

[Cite as *Sellers v. Sellers*, 2010-Ohio-3712.]

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

ABRAHAM SELLERS, :
 :
 Plaintiff-Appellee, : Case No. 09CA45
 :
 vs. :
 :
 MARIA JULIA SELLERS, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Melissa M. Wilson, 1009 Steubenville Avenue,
Cambridge, Ohio 43725
COUNSEL FOR APPELLEE: Michael D. Buell, 322 Third Street, Marietta, Ohio
45750

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-5-10

ABELE, J.

{¶ 1} This is an appeal from a Washington County Common Pleas Court judgment that granted Abraham Sellers, plaintiff below and appellee herein, and Maria Julia Sellers, defendant below and appellant herein, a divorce and designated appellee the minor children's residential parent and legal custodian.

{¶ 2} Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT'S GRANTING OF CUSTODY OF THE

MINOR CHILDREN TO THE APPELLEE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY DENYING THE APPELLANT SPOUSAL SUPPORT IN THIS MATTER.”

{¶ 3} The parties married in 2005 and two children were born as issue of the marriage: A.S., born April 19, 2006, and V.S., born April 19, 2008. On November 20, 2008, appellee filed a complaint for divorce. Appellant answered and counterclaimed for divorce. She subsequently filed a motion for shared parenting and submitted a shared parenting plan.

{¶ 4} On August 13, 2009, the guardian ad litem filed her report. She found that both parents have an appropriate home environment and are appropriately bonded with the children. The guardian ad litem noted some concerns, however, regarding appellant’s physical care and hygiene of the children, as evidenced by A.S. contracting E. Coli and by allegations that the children have “excessive meals” from McDonald’s Restaurant. She further expressed concern that appellant emotionally abuses the children by having outbursts in front of them and by “berat[ing] and scream[ing] at her older children inappropriately.” The guardian ad litem did not believe that shared parenting would be in the children’s best interests due to the hostile relationship between appellant and appellee. She stated that appellee does not trust appellant and that the parties do not communicate effectively. Thus, the guardian ad litem recommended that the court designate appellee the children’s residential parent and legal custodian.

{¶ 5} On September 21, 2009, the trial court granted the parties a divorce. The court found that designating appellee the children's residential parent would serve their best interests and that shared parenting would not be in the children's best interests. The court concluded that substantial, credible evidence existed that raised concerns about appellant's parenting abilities. The trial court's judgment provides, inter alia, as follows: (1) the principal of the school that appellant's older children attended wrote a letter to appellant and expressed concern over her failure to provide lunch on a consistent basis; (2) children services became involved with appellant after receiving a report that appellant failed to properly restrain her children while in a vehicle; (3) appellant did not properly supervise her children and she spoke harshly to her older children ("in words and tone that was vulgar, highly critical, and loud enough for neighbors to hear through solid walls and across substantial distances."); (4) appellant could not control her emotions during discussions, often in front of the children; (5) appellant left her children alone (when the youngest child was only a couple of months old, she left him and the other young child in the car while she talked to appellee in his office for approximately twenty minutes, and during this time she was not in a position to observe the children) - also, other evidence indicated that the younger children were left alone on a couple of other occasions; (6) testimony indicated that the older children were often left to fend for themselves throughout the day and were required to go in and out of their home over porches and through upstairs windows; (7) the overall impression from a number of witnesses showed a general lack of concern for the well being of her children, and for their safety; (8) testimony indicated that appellant has been less than fully cooperative with appellee concerning the children; (9) appellant

missed a scheduled minor surgery for her son, after complaining at the temporary orders hearing that the surgery was not being performed fast enough; (10) appellant arrived late for her children's birthday visitation; (11) appellant allowed her older children to use guns, apparently with minimal supervision, at the home, with the young children present.

{¶ 6} The trial court declined to award spousal support and explained: "This is a short term marriage. Neither party has substantially changed position. Both are in good health. Even given the substantial disparity in income between the parties, spousal support would be inappropriate. [Appellant] had an opportunity to help her economic situation by seeking employment, yet has declined to do so."

{¶ 7} Thus, the trial court trial designated appellee the children's residential parent and legal custodian and granted appellant standard visitation, with the exception that weekend and mid-week visitation would be Monday from 6:00 p.m. until Wednesday at 6:00 p.m., until the children begin school. This appeal followed.

I

{¶ 8} In her first assignment of error, appellant asserts that the trial court's judgment designating appellee the children's residential parent and legal custodian is against the manifest weight of the evidence. Appellee argues that because appellant requested the court to order shared parenting, she waived the argument that the court should have designated her the children's residential parent and legal custodian.

A

WAIVER

{¶ 9} We initially disagree with appellee that appellant, by making a shared parenting request, waived the right to challenge the trial court’s decision to designate appellee the children’s residential parent and legal custodian. We do not construe appellant’s argument as asserting that the trial court should have designated her the residential parent and legal custodian. Rather, we construe her argument as contending that the trial court abused its discretion by rejecting her shared parenting plan and by designating appellee the residential parent and legal custodian of the children.

B

STANDARD OF REVIEW

{¶ 10} Appellate courts afford the utmost deference to a trial court child custody decision. See, e.g., Miller v. Miller (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846. Consequently, absent an abuse of discretion, a reviewing court will not reverse a trial court’s decision regarding child custody matters. See, e.g., Bechtol v. Bechtol (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus. Thus, when “an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court.” Bechtol at syllabus; see, also, Davis v. Flickinger (1997), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159.

{¶ 11} In Davis, the court explained the abuse of discretion standard that applies in custody proceedings:

“Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court. (Trickey v. Trickey

[1952], 158 Ohio St. 9, 47 O.O. 481, 106 N.E.2d 772, approved and followed.)' [Bechtol v. Bechtol] (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus].

The reason for this standard of review is that the trial judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page. As we stated in Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80-81, 10 OBR 408, 410-412, 461 N.E.2d 1273, 1276-1277:

'The underlying 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. * * *

* * *

* * * A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. The determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal, especially to the extent where the appellate court relies on unchallenged, excluded evidence in order to justify its reversal.' This is even more crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well."

Id. at 418-419. Thus, reviewing courts should give great deference to trial court child custody decisions. Pater v. Pater (1992), 63 Ohio St.3d 393, 396, 588 N.E.2d 794.

Additionally, because child custody issues involve some of the most difficult and agonizing decisions that trial courts are required to decide, courts must have wide latitude to consider all of the evidence and appellate courts should not disturb a trial court's judgment absent an abuse of discretion. See Davis, 77 Ohio St.3d 418; Bragg v. Hatfield, 152 Ohio App.3d 174, 787 N.E.2d 44, 2003-Ohio-1441, at ¶24; Hinton v. Hinton, Washington App. No. 02CA54, 2003-Ohio-2785, at ¶9; Ferris v. Ferris, Meigs App. No. 02CA4, 2003-Ohio-1284, at ¶20.

ALLOCATION OF PARENTAL RIGHTS AND RESPONSIBILITIES

{¶ 12} In a divorce action, R.C. 3109.04(A) requires a trial court to allocate parental rights and responsibilities for the care of a minor child. In allocating parental rights and responsibilities, a trial court may designate one parent as the legal custodian and residential parent of the child, or the court may delegate some or all of those responsibilities to both parents under a shared parenting plan. See R.C. 3109.04(A)(1) and (2). A trial court may not approve a shared parenting plan unless it is in the best interest of the children. R.C. 3109.04(A)(1) & (D)(1)(b).

{¶ 13} When allocating parental rights and responsibilities, the paramount and overriding concern is always the child's best interests. See Birch v. Birch (1984), 11 Ohio St.3d 85, 87, 463 N.E.2d 1254; see, also, R.C. 3109.04(B)(1). In determining whether shared parenting is in a child's best interest, the trial court must consider all relevant factors, including but not limited to the factors in R.C. 3109.04(F)(1), the factors enumerated in R.C. 3119.23,¹ and five additional factors in R.C. 3109.04(F)(2).

{¶ 14} R.C. 3109.04(F)(1) requires trial courts to consider the following factors

¹ R.C. 3119.23 is entitled "[f]actors relevant to granting deviation" which is in the section relating to child support obligations. These factors are primarily financial in nature, and take into account a child's special and unusual needs; extraordinary obligations for children who are not the subject of the support order; other court-ordered payments; cost associated with extended parenting time; an obligor obtaining additional employment to support a second family; the child's financial resources and earning ability; income disparity; benefits received from remarriage or shared living expenses; income taxes; in-kind contributions from a parent; each parent's financial resources, assets, and needs; the parent's current and the child's previous standard of living; a child's physical and emotional condition and needs; the child's need and capacity for education and educational opportunities; a parent's responsibility to support others; and any other relevant factor.

when determining a child's best interests:

- (a) The wishes of the child's parents regarding the child's care;
- (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;
- (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;
- (d) The child's adjustment to the child's home, school, and community;
- (e) The mental and physical health of all persons involved in the situation;
- (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;
- (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;
- (h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to [certain] criminal offense[s] * * * *
- (i) 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;
- (j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

When shared parenting is at issue, R.C. 3109.04(F)(2) directs trial courts to consider

the following factors when determining if shared parenting would serve the child's best interests:

- (a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;
- (b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;
- (c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;
- (d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;
- (e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem.

{¶ 15} In the case at bar, we are unable to conclude that the trial court abused its discretion by rejecting appellant's shared parenting plan and by designating appellee

the children's residential parent and legal custodian. Substantial and credible evidence supports the trial court's decision that shared parenting would not be in the children's best interests and that designating appellee the children's residential parent and legal custodian would serve their best interests. With respect to the R.C. 3109.04(F)(2) factors, the evidence shows that appellant and appellee have a hostile relationship and are unable to cooperate. Furthermore, evidence exists that appellant has at least verbally abused some of her older children. Moreover, the guardian ad litem expressed concern regarding appellant's physical care of the children and did not recommend that the trial court adopt a shared parenting plan. We believe that the evidence adduced at the hearing fully supports the trial court's decision to reject appellant's shared parenting request.

{¶ 16} Furthermore, ample evidence supports the trial court's decision to designate the appellee as the children's residential parent. Appellant's former neighbors heard appellant verbally abuse her older children from her prior marriage. One of the partners at appellee's office observed appellant leave her young children unattended and unsupervised in her parked car for approximately twenty minutes. A former teacher at the school that appellant's older children attended stated that her children often came to school without jackets and frequently did not have money to purchase a lunch and did not bring a lunch from home. Another witness stated that she observed one of appellee's and appellant's young children eating garbage at a city park. Appellee's mother testified that: (1) appellant fought with appellee in front of their children; (2) appellant repeatedly failed to change one child's diapers; and (3) appellant drove erratically with her children in the vehicle. Appellee also testified that he has

observed appellant (1) strike her older children from her prior marriage, (2) fail to change her child's diapers, and (3) leave her young children unattended on three occasions. One of the parties' neighbors testified that appellant yelled at appellee in front of the children, stating that "you're fucking crazy." The guardian ad litem recommended that the trial court designate appellee the children's residential parent and legal custodian. The court-appointed psychologist testified that appellant scored in the fifth percentile on the parental custody index and in the .08 percentile on the social scale of the test. The psychologist reported that appellee had fewer relative weak points than appellant and that the parties do not effectively communicate so as to support a shared parenting situation. We believe that all of the foregoing evidence constitutes substantial, competent credible evidence to support the trial court's conclusion in this matter.

{¶ 17} We observe that appellant's main complaint appears to be that the trial court did not credit her witnesses and their testimony. As we have noted, however, credibility, especially in child custody matters, is a matter reserved to the trier of fact and we will not second-guess credibility determinations. Generally, a trier of fact is free to believe all, part or none of any witness who testifies before it. Questions of witness credibility and evidence weight are matters that the trier of fact must consider and resolve.

{¶ 18} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

{¶ 19} In her second assignment of error, appellant asserts that the trial court's failure to award spousal support constitutes an abuse of discretion. Appellee first argues that appellant waived this issue because appellant failed to request spousal support at the final hearing and failed to include the request in her proposed findings of fact and conclusions of law. In the interest of justice, however, we will consider appellee's argument.

{¶ 20} R.C. 3105.18(B) permits trial courts to award reasonable spousal support when appropriate. To determine whether spousal support is reasonable and appropriate, courts must consider the factors set forth in the statute:

- (a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;
- (b) The relative earning abilities of the parties;
- (c) The ages and the physical, mental, and emotional conditions of the parties;
- (d) The retirement benefits of the parties;
- (e) The duration of the marriage;
- (f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;
- (g) The standard of living of the parties established during the marriage;
- (h) The relative extent of education of the parties;
- (i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
- (j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
- (k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;
- (l) The tax consequences, for each party, of an award of spousal support;
- (m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
- (n) Any other factor that the court expressly finds to be relevant and equitable."

{¶ 21} It is well-settled that trial courts enjoy broad discretion to determine spousal support issues. Kunkle v. Kunkle (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83; Cherry v. Cherry (1981) 66 Ohio St.2d 348, 421 N.E.2d 1293. Consequently, an appellate court will not reverse a trial court's spousal support decision absent an abuse of discretion. See Bechtol v. Bechtol (1990), 49 Ohio St.3d 21, 24, 550 N.E.2d 178; Holcomb v. Holcomb (1989), 44 Ohio St.3d 128, 131, 541 N.E.2d 597. "Abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary or unconscionable. See, e.g., Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St.3d 83, 87, 482 N.E.2d 1248.

“[A]n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an “abuse” in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. * * *’ State v. Jenkins (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, 313.”

Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St.3d 83, 87, 482 N.E.2d 1248, 1252
(internal quotation omitted).

{¶ 22} In the case at bar, we do not believe that the trial court's decision to reject appellant's request for spousal support constitutes an abuse of discretion. Although appellant was unemployed at the time of the final divorce hearing, we see no evidence that appellant is incapable of earning income. Furthermore, the parties' marriage was of a short duration, lasting approximately four years. Additionally, because appellant will not be the primary custodian of the minor children, she will be able to presently pursue employment outside of the home. While the parties may have enjoyed a high

standard of living during their marriage, the trial court has no obligation to continue appellant's enjoyment of that high standard of living, especially in light of the fact that the marriage was of a short duration. Appellee has a post-graduate degree, whereas appellant has little post-secondary education. Again, however, nothing in the record suggests that she is unable to pursue additional educational opportunities to advance her income. Also, we find no evidence to suggest that appellant contributed in any way to appellee's education and attainment of his professional license so as to further weigh in favor of a spousal support award. Thus, based upon our review of the foregoing factors, we cannot conclude that the trial court's failure to award appellant spousal support constitutes an abuse of discretion.

{¶ 23} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

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 to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Harsha, J. & Kline, J.: Concur in
Judgment & Opinion For the Court

BY: _____
Peter B. Abele, 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.