[Cite as *Fiveash v. Holtzman*, 2021-Ohio-2347.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

MIRANDA FIVEASH FKA HOLTZMAN,

Plaintiff-Appellee,

v.

CONSTANTINE HOLTZMAN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0067

Domestic Relations Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 14 DR 456

BEFORE:
Gene Donofrio, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed

Atty. Christopher Maruca, The Maruca Law Firm, 201 East Commerce Street, Suite 316, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Jennifer Ciccone, 3685 Stutz Drive, Suite 100, Canfield, Ohio 44406, for Defendant-Appellant.

Dated:
June 22, 2021

Donofrio, J.

{¶1} Defendant-appellant, Constantine Holtzman, appeals from a Mahoning County Common Pleas Court, Domestic Relations Division decision denying his motion to modify the visitation schedule in place between him and plaintiff-appellee, Miranda Fiveash, fka Holtzman.

{¶2} The parties in this case were granted a decree of divorce on May 29, 2015. They share two children, who were ages five and three at the time of the divorce. Appellee resides in Florida while appellant lives in Ohio. Per the agreed terms of the divorce, appellant was designated the residential parent. Appellee was to have parenting time pursuant to a long-distance parenting-time schedule agreed to by the parties. Per that schedule, appellee was to have parenting time at her home in Florida for eight consecutive weeks during the summer. Additionally, she was to have Christmas break and spring break, also at her home in Florida. And appellee was entitled to Thanksgiving break if she exercised that visitation in Ohio. If appellee chose not to exercise her Thanksgiving parenting time, then she was to have nine weeks of visitation in the summer instead of eight. The parties agreed to meet in Kentucky to exchange the children for visits.

{¶3} On March 4, 2019, appellant filed a motion to modify parental rights and responsibilities seeking to modify the visitation schedule. Appellant asserted that the children were now older and involved in school activities, sports, and time with friends. He sought to shorten the amount of time the children spent in Florida during the summers with appellee. Appellee opposed appellant's suggested modification. The court appointed a guardian ad litem (GAL).

{¶4} The matter proceeded to a hearing before a magistrate. The magistrate heard testimony from both parties and the GAL. The GAL recommended that parenting time be modified. He suggested that appellee's parenting time be reduced to six weeks in the summer. In addition, he recommended that the parties alternate Thanksgivings, appellee should have every President's Day weekend, the parties should divide

Christmas break, appellee should have every spring break, and another visit could be possible over Martin Luther King, Jr. weekend.

{¶5} The magistrate addressed the statutory best interest factors. He then concluded that the parenting time afforded to the parties should be given paramount importance and that the individual and personal interests of both parents should be considered when attempting to provide as much contact with the children as possible. The magistrate stated that he did not agree with the GAL's recommendations. He opined that implementing the GAL's suggested plan would increase the number of exchanges and the costs to both parties. He found that finances were a factor in this case and it was unreasonable to increase the financial burden. The magistrate found that given the ages of the children, at the time now nine and seven, and the importance of the parent-child relationship over activities of the children, it was unreasonable to significantly modify the existing parenting-time schedule to reduce appellee's time to which the parties had previously agreed. The magistrate did make one small alteration changing the exchange day to Saturdays to accommodate appellant's work schedule, which the parties had been doing already.

{¶6} Appellant filed objections to the magistrate's decision, raising five specific objections including asserting that the magistrate abused his discretion in not adopting the GAL's recommendation. The trial court held a hearing on appellant's objections. The court found no merit with appellant's objections. It then adopted the magistrate's decision and entered judgment accordingly.

{¶7} Appellant filed a timely notice of appeal on June 25, 2020. He now raises four assignments of error.

{¶8} Appellant's first assignment of error states:

> THE TRIAL COURT ERRED BY ADOPTING THE MAGISTRATE'S DECISION THAT DID NOT PROPERLY CONSIDER THE BEST INTEREST OF THE CHILD [sic.].

{¶9} Appellant argues the trial court erred by adopting the magistrate's decision when that decision was based on appellee's finances instead of on the best interest factors set out in R.C. 3109.051(D). Specifically, appellant asserts the court failed to

consider R.C. 3109.051(D)(3) and (4) when considering the children's ages and extracurricular activities. He points out that when the parties agreed to the visitation order in the divorce decree, the children were very young and not yet involved in school or sports. But now, appellant points out, they are involved in their community and with their friends and they want to be able to participate in summer activities. Appellant argues that the court should have given more weight to the GAL's recommendation because the GAL considered the children's best interests instead of appellee's finances. Appellant notes that of the 16 statutory best interest factors, financial hardship is not listed.

{¶10} We review a trial court's decision on a motion to modify visitation for abuse of discretion. *Braatz v. Braatz*, 85 Ohio St.3d 40, 44, 706 N.E.2d 1218 (1999). Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶11} When determining parenting time matters, the court shall consider all relevant factors, including, but not limited to, all of the factors listed in R.C. 3109.051(D). R.C. 3109.051(C). These statutory best interest factors are:

> (1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, * * *;
>
> (2) The geographical location of the residence of each parent and the distance between those residences * * *;
>
> (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;
>
> (4) The age of the child;
>
> (5) The child's adjustment to home, school, and community;
>
> (6) If the court has interviewed the child in chambers * * * the wishes and concerns of the child, as expressed to the court;

(7) The health and safety of the child;

(8) The amount of time that will be available for the child to spend with siblings;

(9) The mental and physical health of all parties;

(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;

(11) In relation to parenting time, whether either parent previously has been convicted of or pleaded guilty to * * * [certain criminal offenses or has been the perpetrator in a case of child abuse, neglect, or dependency];

(12) [Deals only with visitation by non-parents];

(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;

(14) Whether either parent has established a residence or is planning to establish a residence outside this state;

(15) [Deals only with visitation by non-parents];

(16) Any other factor in the best interest of the child.

R.C. 3109.051(D).

{¶12} In his decision, adopted by the trial court, the magistrate set out the best interest factors, noting that the court was to consider these factors when ruling on issues involving parenting time. The magistrate then discussed what he deemed to be the “relevant and material facts of this case.” He pointed to the following facts.

{¶13} Appellant is a resident of Ohio while appellee is a resident of Florida (R.C. 3109.051(C)(2) and R.C. 3109.051(C)(14)). At the time of the parties’ divorce, they

agreed that appellant would be the residential parent and they agreed to a parenting time schedule for appellee. The schedule provided for a modification of parenting time over and above the court's standard long-distance order. It also provided that each parent would be responsible for transportation to the exchange location in Kentucky. Due to the physical distance between the parties, the available parenting time makes frequent contact with the children difficult to accomplish. Both parties have established new families and have another child residing in their households along with their spouse. Appellant has family in the area in Ohio. Appellee has family in the area in Florida. The children are currently ages nine and seven (R.C. 3109.051(C)(4)). The children have adjusted well to appellant's home (R.C. 3109.051(C)(5)). No evidence was presented that the children have not adjusted well to appellee's home aside from the indication that visitation makes it difficult for them to participate in summer sports (R.C. 3109.051(C)(3) and R.C. 3109.051(C)(5)). Both parties indicated that communication between them is strained.

{¶14} There was no indication that the health of either party or the children are an issue (R.C. 3109.051(C)(7) and R.C. 3109.051(C)(9)). There was no evidence that either party is an abusive or neglectful parent (R.C. 3109.051(C)(11)). Neither party requested the court to interview the children (R.C. 3109.051(C)(6)).

{¶15} Appellant indicated that he wanted the court to modify the visitation schedule to the standard long-distance schedule, while appellee indicated that she wanted the current visitation schedule to remain in place (R.C. 3109.051(C)(16)). The GAL recommended that the court modify the visitation schedule so that the parties would alternate Thanksgivings, appellee would have every President's Day weekend, the parties would divide Christmas break, appellee would have every spring break, and another visit would be possible over Martin Luther King, Jr. weekend (R.C. 3109.051(C)(16)). The parties' finances are a factor and to increase the financial burden is not reasonable under the circumstances (R.C. 3109.051(C)(16)).

{¶16} Thus, in reaching the decision in this case, the magistrate and the trial court specifically discussed 11 best interest factors. Additionally, two of the best interest factors did not apply as they deal with visitation by non-parents.

{¶17} Based on all of these factors, the magistrate and the trial court concluded that given the ages of the children and the importance of the parent-child relationship over the children's activities, it was unreasonable to significantly modify the existing parenting schedule and reduce appellee's already limited time. The court did make one modification, modifying the existing schedule so that exchanges would occur on Saturdays to accommodate appellant's work schedule, as the parties had already been doing.

{¶18} As demonstrated, the magistrate and the trial court discussed the statutory best interest factors in detail in reaching the decision to keep the current parenting schedule in place. Thus, appellant's argument that they failed to consider the statutory factors is unfounded.

{¶19} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶20} Appellant's second assignment of error states:

> THE TRIAL COURT ABUSED ITS DISCRETION BY NOT REVIEWING THE MAGISTRATE'S DECISIONS DE NOVO.

{¶21} Appellant asserts here that the trial court was required to, and failed to, conduct a de novo review of the magistrate's decision. He claims that the trial court's failure to independently review the record and make its own factual and legal findings constituted an abuse of discretion.

{¶22} Pursuant to Civ.R. 53(D)(4)(d) in ruling on objections to a magistrate's decision, the trial court "shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Thus, the trial court is to apply a de novo review of a magistrate's decision, not an abuse of discretion standard of review. *Francis v. McDermott*, 2d Dist. Darke No. 1744, 2008-Ohio-6723.

{¶23} On review of the trial court's decision to adopt, reject, or modify a magistrate's decision, an appellate court applies an abuse of discretion standard. *RBS Citizens, NA v. Sharp*, 7th Dist. No. 13 MA 11, 2015-Ohio-5438, 47 N.E.3d 170, ¶ 9.

{¶24} In this case, appellant raised five specific objections: (1) the magistrate erred in finding that an in-camera inspection is an ex parte investigation and that his finding was contrary to law; (2) the findings of fact erroneously state that the parties exchange the children on weekends to accommodate appellant's schedule when actually is to accommodate both of the parties' schedules as appellee was working at a bank; (3) the magistrate abused his discretion when he did not adopt the GAL's recommendation; (4) the magistrate erred in finding that the finances of the parties are a factor in this case when only appellee testified regarding her financial difficulties; and (5) the magistrate erred in considering facts not in evidence.

{¶25} The trial court's judgment entry indicates that it independently reviewed each of appellant's objections as required by Civ.R. 53(D)(4)(d). The court addressed each of appellant's objections in turn.

{¶26} As to the first objection, the trial court noted that the court has broad discretion to regulate discovery matters, including the decision to set discovery deadlines. It pointed out that the magistrate ordered all discovery to be complete by July 15, 2019, and appellant never filed a motion to extend the deadline. The court noted that appellant cited no support for the proposition that the magistrate should have opened discovery back up after the trial had already commenced. Additionally, the court found that Evid.R. 613, addressing when evidence of a prior inconsistent statement by a witness is admissible, did not allow for the admission of appellee's medical records.

{¶27} As to the second objection, the trial court indicated that it read the transcript and found no mention of appellee working at a bank. It then quoted appellant's testimony where he stated, regarding exchanging the children on the weekends, that he did not want to miss any time from work and he thought the same applied to appellee.

{¶28} As to the third objection, the trial court stated that it researched the issue and found that the court must consider the GAL's report, but must consider it along with all available evidence in considering the children's best interest. It further found that while cost to the parties is not a factor specifically listed in R.C. 3109.051(D), R.C. 3109.051(D)(16) instructs the court to consider any other factor that is in the children's best interest. And it noted that one of the most important issues in this case is the distance between the parties and the cost of travel.

{¶29} As to the fourth objection, the trial court found that financial hardships incurred by a party in exercising parenting time is a relevant factor that a court can look to when fashioning a parenting time order.

{¶30} As to the fifth and final objection, the trial court found that while appellant alleged that the magistrate considered facts not in evidence, he did not set forth what those facts might be.

{¶31} Thus, the trial court independently reviewed and ruled upon each of appellant's objections.

{¶32} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶33} Appellant's third assignment of error states:

> THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF'S REQUEST FOR AN IN CAMERA INTERVIEW.

{¶34} The hearing on appellant's motion began on August 21, 2019. It was scheduled to reconvene on September 12, 2019. In the interim, appellant filed a motion for an in-camera inspection of appellee's medical records. Specifically, appellant requested appellee's medical records from 2015 regarding her pregnancy. He contended that appellee perjured herself by claiming she did not know she was pregnant at the time of the divorce. He sought to use appellee's medical records to impeach her testimony and challenge her credibility. The magistrate denied appellant's request.

{¶35} In this assignment of error, appellant argues appellee's medical records were relevant impeachment evidence. He asserts the court gave disproportionate weight to appellee's testimony about her finances, thus her credibility was an important issue.

{¶36} A trial court has broad discretion in matters regarding discovery. *Estate of Hohler v. Hohler*, 197 Ohio App.3d 237, 2011-Ohio-5469, 967 N.E.2d 219, ¶ 26. (7th Dist.). Thus, we review discovery decisions for abuse of discretion. *Id.*

{¶37} Appellant objected to the magistrate's ruling on appellee's medical records. In ruling on this objection, the trial court first pointed out that the magistrate ordered that all discovery was to be completed in this matter by July 15, 2019 and all dispositive motions were to be filed by July 16, 2019. It noted that appellant pointed to

no case law that would allow discovery to be re-opened once trial commenced. Furthermore, it found that it was not up to the court to order appellee to produce medical documents so that appellant could search for impeachment evidence. And finally the court found that, pursuant to Evid.R. 613(2), whether appellee was pregnant with another man's child at the time of the divorce was not relevant in an action on a motion to modify parenting time.

{¶38} We cannot find that the trial court abused its discretion in overruling appellant's objection regarding appellant's medical records. As the court noted, discovery had been closed for almost two months when appellant filed his motion for an in-camera inspection of appellee's medical records. Moreover, the trial had already commenced on the motion. On this basis alone, the magistrate was within his discretion to deny appellant's motion.

{¶39} The trial court also relied on Evid.R. 613(B), which provides that extrinsic evidence of a prior inconsistent statement is admissible if both of the following apply:

> (1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;
>
> (2) The subject matter of the statement is one of the following:
>
> (a) A fact that is of consequence to the determination of the action other than the credibility of a witness;
>
> (b) A fact that may be shown by extrinsic evidence under Evid.R. 608(A) [character evidence], 609 [conviction of a crime], 616(A) [bias], or 616(B) [sensory or mental defect];
>
> (c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence.

The court found that the evidence appellant sought to admit, which he wished to offer solely for the purpose of impeaching appellee, did not meet Evid.R. 613(B)(2). It noted

that whether appellee was pregnant at the time of the divorce was immaterial to whether the court should now modify parenting time.

{¶40} Thus, in addition to the untimeliness of the motion, the magistrate and the trial court had yet another basis on which to deny appellant's motion for an in-camera inspection of appellee's medical records. For these reasons, the trial court did not abuse its discretion in overruling appellant's objection regarding the medical records.

{¶41} Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶42} Appellant's fourth assignment of error states:

> THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO PROPERLY CONSIDER THE BEST INTEREST FACTORS UNDER R.C. § 3109 ET. SEQ. AND FOLLOW THE RECOMMENDATION OF THE GAL.

{¶43} In his final assignment of error, appellant argues that in order to rebut the GAL's recommendation the trial court must clearly demonstrate that it considered all of the relevant statutory factors. As he argued above, appellant asserts the court failed to properly consider all of the evidence.

{¶44} In ruling on appellant's objection that the magistrate abused his discretion in failing to adopt the recommendation of the GAL, the trial court found that the court is not required to simply adopt the GAL's recommendation. Instead, the GAL's recommendation is one factor to consider in determining the children's best interests.

{¶45} A trial court is not required to follow a guardian ad litem's recommendation. *Liston v. Liston*, 11th Dist. Portage No. 2011-P-0068, 2012-Ohio-3031, ¶ 19. Likewise, a trial court does not err simply by making an order contrary to the recommendation of the guardian ad litem. *Rice v. Sobel*, 9th Dist. Summit No. 27458, 2015-Ohio-2251, ¶ 35. No statute or controlling authority requires a trial court to rule in accordance with a recommendation from a guardian ad litem. *In re Baby C*, 10th Dist. Franklin No. 05AP-1254, 2006-Ohio-2067, ¶ 95.

{¶46} Based on the case law, the trial court correctly overruled appellant's objection regarding the GAL's recommendation. The magistrate, and the trial court, were

to consider the GAL's recommendation, but were not required by law to follow it. The magistrate's decision, as adopted by the trial court, reflects that they did consider the GAL's recommendation:

> Having considered the foregoing, the court concludes that parenting time afforded to each parent should be of paramount importance whenever feasible. The individual and personal interests of both parents should be considered and given their proper weight when attempting to provide as much contact with the children as possible. In doing so, the court does not agree with the recommendations of modification as set forth by the guardian ad litem. The recommendation of the guardian ad litem, if adopted, would only increase the number of exchanges and costs to be incurred by the parties. The evidence presented in this matter indicated that finances of the parties are a factor and to increase that burden is just not reasonable under the circumstances of this case. Therefore, the court shall not adopt the recommendations as set forth by the guardian ad litem.

(Magistrate's Decision, ¶ 54; Trial Court's Judgment, ¶ 54).

{¶47} As discussed above, the magistrate and the trial court were to consider *all* of the applicable best interest factors in ruling on appellant's motion to modify visitation. And as concluded in appellant's first assignment of error, the magistrate and the trial court based their decision after considering all of the evidence, including the GAL's recommendation, and the applicable best interest factors. Therefore, we cannot conclude that the trial court abused its discretion in deciding not to follow the GAL's recommendation.

{¶48} Accordingly, appellant's fourth assignment of error is without merit and is overruled.

{¶49} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.