

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

In the Matter of: : Case No. 09CA31
A.W.C., : DECISION AND
A Minor Child. : JUDGMENT ENTRY
: **Released 7/29/10**

APPEARANCES:

Michael D. Buell, BUELL & SIPE CO., L.P.A., Marietta, Ohio, for appellant.

Nancy E. Brum, Marietta, Ohio, for appellee.

Harsha, J.

{¶1} Judith Smithchild, grandmother of the minor child AWC, appeals an order that reduced her visitation rights with him. Smithchild had filed a contempt motion with the court after AWC's mother, Krixten Bules, refused to allow her to see the child. Bules responded by filing a motion to modify the visitation arrangement. Bules claimed that Smithchild was showering with AWC, who is an eight year old boy. During hearings, Smithchild admitted to showering with AWC on two occasions and also to making a false statement about the incident in a court-filed affidavit. Subsequently, the trial court adopted the magistrate's decision to reduce Smithfield's visitation rights.

{¶2} Smithchild appeals and argues that the court failed to consider some of the statutory factors that are necessary to determine whether a modification of visitation rights is appropriate. Because the court's findings of fact and conclusions of law failed to specifically address all the relevant factors required by R.C. 3109.051(D), we agree.

{¶3} Smithchild also argues that the court relied on two improper factors in determining that a change in visitation was necessary. She claims that the court's

consideration of the showering incidents and her false statements concerning the time frame of the incidents was improper because neither was shown to have any “direct adverse impact” on the child. However, courts developed the “direct adverse impact” test to insure that purely subjective “moral values” do not become the basis for a modification when the lifestyle of the custodian forms the grounds for the request. The showering incidents and the false statements about them are not lifestyle concerns. They were properly considered by the court in its best interest analysis.

I. Summary of the Case

{¶4} In 2003, the trial court issued an order naming Bules residential parent of AWC and granting visitation rights to AWC’s biological father, who was incarcerated. Bules apparently agreed that the father’s visitation rights could be exercised, with certain modifications, by the Smithchilds, AWC’s paternal grandparents.

{¶5} In the summer of 2008, AWC exposed his penis to his younger sister. When Bules discussed the incident with AWC, he revealed that he had been showering with Smithchild while at her home. Bules unilaterally discontinued overnight visitation with the Smithchilds without court intervention. Bules also entered AWC into professional counseling with Richard Nulter, who contacted Smithchild and discussed the showering. Nulter eventually reported the incident to Washington County Children Services, which conducted an investigation.

{¶6} Eventually Smithchild filed a motion for contempt premised on Bules’ failure to abide by the visitation order. She included her affidavit which claimed the allegations about showering with AWC were “untrue.” In response, Bules asked the court to modify the prior order and eliminate overnight visitation with the Smithchilds.

{17} The magistrate held a hearing to address temporary orders on the motions. Nulter, Jamie Vuksic, an employee of Washington County Children Services, Smithchild, and Bules all testified. Nulter indicated that he had met with AWC thirteen times and was helping him establish boundaries between himself and others. AWC told him that Smithchild had him wash her hair when they showered together. Nulter said Smithchild told him that she had showered with AWC for many years beginning when he was young. Smithchild also offered Nulter a pragmatic excuse for showering with AWC – there was limited water available to the property and AWC was prone to taking long showers. In effect, she showered with AWC to conserve water and monitor his use of water.

{18} Nulter also explained that he was helping AWC cope with feelings of sadness that he experienced after Smithchild allegedly asked AWC to change his story about the time frame of the showering incidents. Nulter explained: “he had mentioned that he thought grandma was mad at him because she was like telling him that this had happened earlier, and he said [that] made him feel like a liar.” Ultimately, Nulter opined that AWC was “adjusting fairly well” and there had been no further incidents since treatment began.

{19} Vuksic testified that he conducted an investigation of the showering incident on behalf of Washington County Children Services. Smithchild told Vuksic the same story she told Nulter, that she had showered with AWC for many years starting when he was a young child. She confessed that she had not realized that it became inappropriate as the child grew older. She stressed that she loved AWC, wanted to be part of his life, and was going to remedy the water supply issue. Although Vuksic

believed the showering was “problematic,” Washington County Children Services ultimately concluded that the allegations did not rise to the level of abuse or neglect.

{¶10} Smithchild admitted to two incidents of showering or bathing with AWC, which included AWC washing her hair. She denied that the showering had happened for many years, and explained that Vuksic must have misunderstood her due to poor cell phone reception. Smithchild confessed that she was trained as a counselor and that “something dumb happened” in her head to make her think showering with her eight year old grandson was appropriate. She denied asking AWC to change his story about the time frame of the showering incidents.

{¶11} At the conclusion of the hearing the magistrate remarked:

THE COURT: And Attorney Buell, you’re simply asking the Court [to] enforce its prior order, is that correct?

MR. BUELL: Yes.

THE COURT: Okay. I can tell you right now, without even hearing anything more, I don’t find any concern for the child. If the counselors haven’t found any concern for the child, it’s my intent to order that the visitation as previously ordered be continued.

{¶12} Three months later the magistrate held a final hearing on the motions where only Bules and Smithchild testified. The parties stipulated that in its final disposition the court could consider the testimony of Nulter and Vuksic from the prior hearing.

{¶13} Under cross-examination Smithchild admitted that her statement denying the showering incidents in the affidavit she filed with the contempt motion was false. She again denied attempting to get AWC to change his story about the time frame when the showering incidents occurred. Bules testified that she thought it was in the best

interest of the child to have limited interactions with Smithchild. She stated that AWC was still seeing Nulter for counseling.

{¶14} The magistrate concluded that continued visitation with the grandparents was in the best interest of the child and cited their long relationship with AWC and his desire to continue visiting his grandparents. However, the magistrate also found that Smithchild had violated the trust of the mother and child by inappropriately showering naked with the child over an extended period of time. The magistrate commented: “[t]he grandmother has offered no logical explanation for her inappropriate actions. Thereafter, the grandmother has continued to demonstrate incredibly poor judgment by lying to the mother, the CSB investigator, and the Court. The child has suffered some emotional harm from the grandmother’s actions and lies.”

{¶15} The magistrate restricted the Smithchilds’ weekly visitation to Sundays from 9:00 AM to 7:00 PM and left it to Bules’ discretion as to any additional visitation during the week. The trial court issued a judgment entry adopting the magistrate’s decision in full on the same day.

II. Assignment of Error

{¶16} Smithchild’s sole assignment of error is:

THE TRIAL COURT ERRED WHEN IT MODIFIED THE VISITATION ORDER.

{¶17} Initially we note that Smithchild did not file written objections to the magistrate’s recommendation. Juv.R. 40(D)(3)(b)(iv) provides that “a party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Juv.R. 40(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as

required by Juv.R. 40(D)(3)(b).” And Juv.R. 40(D)(3)(a)(iii) requires a magistrate’s decision to include conspicuous language informing the parties of their responsibility to object to, rather than simply appeal, the magistrate’s recommendation.

{¶18} The provisions of Juv.R. 40(D) are analogous to those of Civ.R. 53(D). Thus, the same principles we have applied to Civ.R. 53(D) are applicable to Juv.R. 40(D). If a “magistrate’s decision does not comply with Civ.R. 53(D)(3)(a)(iii), then a party may assign as error on appeal the trial court’s adoption of the magistrate’s findings of fact and conclusions of law.” *Picciano v. Lowers*, Washington App. No. 08CA38, 2009-Ohio-3780, at ¶17. The rationale is that when a magistrate fails to comply with Civ.R. 53(D)(3)(a)(iii) (or Juv.R. 40(D)(3)(a)(iii)), the parties may be unaware of the strict waiver rule prescribed by Civ.R. 53(D)(3)(b)(iv) (or Juv.R. 40(D)(3)(b)(iv)) and the related time-limited procedures for preserving objections to a magistrate’s decision. See *Rockey v. Rockey*, Highland App. No. 08CA4, 2008-Ohio-6525, at ¶12.

{¶19} Here the magistrate’s decision did not include the required notice under Juv.R. 40(D)(3)(a)(iii). The decision was adopted in full by the trial court on the same day it was filed by the magistrate. Accordingly, despite the failure to file objections, we will review the merits of Smithchild’s assignment of error.

III. Modification of the Visitation Order

A. Failure to Consider the R.C. 3109.051(D) Factors

{¶20} Smithchild argues that the court failed to consider all relevant statutory factors in its decision to modify the visitation arrangement. We agree.

{¶21} In *Braatz v. Braatz*, 85 Ohio St.3d 40, 1999-Ohio-203, 706 N.E.2d 1218, at paragraphs one and two of the syllabus, the Ohio Supreme Court set forth the standard for modifying visitation rights:

{¶22} “1. Modification of visitation rights is governed by R.C. 3109.051.

{¶23} “2. The party requesting a change in visitation rights need make no showing that there has been a change in circumstances in order for the court to modify those rights. Pursuant to R.C. 3109.051(D), the trial court *shall* consider the [sixteen] factors enumerated therein, and in its sound discretion shall determine visitation that is in the best interest of the child. (Emphasis supplied.)

{¶24} Accordingly, in determining whether to grant or modify the visitation rights of a grandparent, a trial court must consider all of the following factors under R.C. 3109.051(D) if they are relevant:

{¶25} “(1) The prior interaction and interrelationships of the child with the child’s parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation if that person is not a parent, sibling, or relative of the child;

{¶26} “(2) The geographical location of the residence of each parent and the distance between those residences, and if the person is not a parent, the geographical location of that person’s residence and the distance between that person’s residence and the child’s residence;

{¶27} “(3) The child’s and parents’ available time, including, but not limited to, each parent’s employment schedule, the child’s school schedule, and the child’s and the parents’ holiday and vacation schedule;

{¶28} “(4) The age of the child;

{¶29} “(5) The child’s adjustment to home, school, and community;

{¶30} “(6) If the court has interviewed the child in chambers, pursuant to division (C) of this section, regarding the wishes and concerns of the child as to parenting time by the parent who is not the residential parent or companionship or visitation by the grandparent, relative, or other person who requested companionship or visitation, as to a specific parenting time or visitation schedule, or as to other parenting time or visitation matters, the wishes and concerns of the child, as expressed to the court;

{¶31} “(7) The health and safety of the child;

{¶32} “(8) The amount of time that will be available for the child to spend with siblings;

{¶33} “(9) The mental and physical health of all parties;

{¶34} “(10) Each parent’s willingness to reschedule missed parenting time and to facilitate the other parent’s parenting time rights, and with respect to a person who requested companionship or visitation, the willingness of that person to reschedule missed visitation;

{¶35} “(11) In relation to parenting time, whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; and whether there is reason to believe that either

parent has acted in a manner resulting in a child being an abused child or a neglected child;

{¶36} “(12) In relation to requested companionship or visitation by a person other than a parent, whether the person previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether the person, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of the adjudication; whether either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent previously has been convicted of an offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that the person has acted in a manner resulting in a child being an abused child or a neglected child;

{¶37} “(13) 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 an order of the court;

{¶38} “(14) Whether either parent has established a residence or is planning to establish a residence outside this state;

{¶39} “(15) In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court;

{¶40} “(16) Any other factor in the best interest of the child.”

{¶41} Smithchild argues that the court failed to consider (1) the geographical location of her residence and the distance between her residence and AWC's residence; (2) AWC's, the grandparents', and mother's available time and schedules; (3) AWC's age; (4) AWC's adjustment to home, school, and community; (5) the grandparents' willingness to reschedule missed parenting time and to facilitate the mother's parenting time rights; (6) that the grandparents had not been previously convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused or neglected child; and (7) that the mother has continuously and willfully denied the grandparents' right to companionship time in accordance with an order of the court. Smithchild implies that had the court considered these factors, it would not have curtailed her visitation rights.

{¶42} Juv.R. 40(D)(3)(a)(ii) states that “a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law.” R.C. 3109.051(C), which directs courts to consider the R.C. 3109.051(D) factors in determining visitation rights of a grandparent, does not require the court to issue specific findings of fact or conclusions of law in reaching its decision. Thus, if the magistrate issued a “general” decision, its failure to specifically address the R.C. 3109.051(D) factors, absent a request to do so, would not be error. But here the decision of the magistrate was not “general” in nature. The decision spans seven

single-spaced pages that contain detailed “Findings of Fact” and “Conclusions of Law.” Although the magistrate’s decision indicated that it was “guided” by R.C. 3109.051 and announced several reasons justifying limited visitation, it did not specifically address every relevant statutory factor.

{¶43} Confronted with a detailed decision that failed to specifically announce findings concerning relevant R.C. 3109.051(D) factors, we must presume that the magistrate failed to consider those factors. This was error under R.C. 3109.051(D) and *Braatz*, supra. Accordingly, the trial court erred in adopting the decision of the magistrate.

B. Consideration of “Lifestyle” Issues

{¶44} Smithchild also argues that the court considered inappropriate factors in determining that a modification of visitation rights was in order. First, Smithchild contends that the magistrate should not have considered the showering incidents because (1) it was past misconduct that had ceased; and (2) there was no evidence that the showering had any direct adverse impact on AWC. Second, Smithchild alleges that the magistrate improperly considered her false statements concerning the time period when she showered with AWC. She again contends that there was no evidence that the false statements had any direct adverse effect on AWC. As a related argument Smithchild directs our attention to the magistrate’s statement at the first hearing -- that he didn’t have any concerns for AWC’s well-being over the showering incident. Based on this statement, she implies that the written decision restricting visitation had to have been motivated by the court’s negative personal opinion of Smithchild rather than the best interest of AWC.

1. The “Direct Adverse Impact” Test is Inapplicable

{¶45} In *In re Burrell* (1979), 58 Ohio St.2d 37, 388 N.E.2d 738, the Supreme Court of Ohio addressed whether two minor girls lacked proper parental care and supervision solely because their mother, with whom they lived, was also living with her boyfriend. The Court found that the evidence showed no conditions adverse to the normal development of the girls other than the fact that the mother lived with her boyfriend. It held: “[S]uch conduct is only significant if it can be demonstrated to have an adverse impact upon the child sufficiently to warrant state intervention. That impact cannot be simply inferred in general, but must be specifically demonstrated in a clear and convincing manner.” *Id.* at 39.

{¶46} Prior to *Burrell*, we endorsed the direct adverse impact test in *Whaley v. Whaley* (1978), 61 Ohio App.2d 111, 399 N.E.2d 1270. We held “immoral conduct must be shown to have a direct or probable adverse impact on the welfare of the child in order to justify a change of custody[.]” *Id.* at 118. And in *Conkel v. Conkel* (1987), 31 Ohio App.3d 169, 172, 509 N.E.2d 983, we extended the “direct adverse impact” test to visitation. There we held that a father could not be denied visitation with his two sons on the basis of his homosexuality without evidence that visitation would be harmful to the sons either physically or psychologically. “[B]efore depriving the * * * parent of his crucial and fundamental right of contact with his child, a court must find that the parent’s conduct is having, or is probably having, a harmful effect on the child.” *Id.* at 172. “The ‘direct adverse impact’ test ensures that a trial court’s denial or severe restriction on visitation will be based on objective criteria, rather than merely on the personal moral

code of the trial judge.” *Anderson v. Anderson*, 147 Ohio App.3d 513, 2002-Ohio-1156, 771 N.E.2d 303, at ¶22.

{¶47} There is a common thread between *Burrell*, *Whaley*, and *Conkel*. All three cases involved modifications of domestic relations orders premised on the lifestyle or moral choices of the parent. In *Burrell* it was the mother’s decision to raise her children in the same home as her live-in boyfriend. In *Whaley* it was the mother’s decision to have a relationship with a married man. In *Conkel* it was the father’s homosexuality. Other Ohio courts have limited the “direct adverse impact” test to lifestyle or moral issues. See *Rowe v. Franklin* (1995), 105 Ohio App.3d 176, 180, 663 N.E.2d 955 (“the direct adverse impact test allows the court to consider moral principles, but only in relation to the direct or probable effect of the parent’s conduct on the child”); *Mills v. Mills*, Trumbull App. No. 2002-T-0102, 2003-Ohio-6676, at ¶38 (“[i]n considering the best interest of the child, a court may examine a parent’s lifestyle, but only to the extent that it has a direct adverse impact on the child”); see, also, *Dexter v. Dexter*, Portage App. No. 2006-P-0051, 2007-Ohio-2568, at ¶32.

{¶48} Thus, the “direct adverse impact” test is properly applied when a parent’s lifestyle or moral conduct forms the basis of a change in custody or visitation. The Eighth District addressed this issue in *In re R.N.*, Cuyahoga App. No. 87027, 2006-Ohio-4266. There the mother claimed that the magistrate failed to properly apply the “direct adverse impact” test to its conclusion that her relocation to another state constituted a change of circumstances in a custody proceeding.

{¶49} In rejecting this argument, the Eight District noted that the “direct adverse impart test” had been applied by other courts in custody determinations when the

parent's conduct that formed the basis for the change was characterized as "immoral." But the court observed that the morality of the parents was not at issue. *Id.* at ¶20. Rather, the issue was how a change in the custodial residence might affect the child. This was an issue that a court could examine using the ordinary "best interest analysis" and to which there was no need to apply the "direct adverse impact test." *Id.*

{¶50} We agree that a court need not apply a "direct adverse impact" test when the factor being considered is unrelated to moral conduct or a lifestyle choice. The direct adverse impact test exists because trial courts possess wide latitude in fashioning and modifying custody and visitation orders. The test ensures that a trial court's decision is based on the best interests of the child and not the trial judge's personal opinion concerning lifestyles or morals.

2. The Showering Incident

{¶51} Even if we assume the direct adverse impact test applies, the trial court did not abuse its discretion in relying on the showering incident as justification for a change in visitation. The court found that AWC suffered some emotional harm from showering in the nude with his grandmother and washing her hair. This finding is supported by the record. AWC has been in professional counseling since the incident was revealed to his mother and he continues to work with Nulter to help establish boundaries.

{¶52} Smithchild's apparent disregard for the appropriate physical boundaries between herself and her eight year old grandson generally indicates that she may not possess the appropriate judgment to take care of the boy. Additionally, by her own actions she has shattered whatever trust may have existed between herself and AWC's

mother. The trial court acted within its discretion to reduce Smithchild's visitation with the child based on the showering incident.

{¶53} Smithchild also contends that a change in visitation cannot be premised upon past misconduct where at the time of the hearing the conduct in question had ceased. For this proposition she cites *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 445 N.E.2d 1153. If that were the actual holding of *Wyss* we would assuredly disagree. The best interest of the child is what is at stake. Past misconduct that has ceased is still relevant to the best interest of the child because it has a tendency to predict future behavior. See *In re Burchfield* (1988), 51 Ohio App.3d 148, 156, 555 N.E.2d 325, (the unfitness of a custodian can be predicted by past history). And the actual holding in *Wyss* was “[c]hange of custody cannot properly be used as a penalty for past misconduct where the misconduct is not continuing *and not shown to materially adversely affect the child.*” *Id.* at paragraph three of the syllabus. (Emphasis added.)

3. The False Statements

{¶54} Again, assuming the direct adverse impact test applies, the trial court did not abuse its discretion in relying on the false statements as justification for a change in visitation. Nulter and Vuksic both testified that Smithchild indicated that she showered with the child beginning at an early age and just did not realize when it became inappropriate. Afterwards, she filed an affidavit with the court denying that she showered with the child. Smithchild later admitted she lied in this affidavit. And at the first hearing, she claimed only showering with the child twice, despite her statements to Nulter and Vuksic. She even claimed that Vuksic may have misunderstood her because of poor cell phone reception.

{¶55} Smithchild's false statements in this case do appear to have had a direct, negative effect on AWC. Bules alleged that Smithchild tried to convince AWC to change his story about how many times he showered with her. Smithchild repeatedly denied this. However, the record demonstrates that AWC was aware that his grandmother was telling a different story than he was. And this made him upset. Nulter stated the child "thought grandma was mad at him because she was like telling him that this had happened earlier, and he said [that] made him feel like a liar." Accordingly, the record lends support to the magistrate's conclusion that Smithchild's false statements caused emotional harm to AWC. And, in addition to the impact this had on AWC, it is clear evidence that Smithfield was acting manipulatively.

{¶56} But our opinion would be the same even if there was no evidence that Smithchild's false statements had any direct, negative effect on AWC. False statements generally indicate that an individual may not be trustworthy. A court should take this into consideration when determining the child's best interest. A court need not wait until the improper behavior has actually and directly harmed the child before it can make a change in custody or visitation rights. The law does not require a court to experiment with a child's welfare to see if the child will suffer harm before it decides to take protective action. *In re Burchfield, supra.*

{¶57} Finally, we address Smithfield's emphasis on the magistrate's statement at the first hearing that he did not have any concern for the child's welfare. We are not convinced that this demonstrates any abuse of discretion in his subsequent decision to modify visitation. Until the court journalizes its final order, it is free to reconsider its decision. *In re Grand Jury Subpoena Duces Tecum Directed to Keeper of Records of*

My Sister's Place, Athens App. No. 01CA55, 2002-Ohio-5600, at ¶1. Although there was no additional testimony at the final hearing from Nulter or Vuksic, the magistrate heard new evidence from both Bules and Smithchild. Notably, Bules testified that AWC remained in counseling, which indicates the child was still suffering from the impact of the events. Moreover, nearly six months had passed since the first hearing and the written decision, more than enough time for the magistrate to reflect on the case and reconsider the impact of his earlier position on the matter. The inconsistency between the magistrate's earlier oral statement and the written decision adopted by the court does not establish that the court acted unconscionably, unreasonably, or arbitrarily. Consequently, we hold the trial court acted within its discretion in relying on Smithchild's false statements as justification for a change in visitation.

IV. Conclusion

{¶58} Accordingly, we reverse the decision of the trial court on the sole basis it failed to address all the statutory factors in its findings of fact and conclusions of law. We remand this matter to the trial court to consider the motions to modify visitation under the proper statutory framework.

**JUDGMENT REVERSED
AND CAUSE REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.