

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

MELISSA R. RAINEY,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-10-083
- vs -	:	<u>OPINION</u>
	:	8/29/2011
A. MATT RAINEY,	:	
Defendant-Appellee.	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 2009-DRA-00076

Donald W. White, 237 Main Street, Batavia, Ohio 45103, for plaintiff-appellant

John D. Smith, Mark D. Webb, 140 N. Main Street, Suite B, Springboro, Ohio 45066, for defendant-appellee

HENDRICKSON, P.J.

{¶1} Plaintiff-appellant, Melissa R. Rainey, appeals a decision of the Clermont County Court of Common Pleas, Domestic Relations Division, regarding matters related to parenting time, child support, and dependency tax exemptions following her divorce from defendant-appellee, A. Matt Rainey. For the following reasons we affirm in part, reverse in part, and remand.

{¶2} The parties were married in 2000. The marriage produced one child, daughter Emma, born in March of 2006. In January 2009 Melissa filed a complaint for divorce. The court entered a temporary order allocating shared parenting time between the parties on a three-week rotating basis. The parenting schedule correlated with Melissa's work schedule as a registered nurse. Under the schedule, Emma spent approximately ten days with Matt and 11 days with Melissa during the three-week period.

{¶3} The allocation of parental rights and responsibilities was a significant point of contention between the parties during the pendency of the proceedings. Melissa requested to be designated residential parent and legal custodian of Emma, while Matt requested shared parenting. The court ordered a parenting investigation and a psychological evaluation to be completed to assist in its custody determination. The court appointed Maggie Mills to complete the parenting investigation and Dr. Charles H. Handel, a clinical psychologist, to perform a psychological examination of the parties.

{¶4} Both Mills and Dr. Handel prepared written reports regarding their respective evaluations which were introduced into evidence at the final divorce hearing on June 29, 2010. In addition to his written report, Dr. Handel also testified at the hearing. Based upon Mills' investigation, which included interviews with Matt and Melissa, she recommended that the parties share in the parenting of Emma, with Melissa designated as residential parent for school purposes only. Mills stated that she believed that the parties possessed the ability to communicate with one another about child issues in an "overall civil and cooperative manner." In his written report, Dr. Handel expressed concern with regard to whether the parties could co-parent effectively. He noted that Melissa had been the primary caretaker of Emma during the parties' marriage and was more aware of her overall needs. He stated that "[i]f the parents cannot come to [an] agreed shared parenting agreement, it would be in the child's best interest to have mother remain residential parent and operate as the primary

custodian of Emma."

{¶15} The court entered its decision on the matter on August 2, 2010. Based on the evidence and testimony presented, and in accordance with Mills' recommendation, the trial court ordered shared parenting pursuant to a three-week rotating schedule and designated Melissa as residential parent for school purposes. The court noted that although Dr. Handel's written report indicated that the parties appeared to be unable to co-parent, the court found that at the hearing Handel had "testified that shared parenting is best for the child and that he believed the parties could make it work." The court also determined that Melissa and Matt possessed the ability to communicate with each other with regard to their daughter's needs in a civil and cooperative manner. Of significance to the court was the fact that the parties had generally complied with the terms of the temporary order allocating parental rights and responsibilities.

{¶16} The court calculated child support in accordance with the guidelines twice, once using Matt as the residential parent and once using Melissa as the residential parent. When Matt was listed as the residential parent, Melissa's child support obligation was calculated as \$7,548.63. When Melissa was listed as the residential parent, Matt's child support obligation was calculated as \$3,107.98. The court deviated from the guideline calculation by reducing Matt's obligation to zero. Melissa was ordered to pay the full \$7,548.63, which created a monthly support obligation of \$641.63.

{¶17} The trial court's decision was incorporated into a final decree of divorce entered on October 7, 2010.

{¶18} Melissa appeals the trial court's August 2, 2010 decision, raising three assignments of error for our review.

{¶19} Assignment of Error No. 1:

{¶10} "AFTER ORDERING A PSYCHOLOGICAL EVALUATION AND RECEIVING A

RECOMMENDATION AGAINST SHARED PARENTING, IT IS AN ABUSE OF DISCRETION FOR THE COURT TO ORDER SHARED PARENTING CONTRARY TO THE BEST INTEREST OF THE CHILD."

{¶11} In her first assignment of error, Melissa argues that the trial court abused its discretion in ordering shared parenting.¹

{¶12} R.C. 3109.04 governs the award of parental rights and responsibilities. In making this determination, the trial court's primary concern is the best interest of the child. *Bristow v. Bristow*, Butler App. No. CA2009-05-139, 2010-Ohio-3469, ¶8, citing *Gamble v. Gamble*, Butler App. No. CA2006-10-265, 2008-Ohio-1015, ¶25. The trial court must consider all relevant factors related to the child's best interest, including but not limited to those specified in R.C. 3109.04(F)(1). *Bristow* at id.

{¶13} With regard to shared parenting, R.C. 3109.04(F)(2) provides, "[i]n determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors, including, but not limited to, the factors enumerated in division (F)(1) of this section, the factors enumerated in section 3119.23 of the Revised Code, and all of the following factors: (a) [t]he ability of the parents to cooperate and make decisions jointly, with respect to the children; (b) [t]he ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent; (c) [a]ny history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent; (d) [t]he geographic proximity of the parents to each other, as the proximity relates to

1. We note that Matt initially claims that Melissa has waived the right to challenge the court's shared parenting order on appeal. He argues that the parenting time schedule set forth in the court's decision was amended in the subsequent decree pursuant to an alleged "agreement" between the parties. Melissa counters that the modification of the schedule was clerical in nature and did not change the substance of the plan. Contrary to Matt's assertion, there is no evidence in the record to suggest that Melissa agreed to waive an appeal of the court's shared parenting award. The issues raised in her first assignment of error are therefore properly before this court.

the practical considerations of shared parenting; [and] (e) [t]he recommendation of the guardian ad litem of the child, if the child has a guardian ad litem."

{¶14} "Shared parenting is the product of efforts to avoid the pain of loss inherent in the sole custody alternative, for both the parents and their child. It purports to continue, as nearly as possible, the joint parent and child relationships which exist in a marriage. Successful shared parenting requires at least two things. One is a strong commitment to cooperate. The other is a capacity to engage in the cooperation required." *Kauza v. Kauza*, Clermont App. No. CA2008-02-014, 2008-Ohio-5668, ¶27, quoting *Meyer v. Anderson*, Miami App. No. 01 CA53, 2002-Ohio-2782, ¶25 (internal quotations omitted).

{¶15} An appellate court will not disturb a trial court's decision with regard to the allocation of parental rights and responsibilities absent an abuse of discretion. *Bristow*, 2010-Ohio-3469 at ¶9. A trial court abuses its discretion if its decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶16} Initially, Melissa contends that Dr. Handel's psychological evaluation and testimony at the hearing demonstrated that shared parenting was not in Emma's best interest. She claims that the trial court's conclusion that Handel "believed the parties could make [shared parenting] work" was contrary to the evidence in light of his opinion that the parties were incapable of co-parenting. We are not persuaded by Melissa's characterization of the evidence and Dr. Handel's testimony.

{¶17} Dr. Handel relied on multiple sources of data in his evaluation, which included the administration of several psychological tests, two clinical interview sessions with each party, and two counseling sessions with the child. Dr. Handel testified that in conducting his evaluation of the parties, he observed that Melissa and Matt had "different personalities" and harbored animosity towards each other. He expressed concern as to whether they could co-parent. As Melissa points out on appeal, Dr. Handel noted in his report that the parties did

not appear to be able to co-parent effectively "at this point in their relationship." At the hearing, he testified that it would "be very difficult for them to be able to come together. But still if they could that would be the best thing [sic]."

{¶18} Dr. Handel also testified that the parties appeared to have a very loving, caring relationship with their daughter, and that she had a healthy bond with both of them. He noted that while Melissa had a more "structured" relationship and schedule with Emma, Matt was more spontaneous with her. With regard to the parties' work schedules, Dr. Handel noted that Melissa worked three 12-hour shifts each week, and that if Matt had flexibility with regard to his work schedule, he hoped that they could "take these two schedules and come up with some parenting plan that would allow frequent access to both sets of parents." He testified that he believed the court could prepare a plan which would balance parenting time between the parties and afford each of them quality time with their daughter.

{¶19} Although Melissa argues that there was no evidence to support the court's conclusion that Dr. Handel believed that the parties could make shared parenting work, we find his above-testimony demonstrates otherwise. There was also evidence before the court that the parties were able to comply with the terms of the temporary order allocating shared parenting responsibilities. In addition, Maggie Mills' recommendation that the parties share in the parenting of their daughter sufficiently supported the trial court's decision in this regard.

{¶20} Melissa also challenges the court's shared parenting award in light of "[Matt's] history or potential for child abuse," and his alleged disregard of the court's order prohibiting Emma from having contact with his brother, an Ohio Tier II registered sex offender.

{¶21} However, contrary to Melissa's assertion that Matt has a history of or a potential for child abuse, there is competent and credible evidence indicating that Melissa's claim is nothing more than unsubstantiated allegations. At the hearing, Melissa presented the testimony of Linda Clemens, a licensed professional clinical counselor and social worker,

who had met with Emma on several occasions. Clemens testified that she counseled Emma on separation and anxiety issues she was experiencing as a result of her transitions between the parties' households. The parties do not dispute that Melissa did not initially inform Matt that Emma was attending counseling sessions with Clemens.

{¶22} According to Clemens, during one session, Emma stated that she had a "tender butt," and that she was "sore both front and back and that she was touched by her father." Clemens testified that she contacted children's protective services and also spoke with Maggie Mills and Dr. Handel. Mills did not refer to the alleged incident in her written report. In his report, Dr. Handel noted that the abuse allegations were "vague and unsubstantiated" and at that time, were beyond the scope of his evaluation. There was also no evidence before the court of any action taken on the part of children's protective services.

{¶23} Melissa also claims that shared parenting was inappropriate because Matt permitted their daughter to have contact with his brother. The parties do not dispute that Matt's brother, Derrick, is a registered sex offender. According to the record, he was convicted of engaging in gross sexual imposition with a 13-year-old girl and was sentenced to several years in prison. In its February 2009, the trial court ordered Matt to ensure that Emma have no contact of any kind with Derrick.

{¶24} Melissa testified at the hearing that on one occasion in March of 2009 she took Emma to Matt's house to celebrate her birthday. As Melissa was leaving, she observed Derrick arriving at the house. Melissa testified that when she asked Matt about why Derrick was present, he replied, "[s]o what of it?" Matt was not questioned at the hearing regarding this allegation. In addition, Melissa testified on cross-examination that she did not know whether Derrick remained at Matt's house or had interacted with Emma on the day in question. With the exception of this alleged incident, there was no evidence before the court to indicate that Derrick had any contact with Emma.

{¶25} In the shared parenting order, the trial court specifically noted its concern with Derrick having contact with Emma, and ordered Matt to ensure that she had no contact of any kind, supervised or unsupervised, with him. Although Melissa claims that protection from Derrick Rainey "should have been reason enough to reject shared parenting," based on the limited evidence in the record, we do not find that a potential for child abuse exists in this case such that the court's decision to award shared parenting constituted an abuse of discretion.

{¶26} Based on the foregoing, Melissa's first assignment of error is overruled.

{¶27} Assignment of Error No. 2:

{¶28} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF[-] APPELLANT WHEN IT ORDERED THE FATHER'S CHILD SUPPORT OBLIGATION DEVIATED TO ZERO."

{¶29} In her second assignment of error, Melissa contends that the trial court abused its discretion in deviating Matt's annual child support obligation to zero. She claims that the court's deviation was in error because it did not set forth adequate findings of fact to support its determination.

{¶30} The child support system is designed to protect the child and his best interest. *Richardson v. Ballard* (1996), 113 Ohio App.3d 552, 555. It is well-established that a trial court enjoys considerable discretion with regard to child support issues. See *Murray v. Murray* (1999), 128 Ohio App.3d 662, 666. As a result, "[m]atters involving child support are reviewed under the abuse-of-discretion standard." *Ossai-Charles v. Charles*, Warren App. Nos. CA2010-12-129, CA2011-01-007, 2011-Ohio-3766, ¶67, quoting *Van Osdell v. Van Osdell*, Warren App. No. CA2007-10-123, 2008-Ohio-5843, ¶20.

{¶31} Pursuant to R.C. 3119.22, "[t]he court may order an amount of child support that deviates from the amount of child support that would otherwise result from the use of the

basic child support schedule and the applicable worksheet * * * if, after considering the factors and criteria set forth in section 3119.23 of the Revised Code, the court determines that the amount calculated pursuant to the basic child support schedule and the applicable worksheet * * * would be unjust or inappropriate and would not be in the best interest of the child. If it deviates, the court must enter in the journal the amount of child support calculated pursuant to the basic child support schedule and the applicable worksheet * * * its determination that that amount would be unjust or inappropriate and would not be in the best interest of the child, and findings of fact supporting that determination."

{¶32} It is well-established that the terms of R.C. 3119.22 are mandatory in nature, and any court-ordered support deviation must be entered by the court in its journal and must include findings of fact to support its determination. See *Marker v. Grimm* (1992), 65 Ohio St.3d 139, paragraphs one and two of the syllabus (requiring strict compliance with R.C. 3113.215, the former analogous child support provision). R.C. 3119.23 enumerates 16 factors to be considered by a court prior to deviating from the amount of support in the worksheet calculations.

{¶33} After creating two child support worksheets, once using Matt as the residential parent and once using Melissa as the residential parent, the court determined it was in the best interest of the minor child to deviate Matt's annual obligation under the guideline calculation from \$3,107.98 to zero. The court held that "[b]ased upon the evidence presented and considering the relevant factors, the Court finds that the child support obligation calculated for [Matt] would be unjust, inappropriate and not in the best interest of the minor child. The Court finds that it is in the best interest of the minor child that [Matt's] child support obligation be reduced to zero."

{¶34} Matt argues on appeal that the trial court's decision to deviate his support obligation was supported by the record. He claims that the substantial disparity in the parties'

incomes, nearly equal division of parenting time, and shared expenses relating to Emma's pre-school costs, all of which are among the factors stated in R.C. 3119.23, required a deviation in this case. Notwithstanding Matt's assertion, we note that the judgment entry fails to include findings of fact. Despite noting that it had considered Emma's best interest and the "relevant factors," the court made no reference to those set forth in R.C. 3119.23. Consequently, we cannot determine what factors, if any, the trial court relied on in ordering the deviation. See *Pahls v. Pahls*, Butler App. No. CA2009-01-005, 2009-Ohio-6923, ¶15.

{¶35} Based on the foregoing, we find the court's failure to include findings of fact with regard to its decision to deviate Matt's child support obligation constituted an abuse of its discretion. Melissa's second assignment of error is sustained.

{¶36} Assignment of Error No. 3:

{¶37} "THE TRIAL COURT ERRED BY ORDERING THE PARTIES TO ALTERNATE CLAIMING THE CHILD AS A DEPENDENT FOR ALL INCOME TAX REPORTING PURPOSES ON A YEARLY BASIS WITH THE MOTHER CLAIMING THE CHILD ON EVEN YEARS AND THE FATHER CLAIMING THE CHILD IN ODD YEARS."

{¶38} In her final assignment of error, Melissa claims that the trial court abused its discretion in ordering the parties to share the dependency income tax deduction. Melissa argues that Matt's 2009 tax return indicated that he did not owe taxes, and thus would not benefit from the exemption. An appellate court reviews a trial court's decision allocating tax exemptions for dependents under an abuse of discretion standard. *Pahls* at ¶21.

{¶39} R.C. 3119.82 governs the designation of which parent is entitled to claim a federal income tax deduction for a dependent child. The statute provides, in pertinent part, "[w]henever a court issues * * * a child support order, it shall designate which parent may claim the children who are the subject of the court child support order as dependents for federal income tax purposes * * *. In cases in which the parties do not agree which parent

may claim the children as dependents, the court shall consider, in making its determination, any net tax savings, the relative financial circumstances and needs of the parents and children, the amount of time the children spend with each parent, the eligibility of either or both parents for the federal earned income tax credit or other state or federal tax credit, and any other factor concerning the best interest of the children."

{¶40} In shared parenting arrangements both parties are, in essence, deemed to be residential parent of the minor child, and the trial court must allocate the tax dependency exemption based on the child's best interest. *Hall v. Hall*, Hardin App. No. 6-10-01, 2010-Ohio-4818, ¶49, citing *Singer v. Dickinson* (1992), 63 Ohio St.3d 408. This court has previously recognized that "the best interest of the child is furthered when the allocation of the exemption * * * produces a net tax savings for the parents." *Tuttle v. Tuttle*, Butler App. Nos. CA2006-07-176, CA2006-07-177, 2007-Ohio-6743, ¶21, quoting *Rotte v. Rotte*, Butler App. No. CA2004-10-249, 2005-Ohio-6269, ¶29. A net tax savings to the parent usually equates to more money being available for the care of the child, and is one of the five factors that a court is required to weigh under R.C. 3119.82. *Foster v. Foster*, Sandusky App. No. S-03-037, 2004-Ohio-3905, ¶20; *Tuttle* at ¶21-22; *Heyman v. Heyman*, Franklin App. No. 05AP-475, 2006-Ohio-1345, ¶46.

{¶41} Upon review of the trial court's decision, we find that our consideration of this issue is limited on appeal. In its entry, the trial court failed to identify a net tax savings, or indicate that it had weighed Emma's best interests in alternating the tax exemptions between the parties. See *Heyman* at ¶47. See, also, *Pahls*, 2009-Ohio-6923 at ¶25. As a result, we cannot adequately determine from the record what factors the court relied on in concluding that the parties should alternate the dependency exemption. The court's failure to reference any factors stated in R.C. 3119.82 constituted an abuse of its discretion.

{¶42} Melissa's third assignment of error is sustained.

{¶43} Based on the foregoing, we conclude that the trial court properly ordered shared parenting in this case. However, we reverse and remand the matter to the trial court with regard to the child support deviation and tax dependency exemption determinations. On remand, the court is required to comply with the requirements of R.C. 3119.23 and R.C. 3119.82.

{¶44} Judgment affirmed in part, reversed in part, and remanded.

RINGLAND and PIPER, JJ., concur.