

[Cite as *In re A.K.*, 2010-Ohio-2913.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
CHAMPAIGN COUNTY**

IN RE:	:	:	Appellate Case No. 09-CA-32
		:	
A.K., C.K. Z.K.		:	Trial Court Case Nos. 07J1008
		:	07J1009
		:	07J1010
		:	
		:	(Civil Appeal from Clark County
		:	Domestic Relations/Juvenile Court)
		:	

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OPINION

Rendered on the 25<sup>th</sup> day of June, 2010.

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FAIN, J.

{¶ 1} Plaintiff-appellant Brian appeals from a juvenile court judgment designating defendant-appellee Jenise as the residential parent and legal custodian of the parties' minor children, A.K., C.K., and Z.K. Brian contends that the trial court abused its discretion in designating Jenise as the sole residential parent and legal

guardian for the children. We conclude that the trial court did not abuse its discretion; the decision was supported by evidence in the record, and was not arbitrary, capricious, or unreasonable. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} The case before us presents yet another example of parents who focus more on fighting with each other than on how their behavior affects their children. We have commented on various occasions about the “ ‘recurring and regrettable tragedy’ in our society when children are used as ‘pawns in a war between divorced and embittered parents.’ ” *In re Custody of Harris*, 168 Ohio App.3d 1, 4, 2006-Ohio-3649, ¶ 10 (citation omitted). Brian and Jenise have never been married, but they have used their children as weapons during a prolonged and bitter custody fight.

{¶ 3} The facts in the record indicate that Brian and Jenise met in 1990 and began having an extra-marital affair. Jenise was pregnant at the time with another man’s child, and Brian was married. Their relationship continued until 1993, when Jenise actually moved in with Brian and his wife, Viola. Viola moved out after a few years, and Brian and Jenise continued to live together from 1993 until February 2007. Brian did not receive a divorce until after Jenise left home in 2007.

{¶ 4} Brian and Jenise had three children of their own during their cohabitation: a son, A.K., who was born in 1998; a daughter, C.K., who was born in 1999; and a son, Z.K., who was born in 2003. Jenise also had two sons from a

previous relationship, who lived with the parties.

{¶ 5} After residing in various places, Brian and Jenise moved to Ohio in 1998. They then moved to a seven-bedroom home in Champaign County, Ohio, in 2001, where they lived until Jenise left home. Jenise was the primary caretaker for the children, and Brian was the wage-earner. Brian was self-employed in the business of wholesaling properties. The business arrangements were unconventional. Brian located real estate, which would be purchased by one of several men who belonged to a group called "Divine Holdings." Ownership of the property would depend on which man was able to obtain financing at that point. The real property would then be leased to others, and in some cases, sold, with income being earned either from the sale or rentals. Brian claimed his income from these ventures was \$44,000 in 2006. However, at the time of the first custody hearing in June 2007, Brian testified that he had not filed any income tax returns since 2002.

{¶ 6} Brian also viewed himself as something of a missionary, and brought people in need to his home to live with the family. Some of these people lived in Brian's house, and others lived in a guesthouse on the property. One such person was Phillip, an alleged crack-cocaine addict. Phillip's exact dates of residence are unclear, but Phillip testified that he met Jenise in the summer of 2006. Phillip lived in a guest bedroom in the main house and spent Christmas with the Brian/Jenise family.

{¶ 7} In mid-February 2007, Jenise left the family home with A.K., C.K., Z.K., and Jenise's own son, Jason, who was about seventeen years of age. Jenise traveled to Lebanon County, Pennsylvania, where her mother and step-father lived.

Jenise then told Brian that she would not be coming back.

{¶ 8} Shortly thereafter, Jenise picked up Phillip, who was working in Cleveland, and took him back to Pennsylvania, where he stayed with Jenise, her children, and her mother's family. Jenise testified that she left Brian because he is abusive physically, emotionally, and mentally. Jenise never filed any charges against Brian, but did leave and go to "Project Woman" in 2003, after an altercation in which Brian had admittedly grabbed her by the throat.

{¶ 9} For the first two months after the separation, Jenise's children stayed in her mother's two-bedroom apartment, while Phillip and Jenise slept in a car several times a week. At the time, Jenise was aware that her step-father had previously sexually abused his own children. Jenise testified that the children were never left alone with her step-father. In April or May 2007, Jenise, Phillip, and the children moved into Jenise's sister's four-bedroom home. The house then contained nine to eleven people and about 21 dogs. After staying there for several months, Jenise, Phillip and the children moved into a motel room in Pennsylvania for two weeks. They subsequently moved to Kenton, Ohio, into a three-bedroom home. The children did not have beds until Christmas-time of that year.

{¶ 10} In March 2007, Brian's attorney wrote Jenise about custody issues, but she did not respond to the letter. Brian then saw the children in Pennsylvania, once in March, and once in April 2007. During the April visitation, an altercation ensued between Brian and Jenise's son, Jason, and the police were called. Brian allegedly told Jason that his mother was a "whore," and that she would have to come to Ohio if she wanted to see the children. Brian then tried to drive away with the children. He

was apparently unsuccessful; the children remained with Jenise.

{¶ 11} Shortly thereafter, Jenise filed a uniform support petition in Lebanon County, Pennsylvania, alleging that Brian had not financially supported the children since February 2007. Brian then filed a complaint for custody in Champaign County, Ohio, Juvenile Court in mid-May 2007, and asked the court to award him ex parte custody of the children. This motion was denied. In June 2007, Jenise filed an answer to the complaint, alleging that Brian was physically violent and controlling, and that she feared for her life and the lives of her children.

{¶ 12} In late May 2007, allegations surfaced regarding sexual abuse. Jenise testified that her daughter, C.K., who was seven at the time, had alleged that her father had sexually abused her, including during his visit to Pennsylvania. These allegations were investigated by the Lebanon Children Services Board. Jenise indicated that this matter arose before she learned that Brian had filed the custody complaint.

{¶ 13} In mid-June 2007, a temporary custody hearing was held before a magistrate in the Champaign County Juvenile Court. After hearing about the alleged sexual abuse, the magistrate awarded sole temporary custody to Jenise, and suspended Brian's parenting time pending resolution of the abuse charges. The magistrate also restrained Jenise from having the children in the presence of Phillip or her step-father, and ordered child support of \$808.29 to be paid to Jenise each month, effective mid-May 2007. Brian's visitation was ultimately restored after investigating agencies decided that these allegations and other subsequent sexual abuse allegations were unfounded. By that time, however, Brian had not seen the

children for approximately 135 days.

{¶ 14} The final custody judgment was not entered for more than two years after the action was filed, due to the many motions for contempt, motions for change of custody, motions to terminate visitation, and so forth that were filed. The guardian ad litem filed a report in March 2008, indicating that Jenise was struggling financially and that Brian was delinquent on child support. In fact, Brian was substantially in arrears on child support throughout the case, as well as at the time of the final hearing. At the last hearing, which was held in October 2008, Brian admitted he was behind on child support. He also said he had paid about \$7,000 to private investigators.

{¶ 15} The guardian ad litem noted Jenise's allegations that Brian was controlling and abusive. The guardian also stated that the children confirmed that Brian had threatened to kill Jenise. In addition, the children were afraid of the people that Brian brought home to live with them, and stated that Brian had rarely been home until late when they all lived together. They said they wanted to remain with their mother, whom they identified as their primary caretaker.

{¶ 16} Brian presented evidence from his pastor and some acquaintances who testified that Brian would be a proper residential parent. Jenise presented evidence from her sons about Brian's physical and sexual abuse, and destructive acts in front of the children, such as getting a shotgun and threatening to blow off his own head. A woman who had dated Brian after the separation also testified about various unsavory matters, including that Brian did not work, continually borrowed money from others, never disciplined his children, and had downloaded adult pornography onto

her computer.

{¶ 17} After considering the evidence, the magistrate issued a decision, concluding that the children's best interests were served by designating Jenise as sole custodian and residential parent, and by giving Brian visitation. The magistrate also held Brian in contempt for failure to pay child support. Jenise was held in contempt for failure to provide the children for visitation and for failing to keep Phillip away from the children.

{¶ 18} Brian filed objections to the magistrate's decision, but the trial court overruled his objections. Brian appeals from the judgment awarding sole custody to Jenise.

## II

{¶ 19} Brian's sole assignment of error is as follows:

{¶ 20} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DESIGNATING THE APPELLEE THE RESIDENTIAL PARENT AND LEGAL CUSTODIAN OF THE PARTIES' MINOR CHILDREN."

{¶ 21} Under this assignment of error, Brian contends that the factors in R.C. 3109.04 weigh significantly in favor of awarding custody of the minor children to him, and that the trial court's decision otherwise is an abuse of discretion. Jenise did not file a brief, and has not responded to this argument.

{¶ 22} Where custody has never been litigated, the parties stand on equal footing regarding allocation of parental rights and responsibilities. *Pyburn v. Woodruff*, Clark App. No. 2009-CA-10, 2009-Ohio-5872, ¶ 8. The children's best

interest is the sole issue, and is evaluated using the non-exclusive list of factors in R.C. 3109.04(F)(1). *Id.* at ¶ 8-9. We review the trial court's decision for abuse of discretion. *Id.* at ¶ 9.

{¶ 23} An abuse of discretion “ ‘implies that the court's attitude is unreasonable, arbitrary or unconscionable.’ ” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (citation omitted). “[A]n abuse of discretion most commonly arises from a decision that was unreasonable.” *Wilson v. Lee*, 172 Ohio App.3d 791, 2007-Ohio-4542, at ¶11. “Decisions are unreasonable if they are not supported by a sound reasoning process.” *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161.

{¶ 24} The pertinent non-exclusive factors listed in R.C. 3109.04(F)(1) for deciding the children's best interests are:

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

{¶ 26} “(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;

{¶ 27} “(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;

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

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

{¶ 30} “(f) The parent more likely to honor and facilitate court-approved

parenting time rights or visitation and companionship rights;

{¶ 31} “(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor; \* \* \* .”<sup>1</sup>

{¶ 32} After hearing extensive testimony over the course of several hearings, the magistrate evaluated the applicable factors, and concluded that the children’s best interests would be served by designating Jenise as sole custodian and legal guardian, and allowing Brian visitation on alternating weekends, with pickup at the children’s school, to allow for minimal contact between the parents. Among other things, the magistrate noted that Jenise has been the primary custodian of the children since their birth, that the children are more bonded with their mother, and that the two older children, who had been interviewed, preferred to live with their mother. The magistrate also observed that neither parent had been able to acknowledge anything positive about the other, and that each parent had taken actions that would alienate the children from the other parent. In addition, the magistrate stated that the guardian ad litem and a court-appointed psychologist recommended that the mother have sole custody and that the father have the standard visitation order.

{¶ 33} In ruling on Brian’s objections to the magistrate’s decision, the trial court concluded that the award of sole custody to Jenise was heavily supported by the evidence. We have reviewed the entirety of the record, which is extensive, and

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<sup>1</sup>R.C. 3109.04(F)(1) contains a few other factors that are not relevant to the case before us.

cannot find that the trial court acted arbitrarily, unconscionably, or unreasonably in granting sole legal custody to Jenise. The children expressed a preference to live with their mother. The children are more bonded with their mother, and she has been the primary custodian since their birth.

{¶ 34} Brian argues that he presented significant evidence to show that the children led happy, healthy lives in Champaign County. Brian also contends that Jenise largely failed to challenge evidence of Brian's active involvement in raising and caring for his children. We disagree.

{¶ 35} The guardian ad litem stated that the children were fearful of the people Brian would bring home, often to live with them. The guardian also noted that the children said Brian was rarely home when they all lived together. Furthermore, Brian discussed inappropriate matters in front of the children when he met with the children and their counselor. These items included that the children should not be with their mother, and that Brian intended to file federal charges against her. Even if Brian sincerely felt this way, he should not have made such comments in front of his young children. Brian also acted inappropriately by calling the children's mother a "whore," and attempting to drive away with them. This undoubtedly would have frightened the children.

{¶ 36} Citing *Beekman v. Beekman* (1994), 96 Ohio App.3d 783, Brian contends that unsubstantiated allegations of sexual abuse are a factor to be considered in determining the merits of a modification of custody. Brian contends that he should have been awarded custody, because Jenise made repeated false allegations of sexual abuse and improperly subjected C.K. to interviews and medical

examinations concerning the alleged abuse.

{¶ 37} In *Beekman*, the Fourth District Court of Appeals held that “unsubstantiated allegations of sexual abuse are a change of circumstances and may be grounds on which to modify a prior custody award.” *Id.* at 789. The court stressed that:

{¶ 38} “When a court makes a custodial decision, it makes a presumption that the circumstances are such that the residential parent will promote both maternal and paternal affection. The residential parent implicitly agrees to foster such affection, not out of any good feeling toward the nonresidential parent, but out of the need of the child for both parent's love. Where the evidence shows that after the initial decree the residential parent is not living up to the court's presumption and is attempting to poison the relationship between the ex-spouse and the child, this is a change of circumstances that warrants a modification of the prior custody decree. Unsubstantiated allegations of abuse are the worst kind of poisoning of the relationship.” *Id.*

{¶ 39} The case before us does not involve modification of a prior custody decree, which requires a change of circumstances. The only custody “award” made before the final judgment was a temporary custody order entered in June 2007. Furthermore, in *Wilburn v. Wilburn* (2001), 144 Ohio App.3d 279, we noted that a subsequent decision of the Fourth District Court of Appeals had clarified *Beekman*. *Id.* at 287, citing *Stover v. Plumley* (1996), 113 Ohio App.3d 839. In *Stover*, the Fourth District noted that the two concurring judges in *Beekman* did not agree that unsubstantiated allegations of sexual abuse, standing alone, warrant modification of

custody. The Fourth District, therefore, concluded in *Stover* that “ ‘unsubstantiated allegations of sexual abuse are only one factor that a court may consider when determining whether a change in circumstances has occurred.’ ” *Wilburn*, 144 Ohio App.3d at 287, citing *Stover*, 113 Ohio App.3d at 842-43.

{¶ 40} Despite this later clarification, the general sentiments in *Beekman* are still relevant to any case involving the custody of minor children. Parents should speak respectfully and should not use children as weapons against each other.

{¶ 41} In the case before us, the magistrate, who heard all the testimony through two years of sparring and allegations on both sides, commented as follows in her final decision:

{¶ 42} “The most disturbing problem with this case has been \* \* \* [C.K.’s] allegations of sexual abuse by her father. [Brian] denies that he has ever sexually abused the daughter. [Jenise] denies that she has coached her child to make the sex abuse allegations against her father. Children Services in three different counties have investigated the allegations and no filings have been made by any of the counties. \* \* \* [C.K.] claimed to have been sexually abused by her father during the in camera interview. The child also claimed to be touched by her father inappropriately to Dr. Lindenberry and did state that to her father in a session with Dr. Lindenberry. Dr. Lindenberry did not refer \* \* \* [C.K.] to sex abuse counseling because she saw the priority in counseling to address \* \* \* [C.K.’s] adjustment issues. Dr. Lindenberry believed \* \* \* [C.K.] was abused, but the information on the abuse allegations came from [Jenise]. It appears that [C.K.] has either been sexually abused by her father or coached by her mother to make those allegations.

The court was not able to determine based on the evidence presented if the child was abused or coached, but finds that either is equally damaging to the child. The child would be best served to be raised by someone other than her parents, however the evidence presented is not sufficient for a removal from either home.” Magistrate’s Decision and Order dated February 9, 2009, ¶ 11 (bracketed material added).<sup>2</sup>

{¶ 43} In ruling on the objections to the magistrate’s decision, the trial court observed that: “Whether the children would be best served by living with someone other than their parents is irrelevant since removal from the home was not found to be warranted by the evidence. Abuse was not, however, proven.” Judgment and Order on Objections, p. 2, ¶ 7.

{¶ 44} The record supports the observations of both the magistrate and trial court. Notably, C.K. told the magistrate about abuse. Dr. Lindabury also heard C.K. firmly say “yes” when Brian asked C.K. if he had touched her inappropriately. Dr. Lindabury further said that Jenise provided her with information about sexual abuse and made it clear when C.K. was out of the room that she did not want Brian accused of something he did not do. And, as noted, Brian denied he had done anything wrong. The trial court and magistrate acted appropriately, because the evidence failed to establish that either parent acted improperly in connection with the alleged sexual abuse.

{¶ 45} As has been stressed in many cases, we defer to the trial court’s

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<sup>2</sup>The magistrate incorrectly spelled the name of Dr. Sara Lindabury, who testified at two hearings.

determination of credibility. “The ‘rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.’ ” *In re J.Y.*, Miami App. No. 07-CA-35, 2008-Ohio-3485, ¶ 33, quoting from *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80. After hearing the testimony of all witnesses, the magistrate concluded that awarding sole custody to Jenise, as opposed to Brian, is in the children’s best interests. Since the evidence supports this finding, the trial court did not abuse its discretion in overruling Brian’s objections to the magistrate’s decision.

{¶ 46} Brian’s sole assignment of error is overruled.

IV

{¶ 47} Brian’s sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

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