003-CA-60, 2004-Ohio-4368, ¶ 5 (a prior order of a trial court can be superseded by subsequent order).

{¶43} Robin asserts that the trial court erred in failing to determine the children's best interests in the 2005 dissolution proceedings. Pursuant to R.C. 3109.04(D)(1)(a)(i), the trial court shall not approve a shared parenting plan in dissolution proceedings "unless it determines that the plan is in the best interest of the

children." *See Spence*, 2010-Ohio 972, at ¶ 13-14. We agree that in 2005, the trial court did not discuss the children's best interests. However, as noted above, this Decree of Divorce was subsequently altered by the 2009 Entry. In that Entry, the trial court *did* consider the children's best interests, stating that the stipulated agreement between the parties pertaining to parental rights was "reasonable and fair and in the best interest of [the] parties' children," thereby curing any defect regarding this issue. Although the court did not make any specific findings on the best interest factors at that time, no such findings are required. *Hardesty v. Hardesty*, 11th Dist. Nos. 2004-G-2582 and 2005-G-2614, 2006-Ohio-5648, ¶ 19 (when parties submit a joint shared parenting agreement, no findings of fact to support a best interest determination are required); *Meyers v. Hendrich*, 11th Dist. No. 2009-P-0032, 2010-Ohio-4433, ¶ 45 (citations omitted). Therefore, Robin is precluded from raising an argument related to the 2005 agreement as to the children's best interests, as she has already had this issue considered by the trial court.

{¶44} Moreover, although Robin raises other errors in the Shared Parenting Plan, we again note that the trial court reviewed it in 2009 and the parties agreed to continue complying with the Shared Parenting Plan, as required by the Decree of Divorce. If Robin disputed the judgment of the trial court, she had ample opportunity to raise this in 2009. Also, regarding the issue of child support, we again emphasize that Robin filed a Motion to Modify, but subsequently dismissed this motion. She had the opportunity to be heard on this issue and instead agreed to continue under the terms of the 2005 Decree of Divorce and Parenting Plan. Therefore, as Robin agreed to terms of dissolution not only in the first proceeding in 2005, but also in 2009, we cannot find

merit in her argument that the 2005 Decree of Divorce must be reversed. *See Marshall* at ¶ 21 (appellant who sought relief from improper child support judgment could have sought a remedy for such a judgment on the basis that it was unlawful or sought to have the order declared void through a Civ.R. 60(B) motion).

{¶45} Finally, in an argument unrelated to the Parenting Plan, Robin asserts that the Separation Agreement should be vacated as it provides that the parties will file for dissolution in Summit County. Although the Separation Agreement does reference Summit County in one provision, it is clear that this was a typographical error. The Petition for Dissolution was filed in Portage County Court of Common Pleas, Domestic Relations Division, and the Judgment Entry Decree of Divorce granting the dissolution was issued by the same court. This error alone does not prevent the parties from determining their rights or affect any of their rights under the Agreement and does not merit vacating the Separation Agreement.

{¶46} The third, fifth, sixth, and seventh assignments of error are without merit.

{¶47} Based on the foregoing, the judgment of the Portage County Court of Common Pleas, Domestic Relations Division, granting Robin and Daniel's Petition for Dissolution, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J., concurs,

CYNTHIA WESTCOTT RICE, J., concurs in judgment only.