

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

CHRISTOPHER TOON,	:	
Plaintiff-Appellee,	:	CASE NO. CA2012-02-011
- vs -	:	<u>OPINION</u>
	:	9/17/2012
LARA SOWDER,	:	
Defendant-Appellant.	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 2010 JI 18214

Jeremy J. Evans, 306 South Third Street, Hamilton, Ohio 45011, for plaintiff-appellee

Kathleen C. King, 810 Sycamore Street, 6th Floor, Cincinnati, Ohio 45202, for defendant-appellant

PIPER, J.

{¶ 1} Defendant-appellant, Lara Sowder (Mother), appeals a decision of the Clermont County Court of Common Pleas, Juvenile Division, ordering equal parenting time and setting child support obligations.

{¶ 2} Mother and plaintiff-appellee, Christopher Toon (Father), had one child, though the parties were never married. Mother and Father had a long-term relationship, and lived

together until Father moved out of Mother's home in February 2010. The parties' daughter was born August 2, 2010.

{¶ 3} Mother allowed Father to visit with the child once a week for approximately one hour. The weekly visitation occurred until October 2010, when Mother received notice that Father filed a motion in juvenile court for determination of parentage and custody of the child. Mother did not permit Father to see the child in November. Father sent Mother a text message and asked to see the child during the Christmas holiday season, but Mother did not respond. Father was once again permitted to see the child in February 2011 once the parties began the litigation process in court. Other than Father's visitation with the child, Mother has been the child's primary caregiver since birth.

{¶ 4} The parties presented testimony and evidence before a juvenile court magistrate during a two-day hearing in July 2011. The magistrate issued a decision establishing Father's paternity and designating Mother the sole residential parent and legal custodian. However, the magistrate ordered equal parenting time, and further ordered Father to pay child support in an amount less than the standard order.

{¶ 5} Mother filed objections to the magistrate's decision, and the trial court overruled each in turn. Mother now appeals the trial court's decision, raising the following assignments of error:

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED BY AWARDING FATHER 50% PARENTING TIME-SHARING WITH THE PARTIES' ONE-YEAR OLD CHILD. [sic]

{¶ 8} Mother argues in her first assignment of error that the trial court erred in giving Father equal parenting time because Father had only weekly contact with the child prior to his custody motion; Father's living situation has been unstable; Father has demonstrated an immature attitude in the past; and because Mother has been the child's primary caregiver

since birth.

{¶ 9} According to R.C. 3109.042,

An unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian. A court designating the residential parent and legal custodian of a child described in this section shall treat the mother and father as standing upon an equality when making the designation.

{¶ 10} An appellate court reviews a juvenile court's custody determination for an abuse of discretion. *In re Brown*, 142 Ohio App.3d 193, 198 (12th Dist.2001). An abuse of discretion constitutes more than an error of law or judgment; it requires a finding that the trial court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "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." *In re J.M.*, 12th Dist. No. CA2008-12-148, 2009-Ohio-4824, ¶ 17, quoting *Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988).

{¶ 11} R.C. 2151.23 sets forth the original jurisdiction of juvenile courts, and states that "the juvenile court shall exercise its jurisdiction in child custody matters in accordance with sections 3109.04 and 3127.01 to 3127.53 of the Revised Code." R.C. 2151.23(F)(1). "When making the allocation of the parental rights and responsibilities for the care of the children * * * in an original proceeding or in any proceeding for modification of a prior order of the court 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)(1).

{¶ 12} In order to determine the best interest of a child, R.C. 3109.04(F)(1) requires the juvenile court to consider all relevant factors. *In re M.M.*, 12th Dist. No. CA2010-12-034, 2011-Ohio-3913, ¶ 9. These factors include, but are not limited to: the wishes of the parents;

the child's interaction and interrelationship with his parents, siblings, and other persons who may significantly affect the child's best interest; the child's adjustment to home, school and community; the mental and physical health of all persons involved; and the likelihood that the caregiver would honor and facilitate or had honored and facilitated visitation and parenting time. *In re A.L.H.*, 12th Dist. No. CA2010-02-004, 2010-Ohio-5425, ¶ 9.

{¶ 13} The juvenile court also has broad discretion as to visitation issues. *In re S.K.G.*, 12th Dist. No. CA2008-11-105, 2009-Ohio-4673, ¶ 21. The juvenile court's decision, therefore, is subject to reversal only where there is an abuse of discretion. *In re A.M.*, 12th Dist. No. CA2005-11-492, 2006-Ohio-5986, ¶ 8.

{¶ 14} Before determining custody and visitation, the trial court considered the best interest factors of R.C. 3109.04(F)(1)(a)-(j). After a thorough review of the record, we cannot say that the trial court's decision in balancing these factors was arbitrary, unreasonable, or unconscionable.

{¶ 15} The court heard evidence that both parents wanted to have custody of the child. The court did not consider the child's wishes or conduct an in camera interview due to the child's young age of 11 months at the time of the hearing. The court also heard evidence that the child has a positive relationship developing with both parents, but spent most of her young life in Mother's care. The child has also bonded with Mother's two older children, as well as the child's maternal grandmother, who provides day-care for the child while Mother is at work.

{¶ 16} Due to the child's young age, the court did not address the child's adjustment to school or the community, but rather focused on the child's adjustment to the homes of either Mother or Father. Father has lacked long-term stability in his housing due to a second job of buying houses, fixing them up, and reselling them. While Mother has lived in the same home for seven years, Father has moved multiple times. However, the court found that the child

will have everything she needs at either Mother's or Father's home.

{¶ 17} The trial court also considered evidence regarding the mental and physical health of all persons involved in the situation, and found that there is no indication that the child had any mental or physical health issues that required consideration. However, the court heard testimony that Mother has received medical attention in the past for bi-polar disorder and anxiety/depression. Mother, though, discontinued her treatment and medication once Father left her home, and did so without medical advice to discontinue such treatment.

{¶ 18} The trial court determined that Father is the parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights. Given the lack of court-ordered established time, neither party has a history regarding facilitating court-approved parenting time. Nonetheless, the court heard evidence that Mother's two children from two different fathers do not have relationships with their father or paternal family members. The court also considered that when Father asked for parenting time during the 2010 holiday season, Mother did not respond and effectively denied Father his request for visitation. Conversely, the court found Father to be "a rule follower" and expressed confidence that he would abide by a court order regarding parenting time.

{¶ 19} The parties did not present any evidence that either party is behind in child support obligations, but Mother did present evidence that Father was charged with domestic violence and pled to a menacing charge. The facts of the incident were disputed by the parties during the hearing, and Father asserted that Mother was actually the one who hit him. Father also argued that Mother was abusive of her two older children, though he never reported his concerns to law enforcement. Mother, on the other hand, characterized what Father called abuse as disciplining her two older children, and provided reasons why the discipline occurred. Regardless of the evidence presented and the back and forth between the parties, the factor calls for the court to consider only prior convictions for "any act that

resulted in a child being an abused child or a neglected child," and there have not been any such acts or convictions.

{¶ 20} After balancing these factors, the trial court determined that Mother should have sole residential and legal custody, but that the parties would have equal parenting time with the child based on a two-week rotating schedule. While the court heard extensive testimony from both parties about the shortcomings of the other parent, both parties love the child and desire a relationship with her. The court found that the parties have very different personalities and traits, some of which would constitute positive attributes while raising a child. However, the trial court also found that both parties had shortcomings, and that neither party was entirely credible. Notwithstanding the parties' shortcomings, the trial court made its decision hoping to "maximize the positives that each parent can provide," and implored the parties to do "likewise" in the future as they navigated through the shared visitation schedule.

{¶ 21} Notwithstanding the fact that Mother was named the child's legal custodian, she argues that the trial court abused its discretion in deviating from the standard parenting order by giving each party equal parenting time. While Mother is accurate in stating that Clermont County Juv.R. 23.1 requires a court to adopt the standard parenting time guidelines, the rule also states that the standard guidelines should not be adopted if the "facts of a case warrant a deviation pursuant to Ohio Revised Code §3109.051(D)." R.C. 3109.051(D) lists several factors to consider when granting parenting time.

{¶ 22} The factors listed in R.C. 3109.051(D)(1)-(16) often mirror the best interest factors from R.C. 3109.04(F)(1)(a)-(j). These include the child's interaction with parents and siblings, the child's adjustment to home, school, and community, any in camera interviews with the child, the mental and physical health of the parties, and the parties' willingness to facilitate visitation. Also included are whether the parties had been convicted of criminal offenses that caused the child to be adjudicated abused, neglected, or dependent, whether

either party has willfully denied visitation rights, whether the parent plans on relocating, and the wishes of the parents.

{¶ 23} The factors not listed in R.C. 3109.04(F)(1)(a)-(j) include a discussion of the geographical location between the parents, the child and parents' available time to spend together, the age of the child, the health and safety of the child, the amount of time available to spend with siblings, as well as "any other factor in the best interest of the child."

{¶ 24} Mother essentially argues that the trial court abused its discretion by not specifically addressing the R.C. 3109.051(D)(1)-(16) factors one-by-one, as it did with the R.C. 3109.04(F)(1)(a)-(j) factors. We disagree. First and foremost, Mother did not specifically raise an objection to the trial court that the magistrate failed to walk through the 16 factors or failed to provide detailed findings of facts and conclusions of law regarding the 16 R.C. 3109.051 factors. Mother, has therefore, waived this issue on appeal. *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, ¶ 16. Moreover, this court has previously held that a court does not abuse its discretion by not specifically referencing the statutory factors found in R.C. 3109.051(D) when the court otherwise "contemplated" the "underlying concepts" of the 16 factors. *Mackowiak v. Mackowiak*, 12th Dist. No. CA2010-04-009, 2011-Ohio-3013, ¶ 107.

{¶ 25} The trial court adopted the magistrate's opinion, which addressed the best interest factors, as well as demonstrated that the magistrate contemplated the 16 factors of R.C. 3109.051. The magistrate's opinion makes specific reference to having considered R.C. 3109.051, and also makes findings regarding the factors found in R.C. 3109.051 that do not otherwise appear in R.C. 3109.04(F)(1)(a)-(j).

{¶ 26} The magistrate's opinion addresses the geographical location between the parents, and that the parties live approximately 45 minutes apart from each other. The magistrate also discussed that the parties both work, when they work, and where the child would receive care when the parties are working. The magistrate often discussed the child's

young age, and specifically found that she would have everything she needs at either house, and also considered the child's ability to continue her relationship with her half-siblings. The opinion also addresses the catch-all factor of "any other factor in the best interest of the child," as the magistrate made several findings regarding how the parties, themselves, impact the child and how both often made questionable choices in relation to the legal proceedings regarding custody and visitation.

{¶ 27} After a thorough review of the record, we cannot say that the trial court abused its discretion in deviating from the standard parenting agreement and giving Father equal parenting time to Mother. As such, Mother's first assignment of error is overruled.

{¶ 28} Assignment of Error No. 2:

{¶ 29} THE TRIAL COURT ERRED WHEN IT DEVIATED DOWNWARD FROM THE CHILD SUPPORT WORKSHEET.

{¶ 30} Mother argues in her second assignment of error that the trial court erred in deviating downward from the child support calculation worksheet when ordering Father's child support obligation.

{¶ 31} According to R.C. 3119.22,

The 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, through the line establishing the actual annual obligation, 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, through the line establishing the actual annual obligation, 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, through the line establishing the actual annual obligation, 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.

R.C. 3119.23 states that a court *may* consider several factors when determining whether a deviation is warranted. Specific to the case at bar,

The court may consider any of the following factors in determining whether to grant a deviation pursuant to section 3119.22 of the Revised Code:

(D) Extended parenting time or extraordinary costs associated with parenting time, provided that this division does not authorize and shall not be construed as authorizing any deviation from the schedule and the applicable worksheet, through the line establishing the actual annual obligation, or any escrowing, impoundment, or withholding of child support because of a denial of or interference with a right of parenting time granted by court order * * *.

{¶ 32} Mother argues that the trial court abused its discretion in setting child support because it failed to make findings of fact to support its determination that it would be in the child's best interest to deviate from the actual child worksheet. However, the statute requires only that a court complete the worksheet, make a finding that the standard amount would be unjust or inappropriate and not in the best interests of the child, as well as findings supporting that determination. After reviewing the record, we find that the magistrate's opinion comports with the statutory requirements.

{¶ 33} The magistrate completed the worksheet, and then found that the standard order would be unjust, inappropriate, and not in the child's best interest. The magistrate then stated that a deviation was proper based on Father having equal parenting time with the child. While the magistrate did not specifically address each factor or offer extensive analysis, nothing in the statute mandates that either is necessary. Instead, the statute requires only the specific finding of unjustness or inappropriateness, coupled with a finding that the standard order is not in the best interest of the child.

{¶ 34} Neither does the statute require extensive analysis, regardless of how helpful a

full analysis is during an appellate review of a trial court's decision regarding deviation. The statute merely requires a finding of fact to support the deviation. Here, the court stated that the deviation was necessary based on Father's increased visitation, a factor specifically listed in R.C. 3119.23(D). See *Preece v. Stern*, 12th Dist. Nos. CA2008-09-024, CA2008-12-029, 2009-Ohio-2519 (affirming trial court's decision even though the trial court did not state in its opinion that it considered each of the factors listed in R.C. 3119.23 because the statute states that such consideration is discretionary); *Beiers v. Phillips*, 5th Dist. No. 08CA0127, 2009-Ohio-3278, ¶ 48 (affirming deviation where "the trial court stated, albeit succinctly, that it granted a deviation from the amount of child support calculated pursuant to the basic child support schedule and worksheet because Appellee paid child support ordered by the Knox County Court of Common Pleas for the parties' other child").

{¶ 35} While the better practice is for a trial court to explain fully its reasoning for reaching a particular decision when deciding whether to deviate from the standard order, we cannot say that the court's concise analysis of the deviation issue failed to fulfill the R.C. 3119.23 requirements.

{¶ 36} The trial court heard evidence regarding Father's ability to provide for the child, and what purchases and ongoing support Father would have to provide once he had the child half the time. Given the extended amount of time that Father would have the child and the related expenses, we cannot say that the decision to deviate from the standard order was arbitrary, unreasonable, or unconscionable. Having found no abuse of discretion, Mother's second assignment of error is overruled. Our decision today renders moot any stay that may have been in place, and there is no reason to delay in implementing the trial court's judgment regarding equal parenting time.

{¶ 37} Judgment affirmed.

HENDRICKSON, P.J., and BRESSLER, J., concur.

Bressler, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.