**[Cite as *Brandt v. Brandt,* 2012-Ohio-5932.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**GEAUGA COUNTY, OHIO**

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|---|---|---|
| KELLY P. BRANDT, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2012-G-3064** |
| - vs - | : | |
| RICHARD H. BRANDT, | : | |
| Defendant-Appellant. | : | |

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 10DC000584.

Judgment: Affirmed.

*David E. Lowe*, Thrasher, Dinsmore & Dolan Co., L.P.A., 100 Seventh Avenue, Suite #150, Chardon, OH 44024-1079 (For Plaintiff-Appellee).

*Deanna L. DiPetta* and *Christa G. Heckman*, Zashin & Rich Co., L.P.A., 55 Public Square, 4th Floor, Cleveland, OH 44113 (For Defendant-Appellant).

*Anna M. Parise*, Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, OH 44077 (Guardian ad litem).

THOMAS R. WRIGHT, J.

**{¶1}** Appellant, Richard H. Brandt, appeals the judgment of the Geauga County Court of Common Pleas overruling his objections to the magistrate's decision which ruled on the allocation of parental rights and responsibilities. This appeal presents two main issues: whether the trial court abused its discretion in finding that shared parenting is *not* in the best interests of the parties' children, and whether the trial court abused its

discretion in making its companionship determination, giving Richard certain visitation rights. For the reasons that follow, the judgment is affirmed.

**{¶2}** Richard and appellee, Kelly P. Brandt, were married on May 22, 1998. They have two children together: O.B., born June 13, 2001; and A.B., born May 28, 2003. On May 24, 2010, Kelly filed for divorce. The two stipulated to the division of assets, the order for child support, and other various issues. They were unable to reach an agreement concerning the allocation of parental rights for their children, though they agreed on a temporary visitation schedule for their two children, essentially a 50-50 sharing of time. The entry which allotted the temporary visitation schedule did not provide which parent was the legal custodian/residential parent, or if the two would engage in shared parenting—thus, the matter of custody was left outstanding.

**{¶3}** The issue of parental rights thereafter proceeded to a three-day trial where the magistrate considered testimony from Richard, Kelly, the Guardian ad Litem, and the Custody Evaluator. The deposition of the parties' former nanny, Kelly Haddad, was also submitted in lieu of live testimony. Richard sought shared parenting, while Kelly opposed it. The magistrate released his decision, finding shared parenting to not be in the best interests of the two children and concluding Kelly should be designated the legal custodian and residential parent. The magistrate concluded Richard should have companionship, i.e., visitation on alternating weekends through the school year, and one weekday evening visit following a visitation weekend, with essentially equal sharing over summer vacation. Richard timely filed eight objections to the magistrate's decision, which were overruled.

**{¶4}** Richard now appeals the order overruling each of his eight objections, raising eight assignments of error. As many of the assigned errors are interrelated, they will be addressed out of numerical order and in a consolidated fashion.

**{¶5}** Richard's third, first, second, and eighth assignments of error state:

**{¶6}** [3.] The trial court erred and abused its discretion by declining to adopt Appellant's proposed shared parenting plan without sufficient evidence rebutting the statutory presumption in favor of shared parenting.

**{¶7}** [1.] The trial court erred and abused its discretion by focusing on a single statutory factor, whether the parents could effectively communicate and cooperate with each other, in declining to adopt Appellant's proposed shared parenting plan.

**{¶8}** [2.] The trial court abused its discretion because its finding that the parents could not sufficiently communicate and cooperate with each other was against the manifest weight of the evidence.

**{¶9}** [8.] The trial court erred and abused its discretion by naming Appellee as the children's residential parent and legal custodian due to her admitted psychiatric issues and poor decisions.

**{¶10}** These assignments of error each require this court to address one universal question: whether the trial court abused its discretion in finding that shared parenting is not in the best interests of the parties' children. Specifically, Richard's above-framed set of assigned errors each involve the trial court's alleged misapplication of R.C. 3109.04(F)(1) and (F)(2): statutes that contain certain considerations the court

must weigh in determining whether shared parenting is in the best interests of the children. Richard argues there is a statutory presumption in favor of shared parenting that has not been properly rebutted by sufficient evidence (assignment of error 3). Richard contends the trial court's decision erroneously focused on a single statutory factor—whether the parents could effectively communicate and cooperate with each other—the findings of which were against the manifest weight of the evidence (assignments of error 1 and 2). Richard argues the trial court did not properly weigh the *other* statutory factors, especially Kelly's alleged history of mental issues (assignment of error 8).

**{¶11}** Before we address the merits of these contentions, this court's standard of review must be explained further. Custody determinations, including, as here, determinations involving proposed shared parenting plans, are entrusted to the sound discretion of the trial court. *Liston v. Liston*, 11th Dist. No. 2011-P-0068, 2012-Ohio-3031, ¶15. These determinations are left to the court's discretion given the serious nature of the court's proceeding and the impact the ultimate decision will have on those concerned. *Dragon v. Dragon*, 11th Dist. Nos. 2011-A-0037 & 2011-A-0039, 2012-Ohio-978, ¶9. Further, the trial court is in the best position to observe the witnesses, "'which cannot be conveyed to a reviewing court by a printed record.'" *Id*., quoting *Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988). Thus, this court operates under an abuse of discretion standard. Moreover, given the considerations outlined above, we are "'guided by the presumption that the trial court's findings were indeed correct.'" *Id*.; *see also Foxhall v. Lauderdale*, 11th Dist. No. 2011-P-0006, 2011-Ohio-6213, ¶26, quoting

*Bates-Brown v. Brown*, 11th Dist. No. 2006-T-0089, 2007-Ohio-5203, ¶18 ("[d]ecisions involving the custody of children are 'accorded great deference on review'").

**{¶12}** The term "abuse of discretion" has been defined as the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* (8 Ed.Rev.2001) 11. "[W]here the issue on review has been confided to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Id*. at ¶67. That is, "in determining whether the trial court has abused its discretion, a reviewing court is not to weigh the evidence, 'but must ascertain from the record whether there is some competent evidence to sustain the findings of the trial court.'" *Foxhall v. Lauderdale*, 2011-Ohio-6213, ¶28, quoting *Clyborn v. Clyborn*, 93 Ohio App.3d 192, 196 (3d Dist.1994).

**{¶13}** R.C. 3109.04 involves provisions for shared parenting and the allocation of parental rights. Pursuant to R.C. 3109.04(D)(1)(b), a trial court may not approve a shared parenting plan unless it first determines that the plan is in the best interests of the child. *Liston v. Liston*, 2012-Ohio-3031, ¶17. Specifically, R.C. 3109.04(F)(1) and (F)(2) enumerate certain factors a court must consider in determining whether shared parenting is in the best interests of the child. This list is nonexclusive as the trial court is not limited to the statutory factors. *Id*. at ¶17. Though there should be some indication in the judgment entry that the trial court considered the best interests of the child pursuant to R.C. 3109.04(F), there is no requirement it make specific findings in its entry as to each and every factor. *Id*.; *see also In re S.S.*, 11th Dist. No. 2010-G-2997, 2012-Ohio-120, ¶23.

**{¶14}** The factors found in R.C. 3109.04(F)(1) include: (a) the wishes of the child's parents regarding the child's care; (b) the wishes or concerns of the child as expressed to the court; (c) the child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interest; (d) the child's adjustment to his home, school, and community; (e) the mental and physical health of all persons involved; (f) the parent more likely to honor and facilitate visitation and companionship rights approved by the court; (g) whether either parent has failed to make all child support payments; (h) whether either parent previously has been convicted of or pleaded guilty to any criminal offense; (i) whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent his or her right to visitation in accordance with an order of the court; and (j) whether either parent has established a residence, or is planning to establish a residence, outside this state.

**{¶15}** The factors found in R.C. 3109.04(F)(2) include: (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 other parent; (c) the history of, or potential for, domestic abuse; (d) the geographic proximity of the parents to one another; (e) the recommendation of the guardian ad litem.

**{¶16}** Before we address the court's evaluation of these factors, we must first consider Richard's claim that there is a statutory presumption in favor of shared parenting that has not been properly rebutted by sufficient evidence. R.C. 3109.04 does not contain a provision that expressly states or suggests a shared parenting plan

is a rebuttable presumption.[1] Richard relies on several cases from the Eighth Appellate District that state there is a "strong presumption" that shared parenting is favored under the statute, rebuttable by evidence that shared parenting is *not* in the best interest of the child.[2] *Dietrich v. Dietrich*, 8th Dist. No. 90565, 2008-Ohio-5740, ¶5; *Qingwei Kong v. Kong*, 8th Dist. No. 93120, 2010-Ohio-3180, ¶6. We agree with the trial court, however, that this presumption has not been adopted by any other appellate district in a child custody case. We also agree that there is no support for this proposition, express or implied, in the statute itself. In fact, R.C. 3109.04(D)(2) recognizes that the court can, in its discretion, find it is in the child's best interest for *neither* parent to enjoy the status of residential parent or legal guardian. Such an express provision obliterates the suggestion that shared parenting is somehow presumed. Of course, shared parenting may be viewed as a preferred option, especially in cases, like *Deitrich*, *supra*, ¶5, where *both* parents' submission of a proposed shared parenting plan indicates a willingness to cooperate with one another.

**{¶17}** Richard, to some extent, recognizes this point, arguing in his brief: "While the trial court correctly notes that R.C. 3109.04 does not affirmatively require or create a rebuttable presumption in favor of shared parenting, it does provide courts with more than ample opportunity to reach an award of shared parenting." Indeed, there is an

1. Rebuttal presumptions are indicated by language elsewhere in the statute. For example, upon consideration of a custody modification motion, there is a presumption that retaining the residential parent and legal custodian designated in the prior decree is in the child's best interest. *See* R.C. 3109.04(E)(1)(a); *see also Foxhall v. Lauderdale*, 2011-Ohio-6213, ¶31. In this case, as there was no prior decree (only a temporary visitation order), there was no designated residential parent or legal custodian; hence, this was not a "modification" triggering this presumption and requiring a "change in circumstances."

2. As the trial court observed, these cases rely on dicta found in a footnote from a non-custody case from the Tenth Appellate District to reach this conclusion. *Archer v. Nationwide Ins. Co*., 10th Dist. No. 93AP-620, 1993 Ohio App. LEXIS 4064 (Aug. 19, 1993).

opportunity to reach an award of shared parenting, pursuant to the express language of the statute, *when shared parenting is in the best interest of the child*. However, this is a determination the trial court must make only after evaluating the statutory factors.

**{¶18}** We now turn to the magistrate's evaluation of those statutory factors. Contrary to Richard's various assertions, there is no indication the trial court failed to consider the multiple, nonexclusive factors set forth in R.C. 3109.04(F)(1) and (F)(2). Throughout multiple, lengthy days of testimony, the trial court considered whether shared parenting would be in the best interests of the children. This testimony was subsequently detailed by the magistrate's 38 findings of fact addressing, inter alia, the geographic proximity of the parents' residences; the physical and mental issues of the parents; the parenting styles and disciplinary tactics of the parents; the involvement of the parents in the activities and lives of the children; and the long-established patterns of how the parents behave around each other.

**{¶19}** The trial court found that the parents could not effectively communicate and cooperate with each other. R.C. 3109.04(F)(2)(a). Richard assigns significance to the court's finding that this overall lack of cooperation and communication is a "threshold" issue. To a large extent, however, the parent's lack of cooperation *is* an initial, threshold determination because it influences many other factors, including whether the parents will willfully deny the other's custody rights, whether the parents will facilitate or honor any court-approved shared-parenting plan, and whether the parents will encourage the sharing of love, affection, and contact between the other parent. R.C. 3109.04(F)(1)(f); R.C. 3109.04(F)(1)(l); R.C. 3109.04(F)(2)(b). In fact, this court has previously held that the failure of parents to communicate or cooperate effectively is

grounds for terminating an existing shared parenting plan. *Duricy v. Duricy*, 11th Dist. Nos. 2009-T-0078 & 2009-T-0118, 2010-Ohio-3556, ¶43, citing *Bates-Brown v. Brown*, 11th Dist. No. 2006-T-0089, 2007-Ohio-5203, and *Harkey v. Harkey*, 11th Dist. No. 2006-L-273, 2008-Ohio-1027, ¶98. Indeed, a shared parenting plan will only work if the parties agree to share by cooperating and communicating with one another. Nonetheless, as noted above, the court's weighing of interests and factors did not cease with this single determination.

**{¶20}** Moreover, this initial determination that the couple lacked cooperation and communication skills is not against the manifest weight of the evidence as Richard contends, but is supported by competent, credible evidence throughout the record. *See Kost v. Hembus*, 11th Dist. No. 2005-L-118, 2007-Ohio-895, ¶63. ("In Ohio, it is well-settled that if an award of custody is supported by competent, credible evidence, such award will not be reversed as being against the manifest weight of the evidence by a reviewing court.") Richard himself notes the divorce was "bitter" and "contentious," and though he claims the "de facto," "nearly 50-50 plan" the two had previously engaged in was a success, the trial court highlighted several factors taken from testimony during the hearings that suggest otherwise. Notably, the testimony indicates, as the trial court found, that the "parties' long-established patterns of relation to each other have continued after their separation. Regrettably, the parties have low opinions of each other and barely acknowledge the other's existence."

**{¶21}** The evidence before the trial court suggested the two harbored feelings of resentment, animosity, and bitterness toward each other. The court found that Kelly has little respect for Richard as she feels he failed to support the family financially and

emotionally. Indeed, Kelly assumed the dominant, "care-taking" role before and after Richard moved out of the couple's residence. This includes taking the children to their various activities and appointments. Kelly testified she felt she had no choice but to assume this responsibility, accusing Richard of skirting his duties as both a husband and father. She also believed she had to work out of necessity because Richard did not earn enough income to support his family. Kelly charged Richard of sitting around the house lazily while she worked to support the family. Kelly also suggested the employment of a nanny, housekeeper, and landscaper was necessary due to Richard's dereliction of the various domestic duties. Richard conversely explained he felt excluded, belittled, and marginalized by Kelly, affirmatively letting his former wife "have her way" with assuming a more dominant role with their children simply to avoid arguments. Richard criticized Kelly's parenting style, accusing her of over-scheduling the children for the extra-curricular activities and also not giving him sufficient notice concerning the activities. As the trial court concluded: "They simply do not like each other * * * [t]heir longstanding estrangement has proceeded too far."

**{¶22}** Not surprisingly, the trial court found, and the record indicates, that these feelings did not give way to effective communication and cooperation. Rather, the two barely communicated outside of text and e-mail correspondence. When the two did manage to communicate, the exchanges were brief and lacked substantive qualities: the discussions did not involve decision-making concerning the children, only scheduling matters based on decisions already made. The record indicates attempts at substantive discussions regularly failed; for instance, an attempted exchange about enrolling A.B. in a summer tutoring program was rebuked as suspicious and

disingenuous. ("[S]he felt it was odd that I would bring this up right after a recent court date, as if I was trying to create more communication[.]") Indeed, the two acknowledged they do not communicate well, a finding also highlighted extensively by the Guardian ad Litem and Custody Evaluator.

**{¶23}** Turning to the additional factors weighed by the court, Richard takes exception to the court's alleged failure to consider the parties' mental and physical health. R.C. 3109.04(F)(1)(e). Again, we find the trial court squarely addressed this factor, the findings of which are supported by the record. The trial court acknowledged all the points Richard highlights in his merit brief: Kelly has bipolar disorder and has had difficulties with alcohol in the past. However, the trial court also noted that Kelly is under the care of a psychiatrist, and has been on medication for several years which has controlled her condition and stabilized her emotions. Additionally, the trial court noted Kelly has been sober since 2006 and continues to be committed to sobriety, actively participating in support groups. Conversely, the trial court found that Richard frequently consumes alcohol and, moreover, had previously misrepresented his alcohol usage. Testimony indicated Kelly attempted to keep a dry house when she quit drinking, to which Richard initially agreed; eventually, however, Richard began storing large amounts of alcohol in the house and would consume alcohol in front of her. Additionally, the trial court, based on the testimony of Kelly, the Guardian ad Litem, and the Custody Evaluator, expressed concern over Richard's anger issues.

**{¶24}** Concerning additional, notable factors weighed by the court, O.B. expressed a desire to live with her mother (R.C. 3109.04(F)(1)(b)); both parties live in the Chagrin Falls School District (R.C. 3109.04(F)(1)(d) & (F)(1)(j)); the parties'

arguments prior to separation escalated to shoving in some instances (R.C. 3109.04(F)(2)(c)); and the Guardian ad Litem specifically did not recommend shared parenting in large part because the parties are "unable to communicate and to make joint decisions regarding the children" (R.C. 3109.04(F)(2)(e)).

**{¶25}** Thus, the trial court considered the factors and weighed the evidence as it pertained to each parent. As the factors the trial court relied on are supported by competent, credible evidence in the record, we conclude the trial court did not abuse its discretion in determining that the various findings should be adopted and that shared parenting is not in the best interests of the children.

**{¶26}** Richard's third, first, second, and eighth assignments of error are therefore without merit.

**{¶27}** Richard's sixth assignment of error states:

**{¶28}** "[6.] The trial court erred and abused its discretion in finding that Appellant's proposed shared parenting plan was not in the children's best interest because it failed to provide a final decision-maker regarding custodial decisions."

**{¶29}** Though it found, pursuant to the factors outlined above, that shared parenting was not in the best interests of the children, the trial court nonetheless noted it did not find Richard's proposed shared parenting plan to be acceptable on its merits. The trial court did not need to make this separate finding in light of its initial determination that shared parenting was not in the best interests of the children. As disposition on this assigned error would not result in any meaningful relief in light of the trial court's other determinations, it is moot. Richard's sixth assignment of error is therefore without merit.

**{¶30}** Richard's fourth, fifth, and seventh assignments of error state:

**{¶31}** [4.] The trial court erred and abused its discretion by failing to properly consider the factors established by R.C. 3109.051(D) in determining Appellant's companionship rights with his children after it declined to adopt his proposed shared parenting plan.

**{¶32}** [5.] The trial court erred and abused its discretion in determining that a 50-50 split of companionship time was not in the children's best interest because of an alleged lack of 'consistency in the children's home arrangements' due to different parenting styles.

**{¶33}** [7.] The trial court erred and abused its discretion in rejecting the recommendations of the Child Custody Evaluator and the Guardian ad Litem regarding parental rights and responsibilities without sufficient reasons therefore.

**{¶34}** The remaining assignments of error require this court to address a second universal question: whether the trial court abused its discretion in making its companionship determination, giving Richard certain visitation rights. After the trial court found shared parenting was not in the best interests of the children, and after it rejected Richard's proposed plan, the court's next determination was Richard's companionship rights with the children. Richard contends the trial court did not properly consider the statutory factors in making its determination. Richard argues the trial court should have found in favor of a 50-50 split of companionship time, as the Guardian ad Litem and Custody Evaluator recommended.

**{¶35}** As this is a custody determination regarding parental rights, we continue the abuse of discretion standard outlined above. *See Guliano v. Guliano*, 11th Dist. No. 2010-T-0031, 2011-Ohio-6853, ¶40, quoting *Utz v. Hatton*, 2d Dist. No. 17240, 1999 Ohio App. LEXIS 1566, *15 (Apr. 9, 1999). ("'We presume the trial court's visitation decision is correct and reverse only upon a showing of an abuse of discretion.'")

**{¶36}** Not unlike the statutes explained above, determining the companionship rights of a parent is also subject to several statutory factors, set forth in R.C. 3109.051(D). Though found in a different statute, these 16 factors essentially mirror the considerations set forth above in R.C. 3109.04(F)(1) and (F)(2). Given the numerous findings, supported by competent, credible evidence, including that the parents were unable to communicate and cooperate with one other, we cannot conclude the court erred in its second determination. Indeed, a 50-50 split of companionship time is, in many ways, tantamount to shared parenting, and for all the reasons fully set forth above, it is an arrangement that the court rejected.

**{¶37}** The trial court concluded that, as Kelly was already determined to be the legal custodian of the children, bearing the responsibility to make the fundamental decisions regarding their upbringing, she should also have the children with her the majority of the time. Richard argues the trial court, in so concluding, did not *separately* consider the matters of custody and companionship as it should have. However, this claim is not supported by the record. To the contrary, the magistrate once again reviewed the factors as applied to the separate statutes. The findings included, as supported by the record, that Kelly has been the primary caretaker for the children since their infancy and has bonded with them (R.C. 3109.051(D)(1)); Kelly is involved in her

children's activities, getting them to practices consistently and on time (R.C. 3109.051(D)(3) & (D)(5)); Kelly followed through with recommended therapy while Richard did not (R.C. 3109.051(D)(9)); and Kelly remains committed to sobriety and adheres to treatments for bipolar disorder (R.C. 3109.051(D)(9)).

**{¶38}** However, the magistrate also recognized that Richard should have more contact with the children than the standard parenting guidelines would provide, i.e. every other weekend. Thus, the magistrate's recommendations adopted by the trial court was to give Richard more parenting visitation rights, including evening visits every other week during the school year in addition to the standard "every other weekend" paradigm. Further, during summer vacation, the parties will share equal time with the children, alternating week-long visitations. These increased visitation terms are representative of the magistrate's recognition that a father's relationship with his children and his ability to visit with his child is not only important, but a natural right. *See Eitutis v. Eitutis*, 11th Dist. No. 2009-L-121, 2011-Ohio-2838, ¶81. But the terms also represent the magistrate's appreciation that there must be consistency in the children's home arrangements, particularly during the school year.

**{¶39}** Richard also takes exception to the court's alleged rebuking of the Guardian ad Litem's and Custody Evaluator's recommendations concerning 50-50 parenting time. However, a trial court is not required to follow a guardian ad litem's or custody evaluator's recommendation and does not err in making a contrary order. *Pettit v. Pettit*, 12th Dist. No. CA2011-08-018, 2012-Ohio-1801, ¶80; *Cichanowicz v. Cichanowicz*, 3d Dist. No. 3-08-04, 2008-Ohio-4779, ¶16.

**{¶40}** Though the Guardian ad Litem and Custody Evaluator favored 50-50 custody, the Custody Evaluator cited concerns, including Richard's anger issues, which corroborated Kelly's testimony on her former husband's temper. Further, despite the recommendation, the Guardian ad Litem noted that a 50-50 arrangement is "rather unusual" and, for the children, "it's like living out of a suitcase and they don't have a home base[.]" We cannot conclude the trial court erred in rejecting the recommendations, which, in and of themselves, were moderately equivocal.

**{¶41}** Thus, the trial court did not abuse its discretion in making its companionship determination, giving Richard certain visitation rights. Richard's fourth, fifth, and seventh assignments of error are therefore without merit.

**{¶42}** The judgment of the Geauga County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.