[Cite as *Duricy v. Duricy*, 2010-Ohio-3556.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

PATRICK BRIAN DURICY,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NOS. 2009-T-0078 and 2009-T-0118**
JANET LIN DURICY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court, Domestic Relations Division, Case No. 2005 DR 173.

Judgment: Affirmed.

William R. Biviano, Biviano Law Firm, 700 Huntington Bank Tower, 108 Main Avenue, S.W., Warren, OH 44481 (For Plaintiff-Appellant).

Benjamin Joltin, Benjamin Joltin, L.L.C., 3855 Starr Centre Drive, Ste. A., Canfield, OH 44406 (For Defendant-Appellee).

Jonathan P. Morgan, 173 West Market Street, Warren, OH 44481 *(*Guardian Ad Litem*).*

DIANE V. GRENDELL, J.

{¶1} Appellant, Patrick Brian Duricy, appeals the Judgment Order of the Trumbull County Court of Common Pleas, Domestic Relations Division, overruling his Objections to Magistrate's Decision, denying his Motion for Allocation of Parental Rights and Responsibilities, and Termination of Shared Parenting Plan. For the following reasons, we affirm the decision of the court below.

{¶2} Duricy and appellee, Janet Lin Duricy nka Misel, were married on December 16, 1989, in Youngstown, Ohio. Two children were born as issue of the marriage: Brian Duricy (dob October 15, 1995) and Anna Duricy (dob April 4, 1997).

{¶3} On May 10, 2005, Duricy filed a Complaint for Legal Separation.

{¶4} On February 23, 2006, the domestic relations court issued a Judgment Entry granting the parties a Decree of Divorce. The court further approved a Shared Parenting Plan entered into by the parties, whereby both Duricy and Misel were "designated residential parents and legal custodians of the minor children." Pursuant to the Plan, Duricy would have parenting time and companionship with the minor children from "Sunday at 7:30 a.m. to Wednesday 12:00 Noon one week and Sunday 7:30 a.m. to Thursday 12:00 Noon the following week." Conversely, Misel would have parenting time and companionship with the minor children from "Thursday 12:00 Noon to Sunday 7:30 a.m. one week and Wednesday 12:00 Noon to Sunday 7:30 a.m. the following week."

{¶5} The domestic relations court's Judgment Entry also contained the following provision: "[Duricy] and [Misel] agree that they shall discuss all the academic, extra-curricular, athletic and religious activities of the children. In the event they do not agree, then in that event, [Duricy] shall make the final decision surrounding said matters and shall notify [Misel] by email."

{¶6} On June 20, 2008, Duricy filed a Motion for Allocation of Parental Rights and Responsibilities and Termination of Shared Parenting Plan.

{¶7} On July 11, 2008, Misel filed a Motion to Terminate Shared Parenting Plan and Motion for Sole Custody.

{¶8} On October 20, 2008, Duricy filed a Motion for In-Camera Interview, requesting the domestic relations court to interview Brian and Anna in camera to determine their wishes.

{¶9} On October 27, 2008, and January 16, 2009, hearings were held on the parties' Motions before a magistrate of the court.

{¶10} At the hearing, Duricy testified that Brian and Anna are both "extremely gifted" children academically. In Duricy's opinion, Misel is indifferent to their academic performance and hinders them from realizing their potential. He has often had to spend his parenting time on Sundays helping the children prepare their assignments for school on Monday.

{¶11} Duricy testified that Brian is an exceptional tennis player who competes at a level beyond his age group. Duricy explained that, prior to high school, formal participation in tennis as a sport depends upon the individual player, who must arrange for his or her own participation in tournaments, clinics, and practices. When Brian is with Misel, he misses practices. Misel does not allow Brian to practice with Duricy during her parenting time. Misel has also became enraged over the demands of Brian's tennis schedule in front of the children.

{¶12} Duricy testified that, during their marriage, Misel did not allow the children to spend time with her family on account of their mental health and substance abuse problems. Currently, Misel allows her mother and sister to watch the children.

{¶13} Duricy testified that Misel does not foster the children's participation in church.

{¶14} Misel testified as to her efforts to assist the children with their homework. She noted that Brian's tennis schedule often interferes with his ability to complete his homework before Sunday.

{¶15} Misel testified that she understands that Brian's tennis schedule is not a fixed schedule. Sometimes, she receives Duricy's emails regarding practice while at work and does not see them until she arrives home. Misel testified that Brian has never missed a scheduled tournament while in her custody. She does not object to the children practicing with Duricy during her parenting time, but would like additional time to compensate.

{¶16} Misel denied ever having a problem with the children visiting with her family.

{¶17} Misel testified that she is a Catholic, although she does not attend mass.

{¶18} Misel testified that, regardless of who obtains custody of the children, both of them should enjoy equal parenting time. She claimed conversations with Duricy in the period immediately after the divorce were heated, but is currently satisfied with their communication.

{¶19} Attorney J. P. Morgan testified as the guardian ad litem for the children. Morgan testified there is a communication problem between Duricy and Misel, noting that Misel tries whereas Duricy is less cooperative. Morgan also noted that Duricy and Misel have completely different ideas of what is in the best interest of the children. Accordingly, Morgan did not believe a shared parenting plan was viable, and he "would probably lean towards recommended custody to the father based on the fact that the children have indicated that's more conducive" (sic). Morgan noted that both children

would prefer to be in Duricy's custody. One of Morgan's concerns, however, was that an award of custody to Duricy would limit Misel's ability to parent the children.

{¶20} On January 29, 2009, a Magistrate's Decision was issued, denying the Motion to Terminate the Shared Parenting Plan. On the same day, the domestic relations court issued a Judgment Order adopting the Magistrate's Decision. The court determined that "the best interest of the children would be served by keeping the present Shared Parenting Plan in effect," so that neither parent had "the power of being the 'residential parent'." The court further stated that "[t]he present Shared Parenting Plan provides checks and balances to protect both parents' interest and time with the children."

{¶21} On February 11 and June 18, 2009, Duricy filed Objections to the Magistrate's Decision.

{¶22} On July 7, 2009, the domestic relations court issued a Judgment Order, overruling Duricy's Objections.

{¶23} August 5, 2009, Duricy filed his Notice of Appeal, designated court of appeals no. 2009-T-0078.

{¶24} On the same date, Duricy filed a Motion for Relief from Judgment (60B). Duricy argued the in camera interview of the children was conducted by Magistrate Anthony M. Natale, but that the interview was neither recorded nor made part of the record. Accordingly, the domestic relations court could not have reviewed this evidence, as it had claimed to do, in ruling on the Objections to the Magistrate's Decision.

{¶25} On September 14, 2009, a Judgment Entry was issued, granting Duricy's Motion for Relief from Judgment. The domestic relations court ordered Magistrate Natale to conduct a second in camera interview with the children, which would be transcribed, sealed, and made part of the record.

{¶26} On September 28, 2009, Brian and Anna were interviewed in camera by Magistrate Natale.

{¶27} On October 14, 2009, the domestic relations court again issued its Judgment Order, again denying the Motion to Terminate the Shared Parenting Plan.

{¶28} On November 13, 2009, Duricy filed a Notice of Appeal, designated court of appeals no. 2009-T-0118.

{¶29} On January 25, 2010, this court consolidated appeal nos. 2009-T-0078 and 2009-T-0118.

{¶30} On appeal, Duricy raises the following assignments of error:

{¶31} "[1.] The trial court erred in adopting the Magistrate's Decision that was incorrect as a matter of law."

{¶32} "[2.] The trial court erred in approving and adopting the Magistrate's Decision that failed to terminate the shared parenting plan despite overwhelming evidence that the parents cannot effectively cooperate."

{¶33} "[3.] The trial court erred in approving and adopting the Magistrate's Decision that on its face contained an obvious error, as the Magistrate and Trial Court denied the motion to terminate shared parenting plan based upon a determination that such a plan provided checks and balances for the protection of the parents' rights."

{¶34} "[4.] Appellant asserts that a review of the confidential *in camera* interviews may reveal new or additional matters [that] were interjected into the proceedings after the close of evidence. Such a review is necessary given the delay in conducting the interviews, the timing of the entry of judgment following the interviews, and the failure to reference the children's wishes in the judgment entry."

{¶35} Custody determinations, such as the decision to terminate a shared parenting plan, are reviewed under an abuse of discretion standard. *Masters v. Masters*, 69 Ohio St.3d 83, 85, 1994-Ohio-483; *Bates-Brown v. Brown*, 11th Dist. No. 2006-T-0089, 2007-Ohio-5203, at ¶18.

{¶36} "The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section [i.e., a jointly filed plan] upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children." R.C. 3109.04(E)(2)(c).

{¶37} In the first assignment of error, Duricy argues "the Magistrate incorrectly applied a best interest determination to the motion to terminate a jointly submitted Shared Parenting Plan." As construed by Duricy, R.C. 3109.04(E)(2)(c) does not require the court to make a best interest determination when a parent moves to terminate the plan. Under Duricy's interpretation emphasizing the disjunctive conjunction "or," termination is proper upon a parent's request "or" the determination that the plan is not in the children's best interests. Thus, a best interest determination is only necessary when the court decides sua sponte to terminate a shared parenting plan. We disagree.

{¶38} Duricy's interpretation of the statutory language, while grammatically possible[1], disregards other statutory provisions and precedent to the contrary. It is fundamental that a court consider the best interest of the children when making a judgment regarding their custody. This court has held that "the best interest of the child is the paramount concern in any child custody case." *Derrit v. Derrit*, 163 Ohio App.3d 52, 2005-Ohio-4777, at ¶74 (citation omitted).

{¶39} "When making the allocation of the parental rights and responsibilities for the care of the children under this section [i.e., R.C. 3109.04] in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children." R.C. 3109.04(B)(1). This provision applies when the court considers a parent's motion to terminate a shared parenting plan. See, e.g. *Sindelar v. Gall*, 9th Dist. No. 25022, 2010-Ohio-1960, at ¶9; *Heiser v. Heiser*, 3rd Dist. No. 10-07-02, 2007-Ohio-5487, at ¶27 ("[i]n terminating a shared parenting plan, the trial court must consider the best interests of the children").

{¶40} Duricy relies upon this court's decision in *Moore v. Moore*, 11th Dist. No. 97-P-0008, 1998 Ohio App. LEXIS 1268, which parrots the disjunctive language of R.C. 3109.04(E)(2)(c): "the plan may be terminated upon the request of either party, or when it is no longer in the best interest of the child." Id. at *18, citing *Brannon v. Brannon*, 11th Dist. No. 96-T-5572, 1997 Ohio App. LEXIS 2897, at *7. Despite the disjunctive language, this court nevertheless conducted a best interest analysis and concluded,

1. Cf. the following: "The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children." R.C. 3109.04(E)(2)(c).

based on the best interest of the children, that the lower court did not abuse its discretion in denying the father's motion to terminate shared parenting. Id. at *22. *Moore* is not persuasive authority that a court need not consider the best interest of the children when a parent moves to terminate a shared parenting plan.

{¶41} The first assignment of error is without merit.

{¶42} In the second assignment or error, Duricy argues the court erred by not terminating the shared parenting plan given the parties' inability to cooperate effectively.

{¶43} Duricy correctly notes that the failure of parents to communicate and/or cooperate effectively are grounds for terminating a shared parenting plan. See, e.g., *Bates-Brown*, 2007-Ohio-5203, at ¶23; *Harkey v. Harkey*, 11th Dist. No. 2006-L-273, 2008-Ohio-1027, at ¶98.

{¶44} The record before us, however, does not demonstrate that Duricy and Misel's communication problems are so detrimental to the children's interests as to require the termination of the shared parenting plan. With the shared parenting plan in effect for three years, the guardian ad litem testified that Brian and Anna are "wonderful," "intelligent," "well-rounded," and "down-to-earth" children who are thriving both academically and socially. Both Duricy and Misel concur in this assessment.

{¶45} The guardian ad litem did testify that Duricy and Misel have a "communication problem." The guardian also noted, however, that this is primarily Duricy's problem. Although Duricy communicates "enough," he is less cooperative than Misel and the guardian is "concerned *** about his communication issues." Against this testimony, we must compare Misel's testimony that she is "satisfied" with the

communication between them and that communication between them has and continues to improve.

{¶46} The record before us supports the impression that communication between Duricy and Misel is problematical but not detrimental. Duricy and Misel have attended the children's teacher conferences and doctor appointments together. Working together, they have ensured that Brian has never missed a scheduled tournament. There have been issues about Brian attending practices, but these are often the result of practices being scheduled shortly before they occur. Thus, Misel is not always advised of the practices with sufficient notice to accommodate them.

{¶47} Based on this record, the communication problems between Duricy and Misel do not render the domestic relations court's failure to terminate the shared parenting plan an abuse of discretion. The second assignment of error is without merit.

{¶48} In the third assignment of error, Duricy argues the court erred by disregarding the best interest of the children in favor of maintaining the shared parenting plan which "provides checks and balances to protect both parties' interest and time with the children." We disagree.

{¶49} As an initial matter, it is incorrect to presume that the domestic relations court's sole purpose in maintaining the shared parenting plan was to protect Misel's parental rights. The court based its decision broadly "on the testimony provided" and "the in-camera interview of the minor children." Although the Judgment specifically mentions protecting the parties' rights, it does not claim this was the only factor in its decision. In the absence of a motion for findings of fact and conclusions of law, we are

not limited in our review of the court's Judgment Order to those facts expressly mentioned. See *In re Fair*, 11th Dist. No. 2007-L-166, 2009-Ohio-683, at ¶¶48-49.

{¶50} Further, for the reasons set forth in our discussion of the second assignment of error, the parties' failure to cooperate is not as compelling a reason to terminate the shared parenting plan as Duricy claims.

{¶51} Duricy's position at the hearings was that it was in the children's best interest that he be the children's residential parent and that Misel's involvement with the children be limited. Misel held a contrary opinion, as did the guardian ad litem. The guardian testified, "I don't think mom should be cut out to the extent of custody to dad, standard order [of visitation] to mom." Misel "is a big part of these kids' lives." The guardian also expressed a "fear" of awarding custody to Duricy, "is this going to enable, and I don't want to say enable, because I don't believe he'd do it intentionally, but it would probably limit mom's ability to parent the children."

{¶52} Based on this record, the domestic relations court's concern with protecting the parties' interest in parenting the children was not unreasonable and was a valid consideration in its decision to maintain the shared parenting plan. The third assignment of error is without merit.

{¶53} In the fourth and final assignment of error, Duricy urges this court to "carefully review the confidential transcript to be certain that no additional or new matters were raised" during the second interview with the children, after the Motion for Relief from Judgment. Duricy also urges this court to "consider whether the trial court gave any weight to the wishes and desires of the children on the issue of custody."

{¶54} With respect to the issue of additional or new matters being raised, our review of the in camera interviews demonstrate that no issues were raised or discussed that were not raised or discussed at the hearings held on October 27, 2008, and January 16, 2009.

{¶55} With respect to consideration of the children's wishes, the domestic relations court stated in its Judgment Order that it based its decision, in part, on the in camera interview of the children. As noted above, Duricy did not motion the court for a more definite finding on this issue. We note that the guardian ad litem testified before the court that both children wished to be with Duricy as the primary residential parent. The guardian found this desire to be "unreasonable" and opined, "I don't think they quite understand how much they need their mother." Without more, the court did not abuse its discretion in its consideration of the children's wishes.

{¶56} The fourth assignment of error is without merit.

{¶57} For the foregoing reasons, the Judgment Order of the Trumbull County Court, Domestic Relations Division, adopting the Magistrate's Decision and overruling Duricy's Motion to Terminate Shared Parenting, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

{¶58} I concur with the majority's disposition of the first, third, and fourth assignments of error. I must part company on the disposition of the second.

{¶59} "***'[S]hared parenting is the product of efforts to avoid the pain of loss inherent in the sole custody alternative, for both the parents and their child. It purports to continue, as nearly as possible, the joint parent and child relationships which exist in a marriage. Successful shared parenting requires at least two things. One is a strong commitment to cooperate. The other is a capacity to engage in the cooperation required.' *Kauza v. Kauza*, Clermont App. No. CA08-02-014, 2008 Ohio 5668, ¶27, quoting *Meyer v. Anderson*, Miami App. No. 01CA53, 2002 Ohio 2782, ¶25 (internal quotations omitted). Numerous shared parenting cases have seemed to turn on the parents' ability to cooperate and communicate. See, e.g., *Harkey v. Harkey*, Lake App No. 2006-L-273, 2008 Ohio 1027; *S.H. v. C.C.*, Madison App. No. CA2006-12-051, 2007 Ohio 4359; *Wingard v. Wingard*, Greene App. No. 2005 CA 09, 2005 Ohio 7066; *Steven D.C. v. Carrie Anne P.*, Huron App. Nos. H-04-029, H-04-023, 2005 Ohio 3858; *Bechara v. Essad*, Mahoning App. No. 03MA34, 2004 Ohio 3042. While no factor in R.C. 3109.04(F)(2) is dispositive, *effective communication and cooperation between the parties is paramount* in successful shared parenting. See *Rengan v. Rengan* (June 29, 2001), Montgomery App. No. 18522, 2001 Ohio App. LEXIS 2919, ***." *Seng v. Seng*, 12th Dist. No. CA2007-12-120, 2008-Ohio-6758, at ¶21. (Emphasis added.) (Parallel citation omitted.)

{¶60} In the instant case, the record is replete with instances of the parents' failure to communicate and cooperate effectively regarding the shared parenting plan. Further, the GAL testified that both children wished to be with their father, and that this would be in the children's best interest. After a full review of the evidence in this case, I conclude the trial court abused its discretion in failing to terminate the shared parenting plan.

{¶61} Finding merit in the second assignment of error, I would reverse the judgment of the trial court.

{¶62} Consequently, I concur in part, and dissent in part.