

[Cite as *Kniszek v. Kniszek*, 2009-Ohio-3249.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

PAMELA KNISZEK

PLAINTIFF-APPELLANT

VS.

RANDY KNISZEK

DEFENDANT-APPELLEE

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CASE NO. 08 JE 30

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common
Pleas of Jefferson County, Ohio
Case No. 07 DR 228

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

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For Defendant-Appellee:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 26, 2009

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WAITE, J.

{¶1} Appellant Pamela Kniszek appeals a child custody ruling as part of the divorce decree issued by the Jefferson County Court of Common Pleas. The court designated Appellee, Randy Kniszek, the residential parent of minor child A.K., (d.o.b. 8/21/2003), who was five years old at the time of the divorce. The parties began living together in 2003, and were married in 2006. Pamela filed for divorce a year later. Pamela had another minor child, B.P., from a previous relationship. B.P. was thirteen years old at the time of the divorce, and living with Pamela. The divorce case was heard before a magistrate, who found that B.P. presented a danger to A.K. The magistrate recommended that Randy be designated as the residential parent. Pamela filed objections to the magistrate's decision, which were overruled.

{¶2} Pamela argues on appeal that the trial court abused its discretion in finding that B.P. was a danger to A.K., and she contends that the court should have designated her as the residential parent. It is well-established that a trial court has broad discretion in making child custody determinations in a divorce. The record contains ample evidence of B.P.'s behavioral problems. B.P. was involved in numerous fights at home and at school, mistreated animals, and there was an allegation from Randy that B.P. sexually assaulted A.K. The County Sheriff was called to B.P.'s home five times because of unruly and violent incidents. Pamela herself reported to the sheriff's deputies that she was fearful of leaving B.P. alone with A.K. B.P. has been hospitalized due to his psychiatric and emotional problems. His outbursts included urinating on the floor of his home, stabbing himself with a pencil, pouring nail polish on a television, stealing money, hitting a dog in the head

with a shovel, spitting on furniture, threatening his grandmother, smearing feces on the toilet, and hitting A.K. with the back of his hand. Because the record fully supports the trial court's judgment, the judgment is affirmed.

Background of the Case

{¶3} The parties were married on July 3, 2006. They had been living together for approximately three years prior to their marriage. Pamela filed for divorce on August 2, 2007. The court granted temporary custody of A.K. to Pamela during the divorce proceedings. The final divorce hearing was held before a magistrate on November 9, 2007. Both parties were represented by counsel. The primary issue at the hearing was the determination of which party was to be the child's residential parent. Almost all the testimony at this hearing was related to B.P.'s behavior and whether he posed a danger to A.K. Twelve witnesses testified, including various relatives and friends of the parties, a minister, and two sheriff's deputies. The two parties themselves testified, as well as B.P.

{¶4} At the end of the hearing the magistrate ordered that a psychological evaluation be done of B.P. The court received the evaluation on January 21, 2008. On February 29, 2008, the court ordered another psychological evaluation to supplement the record. The second report was filed on August 4, 2008.

{¶5} The magistrate filed her decision on August 8, 2008. The magistrate found that both parents desired to be designated as A.K.'s residential parent. The magistrate found that A.K. interacted well with both parents. The magistrate found that the parties and their extended families, excluding B.P., were in good mental and

physical health. The magistrate found no problems with either party regarding the likelihood of facilitating visitation or complying with child support orders. The magistrate found no history of charges of abuse or neglect. The magistrate's sole concern appeared to revolve around A.K.'s interaction with B.P. if Pamela were named as the residential parent. The magistrate noted that B.P. had exhibited behavioral problems since age six, had been involved in fights with other children, and was hospitalized for his behavioral problems. He had acted out at home by pouring nail polish on a television, stealing money from his mother, hitting a dog on the head with a shovel, smearing feces on the toilet, and raising his fist to his grandmother. The magistrate found that the sheriff's department was called to the residence five times due to B.P.'s behavior problems. The magistrate found no evidence that B.P.'s behavioral problems were attributable to his relationship with Randy, his stepfather.

{¶16} The magistrate recommended that Appellee, Randy Kniszek, be designated as the residential parent. Pamela filed objections to the magistrate's decision on August 20, 2008. A hearing was scheduled for September 15, 2008, but did not take place. On September 18, 2008, Pamela filed what was styled as a, "motion for reconsideration due to newly discovered evidence and change of circumstance." Pamela sought to prove to the court that B.P. had been placed in a permanent care facility to deal with his psychological problems. The court held a hearing on the motion and on the objections on September 22, 2008. At the hearing, Pamela testified that she had no idea how long B.P. would be kept in the hospital,

and she did not have any specific plan for his care if he were to be released. The court overruled Pamela's motion for reconsideration, and on October 14, 2008, overruled the objections to the magistrate's decision and issued the divorce decree. The court designated Randy as the residential parent of A.K. This appeal followed on October 22, 2008.

ASSIGNMENTS OF ERROR NOS. ONE AND TWO

{¶7} "THE DECISION OF THE TRIAL COURT TO DESIGNATE APPELLANT RANDY KNISZEK RANDY KNISZEK [sic] AS RESIDENTIAL PARENT OF THE PARTIES' MINOR CHILD WAS AN ABUSE OF DISCRETION."

{¶8} "THE DECISION OF THE TRIAL COURT DESIGNATING THE APPELLANT RANDY KNISZEK RANDY KNISZEK [sic] AS THE RESIDENTIAL PARENT AND LEGAL CUSTODIAN OF THE MINOR CHILD WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶9} These two assignments of error are essentially the same. Pamela contends that the evidence at trial did not support the court's decision to award custody of A.K. to Randy, the father. Pamela accepts that the standard of review in these cases is abuse of discretion, but she believes the evidence does not support the trial court's decision and concludes that an abuse of discretion occurred in this case. Appellant relies primarily on the fact that there were two psychological evaluations done in this matter, and that neither of them revealed that B.P. posed any specific danger to A.K.

{¶10} A trial court is vested with broad discretion in allocating parental rights and responsibilities in a divorce case. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846. An abuse of discretion connotes an attitude that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court. *Bechtol v. Bechtol* (1991), 49 Ohio St.3d 21, 23, 550 N.E.2d 178.

{¶11} “The discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record. In this regard, the reviewing court in such proceedings should be guided by the presumption that the trial court's findings were indeed correct.” (Citations omitted.) *Miller*, supra, 37 Ohio St.3d at 74, 523 N.E.2d 846.

{¶12} R.C. 3109.04(A) requires a trial court to allocate parental rights and responsibilities in a divorce. The court makes its determination based on the best interests of the child, using the factors found in R.C. 3109.04(F) or any other factors that the court finds relevant. R.C. 3109.04(F)(1)(c) directs the court to consider, “[t]he child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest”. R.C.

3109.04(F)(1)(e) directs the court to consider, “[t]he mental and physical health of all persons involved in the situation”. The results of any psychological tests or evaluations submitted as evidence are not determinative in the allocation of parental rights and responsibilities. Rather, they constitute only one factor that the court may consider. *Puls v. Puls*, 2nd Dist. No. 20487, 2005-Ohio-1373, ¶21-23.

{¶13} In determining the child's best interests, the court is required to consider all relevant factors, including the child's wishes; the child's relationship with his or her parents, siblings, and any other person who may significantly affect the child's best interests; and the child's adjustment to his or her home, school, and community. There is no presumption that either the mother or the father should become the residential parent. The parents stand on equal footing regarding the final allocation of parental rights and responsibilities. R.C. 3109.03; *Bechtol*, supra, 40 Ohio St.3d at 24, 550 N.E.2d 178.

{¶14} Pamela contends that the trial court ordered a psychological evaluation of B.P. but was not satisfied with the results and ordered another evaluation. She submits that the results of the second evaluation were the same as the first, namely, that B.P. did not pose a danger to A.K. Pamela questions why the court rejected the results of the two evaluations. In so doing, she appears to be under the impression that the only relevant and material evidence in this case came from the psychological evaluations. Most of the other evidence in this case, including Pamela's own testimony, indicated that B.P. has had severe behavioral and emotional problems. The psychological evaluations do contain comments indicating that B.P. did not

necessarily pose a current threat to A.K., but those comments were made after describing in detail the many behavioral problems B.P. has exhibited since he was six years old.

{¶15} Regardless of the results of the psychological evaluations, they constitute only one factor in the court's determination. A trial court may choose to disregard a psychologist's report and make its decision based on other evidence. *Frost v. Frost* (1992), 84 Ohio App.3d 699, 709, 618 N.E.2d 198.

{¶16} The entire body of the evidence, including the psychological evaluations, indicates that B.P. has a range of psychological, emotional and behavioral problems. He has exhibited violent behavior toward friends, family members and animals. Some examples of B.P.'s problem behaviors include urinating on the floor; inappropriate spitting, licking and touching; smearing feces on a toilet; stealing money; and pouring nail polish on a television.

{¶17} The record indicates that both parties used corporal punishment on B.P., as well as other types of punishment for his behavior problems. B.P. himself testified that he engaged in his problem behaviors because Randy treated him harshly. Specific examples of such treatment, according to B.P., were that Randy told him to pull weeds; that Randy would not permit him on occasion to take a drink until he was done eating; that Randy would not allow him to eat all of his Halloween candy; and that Randy required him to repeatedly write, "I will start behaving and listening to my parents." (Tr., p. 153ff.) B.P. also stated that he was angry because Randy was "back talking at me" and "pounding me". (Tr., p. 153.) B.P.

acknowledged that he hurt his dogs and that he urinated in the house for revenge.

B.P. also acknowledged that he hit A.K. on different occasions:

{¶18} “Q You’ve hit her before, haven’t you?

{¶19} “A Only when she takes my stuff.

{¶20} “Q When she makes you mad you hit her, right?

{¶21} “A Yes, sir.” (Tr., p. 166.)

{¶22} The record contains example after example of B.P. engaging in some type of violent or disruptive behavior. Targets included not only Randy, but Pamela, B.P.’s grandmother, his schoolmates, his pets, and A.K.

{¶23} The record contains ample evidence supporting the trial court’s decision to designate Randy as the residential parent. Even if the evidence regarding B.P. could be interpreted as ambivalent, the court must always make a custody determination. The evidence in the record (absent any consideration of B.P.’s problems) would support giving custody to either parent. The record reflects that the magistrate considered many factors other than B.P.’s behavior in making her decision to award custody to Randy. The magistrate examined the interaction of the child with each parent, the interaction of the child with other family members, the mental and physical health of the parties, the likelihood each party would be willing to facilitate visitation, the record of child support payments, the fact that neither party had a criminal record with regard to abuse or neglect of children, as well as other factors. This record could support the trial court’s decision regardless of which parent was designated as the residential parent. Thus, there is no abuse of

discretion in the trial court's choice. The court was required to pick one parent over the other and there was no abuse of discretion in the trial court's decision to designate Randy. Appellant's first two assignments of error are overruled.

ASSIGNMENT OF ERROR NO. 3

{¶24} "THE TRIAL COURT ERRED BY OVERRULING THE MOTION TO RECONSIDER NEWLY DISCOVERED EVIDENCE AS IT DIRECTLY RELATED TO THE MAGISTRATE'S DECISION WHEN ALLOCATING PARENTAL RIGHTS AND RESPONSIBILITIES."

{¶25} Pamela argues that she filed a motion on September 18, 2008, for the court to consider new evidence with respect to B.P. The court had not yet ruled on her objections to the magistrate's decision and had not yet issued the divorce decree when she filed this motion. Pamela contends that a magistrate's decision is an interlocutory order that may be reconsidered at any time by the trial court until the court enters judgment on the decision. She argues that the extreme length of time between the divorce hearing (November 9, 2007) and the hearing on the objections (September 22, 2008) should have warranted a new evidentiary hearing, particularly with respect to B.P. The purpose of the motion for reconsideration was to prove to the court that B.P. had been placed in a permanent hospital setting and that B.P. should no longer be a factor in the court's analysis regarding custody of A.K.

{¶26} Magistrate's decisions are generally interlocutory in nature, and may be reconsidered upon the court's own motion or that of a party. *Robinson v. Ohio BMV*, 8th Dist. No. 88172, 2007-Ohio-1162, ¶5, citing *Pitts v. Dept. of Transp.* (1981), 67

Ohio St.2d 378, 423 N.E.2d 1105. A court also has the discretionary power to take new evidence after a matter has already been referred to a magistrate, whether or not objections have been filed to the magistrate's decision. Civ.R. 53(D)(4)(b). The trial court's standard of review of a magistrate's decision is de novo. *Shihab & Assoc. Co., L.P.A. v. Ohio Dept. of Transp.*, 168 Ohio App.3d 405, 2006-Ohio-4456, 860 N.E.2d 155, ¶13. An appellate court reviews a trial court's ruling on a magistrate's decision only for abuse of discretion. *Briarwood v. Bratanov*, 9th Dist. No. 23318, 2007-Ohio-2476, ¶9.

{¶27} The record indicates that the court allowed Pamela to present new evidence at the September 22, 2008 hearing. Pamela testified that B.P. was hospitalized, but she did not know for how long or what would happen to him if he were released. Oddly, the new evidence that she presented tended to undermine her evidence from the November 7, 2007, hearing, in which she attempted to prove that B.P. did not have any significant behavioral or psychological problems and that his behavior only deteriorated when he was in the presence of Randy. The court allowed Pamela to present new evidence regarding B.P., however, she did not prove what she had alleged in her motion, namely, that B.P. was permanently institutionalized and would never return to her household. The trial court did not abuse its discretion in overruling Pamela's motion for reconsideration. The court allowed a limited reopening of the case for new evidence, and then proceeded to rule on the objections to the magistrate's decision. It was clear from Pamela's testimony

at the objections hearing that she had no further evidence to offer. Pamela's third assignment of error is overruled.

{¶28} In conclusion, the record of this case supports the trial court's decision to designate Appellee, Randy Kniszek, as the residential parent of A.K. When examining the parents, alone, the court was faced with fairly equal evidence regarding which should be designated as the residential parent. The court also examined the extensive evidence regarding whether Pamela's other child, B.P., would pose a danger to A.K. There were many indications that B.P. could pose a danger or at least present a disruptive influence in A.K.'s life. There is no basis for finding an abuse of discretion from the record before us.

{¶29} Pamela's argument regarding her motion for reconsideration is also baseless. The trial court allowed her to present new evidence regarding B.P., but the evidence revealed only that B.P. had been hospitalized again for his psychological problems. There was no indication as to how long B.P. would be hospitalized or what would happen to him when he was released. The trial court was not required to conduct any further evidentiary hearings, and did not abuse its discretion in proceeding to rule on Pamela's objections to the magistrate's decision. All three of her assignments of error are overruled and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.