

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:) CASE NO. 13 CO 50
K.E.C.)

MEGAN LABUDA,)

APPELLANT,)

VS.)

ERICK COLLINS,)

APPELLEE.)

OPINION

CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court,
Juvenile Division
Case No. C2010-0452

JUDGMENT: Affirmed.

APPEARANCES:

For Appellant: Attorney Charles Payne
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For Appellee: Attorney Kelly Linger
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JUDGES:

Hon. Mary DeGenaro
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: June 12, 2015

DeGENARO, J.

{¶1} This appeal filed by Appellant-Mother, Megan Labuda, challenges the Columbiana County Juvenile Court's decision terminating the parties' shared parenting plan and awarding custody of the minor child, K.E.C., to Appellee-Father Erick Collins. Because Mother's assignments of error are meritless, this matter is affirmed.

Facts and Procedural History

{¶2} K.E.C. was born on January 15, 2009. The parties entered into a shared parenting plan filed with the court in August of 2010. Pursuant to said plan, Mother was named the primary residential parent and Father was given "liberal visitation" with K.E.C., but not less than the local visitation rules.

{¶3} On January 29, 2013, Father filed a motion to terminate the shared parenting plan, terminate his child support order, and award him custody of K.E.C. Father alleged that a substantial change of circumstances had occurred and the change of custody was in the child's best interests.

{¶4} A pre-trial was held on March 19, 2013, wherein both parents requested a guardian ad litem. The Guardian filed reports on June 11, 2013, and September 30, 2013. In the June report the Guardian indicated that she needed more time to form an opinion regarding custody pending further interactions between the child and the counselor. The Guardian did not make any recommendation as to custody in the September report leaving it up to the juvenile court judge after hearing the evidence presented.

{¶5} On October 8, 2013, Father's motion to terminate the shared parenting plan was heard. Mother, paternal grandmother's neighbor, paternal grandmother, Father, Guardian, and Mother's new husband testified. On November 8, 2013, the juvenile court terminated the shared parenting plan and placed K.E.C. into the legal custody of Father. Mother was granted visitation with the minor child.

Termination of Shared Parenting

{¶6} In her first of two assignments of error, Mother asserts:

{¶7} "The trial court abused his discretion when he terminated the shared parenting plan and order because his conclusions were based on erroneous factual determinations and on matters not is (sic) evidence."

{¶8} An appellate court reviews a trial court's decision to terminate a shared parenting plan under an abuse of discretion standard. See *Masters v. Masters*, 69 Ohio St.3d 83, 85, 1994-Ohio-483, 630 N.E.2d 665. "The term 'abuse of discretion' means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *In re S.S.L.S.*, 7th Dist. No. 12 CO 8, 2013–Ohio–3026, ¶ 22.

{¶9} R.C. 3109.04(E)(2)(c) governs termination of a shared parenting plan:

The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interests of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children.

{¶10} As the juvenile court explicitly stated that it terminated the parties' prior shared parenting plan, it was not required to find a change in circumstances; the statute merely requires that the moving party prove that terminating the plan is in the child's best interests. *Kougher v. Kougher*, 194 Ohio App.3d 703, 2011-Ohio-3411, 957 N.E.2d 835, ¶ 18 (7th Dist.).

{¶11} Mother argues that the juvenile court's findings of fact were unsupported by the evidence and wrongly decided; as such, the juvenile court abused its discretion in terminating shared parenting plan. Specifically Mother asserts the following three findings were erroneous: 1) that K.E.C. lived for the greater period

of time with the paternal grandmother and Father since the establishment of the shared parenting plan; 2) that Father has shown more stability; and 3) that Mother has not been diligent regarding K.E.C's healthcare.

Residency

{¶12} The court made the following finding regarding K.E.C.'s residency:

"Since the Court's approval of the Shared Parenting Plan of August 2010, the minor child has lived for a greater period of time in the custody and care of the paternal grandmother and the child's father as opposed to being in the primary care of Mrs. Labuda."

{¶13} Mother contends that K.E.C. has actually lived with her for a majority of her life, as opposed to the paternal grandmother and Father. As such, Mother argues that this error "colored the trial court's subsequent findings" that her life was not stable. However, Mother's argument is in direct contravention to the testimony she gave at trial. Father's attorney elicited the following testimony from Mother as if under cross-examination:

FATHER'S ATTORNEY: Okay. Now speaking in terms of K.E.C. has she always resided with you?

MOTHER: No.

FATHER'S ATTORNEY: Okay.

MOTHER: For the most part she didn't. She did stay with her grandmother from August of 2011 until March of 2012. I'm sorry it was 2010, from August of 2010.

{¶14} By her own testimony Mother concedes that K.E.C. did not live with her "for the most part."

{¶15} Even assuming that Mother was confused when answering this question, paternal grandmother testified that despite a parenting arrangement, in reality K.E.C. spent more time with her than Mother. K.E.C. was born January 15, 2009 and lived with both parents until they separated when she was 15 months old. Thereafter, the

parties entered into a shared parenting plan which was adopted by the juvenile court where Mother was named the primary residential parent and Father received visitation. About the same time, in the summer of 2010, Mother experienced economic difficulties and K.E.C. lived with paternal grandmother from mid-2010 until March 2011 when Mother was able to regain stability.

{¶16} When Mother obtained her own residence and vehicle in March of 2011,

K.E.C. returned to living with Mother until October of 2012. Significantly, paternal grandmother testified that although K.E.C. lived with Mother during this period, K.E.C. was with her "a lot more" than with Mother. In October of 2012 K.E.C. moved in with Father until January 2013. In January of 2013 until the change of custody by the juvenile court in November of 2013, K.E.C. resided with Mother.

{¶17} The juvenile court weighed the testimony and credibility of the witnesses

in making its determination that the child had lived for a greater period of time with paternal grandmother and Father. Pursuant to Mother's stipulation and the testimony adduced at trial, this finding is supported by the evidence presented. Accordingly, this subpart of Mother's assignment of error is meritless.

Parental Stability

{¶18} The court made the following finding regarding stability:

"Mr. Collins has clearly demonstrated a greater degree of stability and security and an atmosphere more conducive to the child having a reasonable daily schedule. Mrs. Labuda's history indicates ongoing instability. While she is currently married and employed, the Court finds that these circumstances have not existed for a substantial enough period for the Court to be satisfied that the current stability of Mrs. Labuda will continue."

{¶19} Mother argues that the trial court's determination that Father's life was more stable was erroneous and unsupported by the evidence. She seemingly argues that it was error for the juvenile court to examine her life so closely and to not

do the same for Father. She argues that there is much that "we do not know" about Father, such as where he worked, where he lived, or with whom he lived.

{¶20} Father testified that he currently lives in East Liverpool, Ohio, having returned in June 2012; previously he lived in Kentucky for two years for his job at Comcast. He is currently employed as a field supervisor for Trialwire Engineering, a contractor for Comcast. He works six days a week usually from 6:30 a.m. to 5 p.m. He is married to Terri Collins who does not work and has three children. The family lives in a five bedroom home where each one of the girls has her own room. Terri has full custody of her children and receives child support for them. Terri is on disability due to nerve damage in her lower extremities but this does not affect her ability to care for the children, and she is available for provide child care for K.E.C., if needed.

{¶21} Regarding Mother, the juvenile court found her life to be unstable; having had several residences since the prior order and often not having the minor child in her care. The determination that K.E.C. was with paternal grandmother and Father more than Mother, was supported by the trial testimony as detailed above. Mother admitted that she had lived in multiple places since the prior order. Further, Mother's work schedule necessitates that the minor child is awake at 3:30 a.m. daily and taken to a babysitter that Mother found on Craigslist.

{¶22} The juvenile court weighed the testimony and credibility of the witnesses in making its determination that Father's life was more stable than Mother's. If counsel had issues with a lack of testimony presented, deficiencies in evidence, or concerns that Father's new wife did not testify, then the correct time to remedy these situations was at trial. A party waives the right to appeal an issue that was not raised at the appropriate time. *Little Forest Med. Ctr. of Akron v. Ohio Civ. Rights Comm.*, 91 Ohio App.3d 76, 80, 631 N.E.2d 1068 (9th Dist.1993). Accordingly, this subpart of Mother's assignment of error is meritless.

Medical Care

{¶23} The court concluded that Mother's response to K.E.C.'s medical issues (specifically flea bites and lice infestation) was inadequate. Mother argues that the

evidence does not support this conclusion and the only testimony about a "lice problem" came from Father and paternal grandmother. In contrast, Mother argued at trial and on appeal that she did not see any lice on K.E.C.

{¶24} Mother's argument is undercut by the fact that she testified that she treated K.E.C. multiple times for lice; she treated K.E.C. the "first couple of times" with "medicine from the store" but later did research on the internet and found that Dawn dish soap and baby oil were an alternative treatment, though not prescribed by a physician. Further, Mother used "preventative methods" such as tea tree oil which she testified keeps "any type of bugs away." Mother's truthfulness regarding this subject is also called into question by the Guardian's report that stated after the third lice infestation, Mother suggested that the lice may have come from a bike helmet that she recently purchased for K.E.C.

{¶25} Paternal grandmother testified that K.E.C. had lice at least nine times in the last two years. Father testified that K.E.C. had lice on several occasions which he treated with Rid as advised by Dr. Varkey. The Guardian cited three different lice infestations in her report.

{¶26} Regarding fleas, Father additionally stated that K.E.C. was "covered in flea bites" and as he had no pets it would have had to come from Mother's house. Mother acknowledged her home had a flea problem prompting her to "bomb" the house twice with nine different bombs followed by saturating her house with salt to dry up any residual fleas and eggs that were on the ground.

{¶27} Regarding wellness checks, Mother testified that she takes the child to yearly wellness checks but missed one in 2011 when everything was "kind of in shambles." Paternal grandmother testified that she receives the cards for wellness checkups and she has to let Mother know. She discovered that K.E.C. had not been to a wellness check for almost two years. The Guardian noted that she reviewed K.E.C.'s medical records and Mother was "negligent concerning medical issues."

{¶28} Mother's testimony, in conjunction with that of Father, paternal grandmother, and Guardian, support the notion that Mother was less than diligent in getting medical treatment for K.E.C, exemplified by K.E.C.'s repetitive bouts with fleas and lice. Accordingly, this subpart of Mother's assignment of error is meritless.

{¶29} Mother closes the first assignment of error by arguing that the juvenile court was biased against her, and not Father, for entering into a shared parenting plan when she had no intent or ability to follow the plan, as she soon after gave K.E.C. to paternal grandmother for an extended period of time. Mother argues that this "evident bias further led the trial court to abuse his discretion." The juvenile court found that the very premise of shared parenting as presented to the court was a misrepresentation of circumstances. However, the court cited both Mother and Father's actions as the basis of that finding. As such, it cannot be said that the juvenile court was biased only towards her, nor is there any evidence in the record to support this notion.

{¶30} The findings regarding K.E.C.'s residency, the parties' stability, and deficiencies in her medical care are supported by the evidence presented. The juvenile court did not abuse its discretion when it made these findings and terminated the shared parenting plan. Mother's first assignment of error is meritless and is overruled.

R.C. 3109.04(F)(1)

{¶31} In her second of two assignments of error, Mother asserts:

{¶32} "The Trial Court abused his decision (sic) when he failed to properly apply the factors RC 3109.04(F)(1) when he designated the Appellee primary residential parent."

{¶33} When terminating a shared parenting plan under R.C. 3109.04(E)(2)(c), the trial court must consider the best interests of the child. This Court stated in *Schmidt v. Schmidt*, 7th Dist. No 11 MO 6, 2012-Ohio-5252, ¶ 24:

When allocating parental rights and responsibilities in an original decree or in any proceeding for modification, the court shall consider the child's best interests. R.C. 3109.04(B)(1). To determine best interests, the court shall consider all relevant factors including: (a) the parents' wishes; (b) the child's wishes if the court has interviewed the child; (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 interests; (d) the child's adjustment to home, school, and community; (e) the mental and physical health of all relevant persons; (f) the parent more likely to honor and facilitate court-approved parenting time rights or companionship rights; (g) whether either parent has failed to make all child support payments pursuant to a child support order; (h) whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to certain criminal offenses involving children; (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 a court order; and (j) whether either parent has established a residence, or is planning to establish a residence, outside of Ohio. R.C. 3109.04(F)(1)(a)-(j). The allocation of parental rights and responsibilities deals with the designation of the residential parent and legal custodian to one parent or to both (as in many shared parenting decrees). *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007–Ohio–5589, 876 N.E.2d 542 [sic], ¶ 23–25.

{¶34} Although the trial court must consider all relevant factors, there is no requirement that the trial court set out an analysis for each of the factors in its judgment entry, so long as the judgment entry is supported by some competent, credible evidence. *Brammer v. Meachem*, 3d Dist. No. 9-10-43, 2011-Ohio-519, ¶ 30 (internal citations omitted). "[A]bsent evidence to the contrary, an appellate court will presume the trial court considered all of the relevant 'best interest' factors listed in R.C. 3109.04(F)(1)." *Id.* at ¶ 32, citing *Goodman v. Goodman*, 3d Dist. No. 9–04–37, 2005–Ohio–1091, ¶ 18.

Interaction and Relationship

{¶35} Mother specifically contends the juvenile court erred regarding four of the R.C. 3109.04(F)(1) factors. First, she argues that the juvenile court did not consider any testimony about the interrelationship between Father's new wife and her children with K.E.C. However, Father's wife was referenced at multiple places in the

record. Two of Father's stepchildren were referenced in paternal grandmother's testimony. Further, Father acknowledged that his wife did not work, is on disability, has full custody of her three children for which she receives child support, and she would watch K.E.C. as needed. He stated that each one of the girls has her own bedroom. The Guardian testified that she interacted with Father's wife and had no concerns and saw no negative impact between her and K.E.C.

{¶36} While the juvenile court did not make an explicit finding pursuant to this section within the judgment entry, it cannot be said that the court failed to consider KEC's relationships and interactions with Father's wife and her children.

Child's Adjustment

{¶37} Mother makes a two-sentence argument that the evidence concerning K.E.C.'s adjustment to home, school and community favored naming her as the residential parent. She argues that the juvenile court ignored the fact that K.E.C. was "integrated into Mother's home and community for the past two years."

{¶38} The child was four years old at the time of the hearing and not enrolled in primary school or extra curricular activities. As such, a consideration of school and community factors are not at issue. Regarding K.E.C.'s home life, the juvenile court stated that K.E.C. has lived with Mother since January of 2013 and has a brother and sister at home. Although Mother disagrees with the outcome, the court clearly was aware of the duration K.E.C. had lived with Mother and her siblings.

Physical and Mental Health

{¶39} Mother argues that "[t]he court had no evidence to find that the mental and physical health of Appellee's household was better than Appellant's." The juvenile court did not make this finding. As such, this argument will not be addressed.

Companionship

{¶40} Again Mother makes a two sentence argument that though there was "evidence of some typical companionship issues" the juvenile court did not make a determination that one party would be less likely to follow a companionship requirement.

{¶41} The evidence demonstrated that there were no issues with Mother or Father honoring companionship time. As such there was no need to make that finding. Though the court did not specifically list anything regarding this factor, there is no requirement that the court expressly and separately address each best-interest factor. *Wise v. Wise*, 2nd Dist. No. 23424, 2010-Ohio-1116, ¶ 5 (internal citations omitted). As such, Mother's argument regarding companionship is meritless.

Conclusion

{¶42} The juvenile court weighed the testimony and credibility of the witnesses in this matter. The court's findings were supported by competent, credible evidence. As such it was not an abuse of discretion to find it was in the best interests of K.E.C. to terminate the shared parenting plan and name Father the primary residential parent. Accordingly, Mother's two assignments of error are meritless and this matter is affirmed.

Waite, J., concurs.

Robb, J., concurs.