

[Cite as *Molloy v. Molloy*, 2009-Ohio-4951.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

KEVIN A. MOLLOY	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23172
v.	:	T.C. NO. 2001 DR 00012
NAKITA S. MOLLOY	:	(Civil appeal from Common Pleas Court, Domestic Relations)
Defendant-Appellee	:	

**OPINION**

Rendered on the 18<sup>th</sup> day of September, 2009.

KEVIN A. MOLLOY, 3415 Creek Road, Cincinnati, Ohio 45241  
Plaintiff-Appellant

NAKITA S. MOLLOY, 7011 Blakemore Lane, Dublin, Ohio 43016  
Defendant-Appellee

DONOVAN, P.J.

{¶ 1} This matter is before the Court on the pro se Notice of Appeal of Kevin Molloy, filed December 30, 2008. Kevin appeals from the trial court’s adoption of the magistrate’s decision continuing the designation of Nakita Molloy as the residential parent and legal custodian

of the parties' minor children, K.M. and C.M. Nakita did not file a brief in response.

{¶ 2} Kevin and Nakita were married on February 20, 1999, and they were divorced on January, 10, 2002. Two children were born of their relationship, K.M., born on October 21, 1998, and C.M., born on October 3, 2000. Pursuant to the parties' Final Decree, Nakita was granted custody of the children, and Kevin received visitation pursuant to the court's Standard Order of Parenting Time.

{¶ 3} On May 18, 2006, Kevin filed a three-branch motion seeking to have Nakita held in contempt for violating the parenting time order; for a reallocation of parental rights and responsibilities; and for costs and attorney fees. Hearings were held before a magistrate on May 8 and 17, 2007, and August 16, 2007, and the children were interviewed in camera on August 16, 2007.

The magistrate also reviewed in camera the records of children's services agencies in Montgomery and Franklin Counties regarding unsubstantiated allegations of sexual abuse involving Kevin and K.M. Both parents underwent psychological evaluations, and the resulting reports were considered by the magistrate, as well as the testimony of Dr. Tyrone Payne, who administered the evaluations.

{¶ 4} Dr. Payne's evaluation included in part an observation of each parent's interaction with the children. After observing the boys with Nakita, Dr. Payne's report provides, "The boys chose to play with Legos ,and Nakita sat reading a magazine on the sofa. \* \* \*

{¶ 5} "By the end of the session she was showing more interest in them than in the magazine, however, I found it to be very strange that she would pay so little attention to her sons under such circumstances. She seemed almost disinterested and unmotivated in what was taking place.

{¶ 6} \* \*

{¶ 7} “After considering the information available, this psychologist concludes that it is in the best interest of [K.M.] and [C.M.] to be in the custody of their father. He appears to be more motivated to interact with them, and he appears to set better limits for them. He is more interested in their schooling and extracurricular activities. He will have more time available to interact with them, especially during the school year. It is my judgment that the benefits of making such a change in custody outweigh the disadvantages, including spending less time [with] their other half-siblings.

{¶ 8} “Kevin should immediately follow through with his plan for a change in housing. He has stated he intends to obtain housing in the Sharonville area.

{¶ 9} “I would recommend that the boys have alternate weekends visitation with their mother. I would recommend that the standard visitation guidelines be followed with respect to holidays and summer vacation.”

{¶ 10} The magistrate issued a decision on February 15, 2008, and Kevin filed objections and supplemental objections. Upon reviewing the objections, on July 15, 2008, the trial court issued an Entry and Order noting that the magistrate had failed to sign her decision, and the matter was remanded to the magistrate “for the sole purpose of allowing the magistrate the opportunity to review the magistrate decision and either acknowledge in a brief entry that this is in fact her decision or that it is her decision with certain modifications.” The trial court granted the magistrate 10 days to file her entry.

{¶ 11} On August 5, 2008, the magistrate filed a signed Decision and Permanent Order which provides, “this magistrate does state in fact that this is her decision and that the only modification that she would make would be under the section entitled ‘Interview of Children.’

The only wording that would be added there would be the following included as the last sentence:

“This magistrate has reviewed this evidence and has given this evidence its appropriate weight.”

{¶ 12} The magistrate’s decision provided in relevant part:

{¶ 13} “Since the date of the divorce, the children have lived with the defendant. During the plaintiff’s parenting time the plaintiff may have acted inappropriately. The concern of this magistrate is that on more than one occasion the plaintiff may have inappropriately touched the oldest child and put grease or substance on the children’s buttocks. There was insufficient evidence to bring criminal charges, so none have been brought. This magistrate is also concerned about the sleeping arrangements when the children are with the plaintiff. Also, this magistrate is concerned about the number of moves that the defendant has made since the divorce.”

{¶ 14} Regarding her in camera interview of the children, the magistrate’s decision provided, “the children have sufficient reasoning ability to express their wishes and concerns regarding the allocation of parental rights and responsibilities.” The magistrate, however, did not articulate the children’s wishes.

{¶ 15} Regarding the psychological evaluations of the parties, the magistrate noted, “After considering the information available and tests performed, the psychologist concluded that it was in the best interest of the children for the plaintiff to have custody of the children. The rationale given by the psychologist was that the plaintiff set limits for the children and was more interested in their schooling and extracurricular activities. The psychologist felt that the benefits in the change of custody outweighed the disadvantages \* \* \* .”

{¶ 16} Finally, the magistrate found “that from the evidence presented in this case, there

has been a change of circumstance of both parents herein. The plaintiff has lived in his mother's home since the date of divorce except for a brief period of time that he was married. This is a two bedroom home. The plaintiff did testify that he had in the past, slept in the children's bedroom, but now he sleeps on a couch in the family room. These are not adequate sleeping arrangements for these children. Of concern is the allegation made to the Children Services Board in Montgomery County and Franklin County that the plaintiff touched the oldest child's private parts allegedly to determine if the child had wet his pants. There is also an allegation that the plaintiff put grease on the children's buttocks. The allegations made to both agencies did not result in charges being brought however, that does not mean that the allegations did not occur. Given the children's ages and these allegations, the best interest of these children cannot be served by changing the allocation of parental rights and responsibilities. Any change in environment would be harmful to the children at this time. With trepidation this magistrate believes that the plaintiff should be permitted to continue to exercise parenting time; however, caution should not be thrown to the wind.

{¶ 17} “This magistrate further finds that the defendant does not present herself in the best possible light as evidenced by the psychological evaluation. She has moved numerous times and has some difficulty in controlling the children. Both parents have made disparaging and racial remarks regarding the other parent, which is disturbing to this magistrate.”

{¶ 18} Kevin initially delineated 23 single sentence objections to the magistrate's decision. His supplemental objections were addressed to four areas, namely, (1) the weight placed upon the unsubstantiated allegations of sexual abuse; (2) the alleged mutual denigration and racial slurs the parties direct toward each other; (3) the relative parenting abilities of the

parties and; (4) the insufficient weight placed upon the report and testimony of Dr. Payne.

{¶ 19} Regarding the unsubstantiated allegations of abuse, the trial court noted its concern that “the magistrate said nothing in her decision about the in camera inspection of the records. If in fact certain aspects of the records were deemed relevant, probative, and admissible, it was incumbent upon the magistrate to make this matter known to counsel and have it entered in the record to be considered. In the court’s review of the record, something which kept surfacing was [K.M.’s]’s statement or questioning of the investigator as to whether or not he had said enough so that he wouldn’t have to visit with his father anymore. During multiple interviews, the defendant kept asking about allegations, whether or not the children mentioned allegations to which she continued to add detail, and at least one worker during the investigation opined that the mother was not credible. What is most disturbing to the court is that the magistrate never commented on the relevancy of these documents, nor did she reveal any part of these documents to counsel for the parties.”

{¶ 20} Regarding Kevin’s objections about the alleged racial slurs, the trial court noted that Kevin is Caucasian and Nakita is African-American, and that “it does not appear that these allegations were especially decisive in the magistrate’s ruling. The simple fact that the magistrate stated in section 8 of her order that neither parent is to make disparaging or racial remarks regarding the other parent is a cautionary order.”

{¶ 21} Regarding the relative parenting abilities of the parties, the trial court noted Kevin’s allegations that Nakita failed to enroll K.M. in kindergarten, failed to take K.M. for essential dental work, complained about the boys getting on her nerves, and “relinquished the children to the father for extended periods of time.” The trial court noted that “even though he

lives in Cincinnati, [Kevin] would come to Dayton or wherever the defendant was residing and take the children to school, take them back home, take them to school the next day.” The trial court noted Kevin’s complaints about the overall hygiene of the boys when they are in Nakita’s care. The trial court also noted that while counseling was recommended in 2002, Nakita was “unable or unwilling to take the children for said counseling.” Finally, the trial court noted, while Nakita claims to be actively involved in the children’s school functions, “the evidence as to whether the mother attended some or part of these functions is unclear.”

{¶ 22} Regarding the report and testimony of Dr. Payne, the trial court noted Dr. Payne’s comments that he has reservations about both parents. The trial court “wondered what could have negated or neutralized the very strong recommendation of the evaluating psychologist that custody be changed to the plaintiff/father. The magistrate did interview the minor children in camera. However, the magistrate merely found that the children had sufficient reasoning ability to express their wishes and concerns regarding the allocation of parental rights and responsibilities. The magistrate did not state what those wishes and concerns were or what weight she gave them in terms of making the decision. In weighing all the factors to determine whether or not one party or the other should be awarded custody or whether or not a change of custody is appropriate, it is absolute mandatory that the magistrate, if the magistrate has found that the child or children have sufficient reasoning ability, to state the wishes and concerns of the children.”

{¶ 23} The trial court then went on to note that it “reviewed the interview with both children. First, the court comments that the interviews of both [K.M.] and [C.M.] were very extensive and complete. Both children, [K.M.] more strongly than [C.M.], clearly expressed a

strong preference to remain in the custody of the mother and were very adamant about not having to live with the father. The ‘touching allegations’ were repeated. It is noted that, while not conditional, the psychologist recommended that the plaintiff immediately follow through on his plan for a change in housing, presumably so that sleeping arrangements would be separate. The court further notes from the context of the children’s interviews that defendant’s objection to the magistrate’s claim that both parents have made disparaging and racial remarks concerning the other parent is certainly confirmed by what the children said to the magistrate.

{¶ 24} “ \* \* \* While the court finds several procedural and evidentiary errors on the part of the magistrate, nonetheless, it is the conclusion of the court that custody should remain with the defendant/mother, however, that order of custody shall be reviewed by the court.”

{¶ 25} The trial court ordered that the matter of allocation of parental rights and responsibilities shall be reviewed by the court on May 19, 2009.

{¶ 26} The trial court held Nakita in contempt for failing to provide parenting time to Kevin and ordered her to pay attorney fees of \$350.00 and all administrative costs. The trial court sentenced Nakita to three days in jail, allowing her to purge the finding of contempt by paying the attorney fees and costs within 30 days.

{¶ 27} Kevin asserts five assignments of error. We will first consider his second and fifth assignments of error together. They are as follows:

{¶ 28} “THE TRIAL COURT DENIED APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY THE COURT’S REFUSAL TO REVERSE THE MAGISTRATE’S DECISION.”

{¶ 29} And,

{¶ 30} “THE APPELLANT WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAWS BY THE TRIAL COURT’S REFUSAL TO REVERSE THE MAGISTRATE’S DECISION WHEN THE EVIDENCE SHOWED THAT THE APPELLANT WAS MORE FIT, RESPONSIBLE, INVOLVED, AND CONCERNED PARENT.”

{¶ 31} “Initially, it should be noted that in accordance with Civ.R. 53, the trial court must conduct an independent review of the facts and conclusions contained in the magistrate’s report and enter its own judgment. *Dayton v. Whiting* (1996), 110 Ohio App.3d 115, 118. Thus, the trial court’s standard of review of a magistrate’s decision is de novo.

{¶ 32} “An ‘abuse of discretion’ standard, however, is the appellate standard of review when reviewing a trial court’s adoption of a magistrate’s decision. Claims of trial court error must be based on the actions taken by the trial court, itself, rather than the magistrate’s findings or proposed decision. When an appellate court reviews a trial court’s adoption of a magistrate’s report for an abuse of discretion, such a determination will only be reversed where it appears that the trial court’s actions were arbitrary or unreasonable. *Proctor v. Proctor* (1988), 48 Ohio App.3d 55, 60-61. Presumptions of validity and deference to a trial court as an independent fact-finder are embodied in the abuse of discretion standard. *Whiting*, supra.

{¶ 33} “An abuse of discretion means more than an error of law or judgment; it implies that the trial court’s attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. *Berk v. Mathews* (1990), 53 Ohio St.3d 161.” *Randall v. Randall*, Darke App. No. 1739, 2009-Ohio-2070, ¶ 8-10.

{¶ 34} R.C. 3109.04(E)(1) provides, “(a) the court shall not modify a prior decree allocating parental rights and responsibilities for care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child’s residential parent, \* \* \* , and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree \* \* \* , unless a modification is in the best interest of the child and one of the following applies:

{¶ 35} “(i) The residential parent agrees to a change in the residential parent \* \* \* .

{¶ 36} “(ii) The child, with the consent of the residential parent \* \* \* , has been integrated into the family of the person seeking to become the residential parent.

{¶ 37} “(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.”

{¶ 38} “In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

{¶ 39} “(a) The wishes of the child’s parents regarding the child’s care;

{¶ 40} “(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child’s wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

{¶ 41} “(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 interest;

{¶ 42} “(d) The child's adjustment to the child's home, school, and community;

{¶ 43} “(e) The mental and physical health of all persons involved in the situation;

{¶ 44} “(f) the parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶ 45} “(g) Whether either parent has failed to make all child support payments, including all arrearage, that are required of that parent pursuant to a child support order under which that parent is an obligor;

{¶ 46} “(h) \* \* \* whether there is reason to believe that either parent has acted in manner resulting in a child being an abused child or a neglected child;

{¶ 47} “(i) Whether the residential parent \* \* \* has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court.

{¶ 48} “ \* \* \* .” R.C. 3109.04(F)(1).

{¶ 49} Having reviewed the trial court's decision, it is clear that the in camera interviews with the children played a decisive role in her decision. The interviews, as the trial court noted, were thorough and extensive. Both children expressed a firm desire to live with their mother. Among other things, the sleeping arrangements were less than ideal with Kevin, and both boys repeated the allegations of abuse while in Kevin's care. We note that K.M. did acknowledge that he loves his father.

{¶ 50} It is evident from our review that the trial court thoroughly analyzed all the evidence presented. Presuming the validity of the trial court's decision and deferring to the trial court as an independent fact-finder, we conclude that the trial court did not abuse its discretion in

adopting the magistrate's decision regarding the custody of K.M. and C.M. Although certain R.C. 3109.04(F) factors weigh in Kevin's favor, such as Dr. Payne's concerns regarding the children's interactions and interrelationships with Nakita as opposed to Kevin, and the finding of contempt as to Nakita regarding parenting time, we will not substitute our judgment for the trial court's. While the magistrate failed to discuss the wishes of K.M. and C.M., the trial court's decision makes clear that the children's interviews, which were "extensive and complete" provide the primary basis of the trial court's decision. There being no abuse of discretion, Kevin's second and fifth assignments of error are overruled.

{¶ 51} We will next consider Kevin's third assignment of error. It is as follows:

{¶ 52} "THE TRIAL COURT DENIED APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW WHEN THE MAGISTRATE COMMITTED PREJUDICIAL ERROR BY LIMITING THE SCOPE OF THE APPELLANT'S CROSS EXAMINATION OF THE APPELLEE AND A FAILURE OF MAKING ANY FINDING REGARDING APPELLEE'S LACK OF CREDIBILITY."

{¶ 53} Kevin's initial objections provided in part:

{¶ 54} "(1) The Magistrate committed prejudicial error by limiting the scope of the plaintiff's cross-examination of the defendant.

{¶ 55} "(2) The Magistrate failed to make any finding regarding the defendant's lack of credibility."

{¶ 56} The trial court noted, "the plaintiff's objections are numbered one through 23, most of which object to or note the lack of findings as to various allegations and statements of evidence made during the proceedings. However, it appears that the objections are more clearly

defined in the supplemental objections to the magistrate decision.” The trial court accordingly specifically addressed the four alleged trial court errors above.

{¶ 57} After a brief review of Kevin’s third assigned error, we conclude that Kevin has failed to show prejudice. Kevin directs our attention to pages 280 - 288 of the transcript to argue that his cross-examination of Nakita was limited during the following exchange:

{¶ 58} “Q. Now, your mother is not employed, is she?

{¶ 59} “A. Yes, she is.

{¶ 60} “Q. \* \* \* Where does she work?

{¶ 61} “A. That’s none of your business. What does this have to do - -

{¶ 62} “Q. I’m trying to understand the income going into the household, ma’am.

{¶ 63} “A. Okay. But that doesn’t have anything to do with my children.

{¶ 64} “Q. What is [your mother’s] income?

{¶ 65} “MR. GUMP: I’ll object on relevancy.

{¶ 66} “THE COURT: Sustained.

{¶ 67} “Q. Does she have an income?

{¶ 68} “A. Yes, she does.

{¶ 69} “Q. Does she contribute to the household?

{¶ 70} “A. Yes, she does.

{¶ 71} “Q. How much does she contribute?

{¶ 72} “A. Half.”

{¶ 73} Counsel for Kevin then asked a series of questions about the way in which Nakita pays her rent, whether she hand delivers cash to her landlord, mails cash to her landlord, or pays

the landlord from her checking account. The following exchange occurred:

{¶ 74} “Q. You don’t pay her out of your checking account?”

{¶ 75} “A. No.

{¶ 76} “MR. GUMP: What is the relevance?”

{¶ 77} \* \*

{¶ 78} “THE COURT: Sustained.

{¶ 79} “MS. HENLEY: You Honor, I’m just trying - -

{¶ 80} “THE COURT: Okay. What I’m focused on is this, number one, if you’re asking questions as to what her income is that’s very relevant to this whole thing, But I don’t know where you’re going \* \* \* .”

{¶ 81} Counsel for Kevin then resumed questioning, and we see no prejudicial error in the course of the above quoted transcript pages.

{¶ 82} Kevin next directs our attention to pages 275 - 333 of the transcript, asserting, “The trier of fact made no finding of [Nakita’s] credibility. The transcript is replenished (sic) throughout the appellee’s cross-examination of lies and misstatements.” Kevin does not identify the alleged “lies and misstatements” in the body of his assigned error. We note, however, regarding Nakita’s credibility, that the trial court did expressly state after thoroughly reviewing the records that the magistrate reviewed in camera, that at least one worker during the investigation of the allegations of abuse “opined that [Nakita] was not credible.”

{¶ 83} We see no abuse of discretion, and Kevin’s third assignment of error is overruled.

{¶ 84} Kevin’s fourth assignment of error is as follows:

{¶ 85} “THE TRIAL COURT DENIED APPELLANT DUE PROCESS AND EQUAL

PROTECTION OF THE LAWS BY ALLOWING THE MAGISTRATE'S ERROR IN NOT GIVING SUFFICIENT WEIGHT TO THE REPORT AND TESTIMONY OF THE COURT APPOINTED PSYCHOLOGIST, DR. TY PAYNE.”

{¶ 86} It is clear from the trial court's decision, after her thorough de novo review, that she considered the testimony and report of Dr. Payne, even quoting from his report in her Decision and Entry and noting the “very strong recommendation” therein. As discussed above, the in camera interview of K.M. and C.M. was unequivocal and clearly dispositive for the trial court and, deferring to her determinations of credibility, we may not substitute our judgment. There being no abuse of discretion, Kevin's fourth assignment of error is overruled.

{¶ 87} Kevin's first assignment of error is as follows:

{¶ 88} “PETITIONER/APPELLANT WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAWS BY THE COURT'S REFUSAL TO REVERSE THE CONVICTION OF THE APPELLANT FOR THE MAGISTRATE'S VIOLATION OF CRIMINALLY CONVICTING THE PETITIONER WHEN THE PETITIONER WAS NOT INDICTED FOR ANY CRIMES.”

{¶ 89} Kevin again focuses on the unsubstantiated allegations of abuse of his son, K.M. First, we note that Kevin was not criminally indicted or convicted in these civil proceedings pursuant to R.C. 3109.04, as he suggests. We do note, however, the trial court's statement, “\* \* \* the fact that criminal charges were never brought does not mean that things that were uncomfortable or inappropriate did not occur or were not perceived as being inappropriate or uncomfortable by this minor child.” Kevin's first assignment of error is overruled.

{¶ 90} The judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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Hon. Judith A. King