[Cite as *Janecek v. Marschall*, 2015-Ohio-5219.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STEVE A. JANECEK,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NO. 2015-L-065**
MARILYN MARSCHALL,	:	
Defendant-Appellee.	:	

Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2008 PR 00020.

Judgment: Affirmed.

Vincent A. Stafford, Stafford Law Co., L.P.A., 55 Erieview Plaza, 5th Floor, Cleveland, OH 44114 (For Plaintiff-Appellant).

Marilyn Marschall, nka Rowley, pro se, 7240 South Jester Place, Concord, OH 44070 (Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Steve A. Janecek, appeals from the judgment of the Lake County Court of Common Pleas, Juvenile Division, terminating the parties' prior shared parenting decree. Based on the following, we affirm.

{¶2} Although never married, the parties in this matter resided together for a period of four years and one child was born as issue of their relationship. The parties entered a shared parenting agreement, which provided each party would be the

residential parent while the child was in his or her care. The trial court accepted the agreed plan and entered a decree ordering the parties to adhere to the written plan.

{¶3} In this case, a shared parenting decree was issued by the trial court on August 6, 2009. Pursuant to the order, the parties shared the title of residential parent, i.e., the parent who had custody of the child was the residential parent for the custodial period.

{¶4} Appellant filed a "Motion to Modify Parental Rights and Responsibilities, Motion to Show Cause and Motion to Modify Child Support." Appellee opposed appellant's motion to modify parental rights and responsibilities and requested the court to terminate the shared parenting decree. On August 16, 2013, the magistrate issued his findings and conclusions. In relevant part, the magistrate: denied appellant's motion to modify the shared parenting plan; granted appellee's request to terminate the shared parenting plan; the court designated appellee the sole residential parent and legal custodian of the parties' child; granted appellee's motion to show cause for appellant's failure to pay child support; granted appellant's motion to modify child support; and denied appellant's motion to show cause.

{¶5} Appellant filed objections to the magistrate's decision. And, on December 2, 2013, the trial court overruled appellant's objections and adopted the magistrate's decision in its entirety. Appellant appealed and, in *Janecek v. Marschall,* 11th Dist. Lake Nos. 2013-L-136 & 2014-L-013, 2015-Ohio-941, this court remanded the matter to the trial court to make additional findings. Pursuant to this order, the trial court issued a final judgment entry April 27, 2015. This appeal follows.

{¶6} Appellant assigns three errors for this court's review. They provide:

{¶7} "[1.] The trial court erred and/or abused its discretion by terminating the parties' Shared Parenting Plan and designating Marilyn Marschall, as the residential parent and legal custodian of the parties' minor child."

{¶8} "[2.] The trial court erred and/or abused its discretion by decreasing Steve's parenting time with the minor child."

{¶9} "[3.] The Judgment Entries are not in the best interest of the parties' minor child."

{¶10} On appeal, appellant claims the trial court erred in its termination of the shared parenting plan, as the termination of such plan is not in the best interest of the parties' minor child. Appellant maintains the trial court unfairly placed the responsibility for the acrimony between the parties on him and then goes to great lengths to cite to instances where it was, in fact, appellee's conduct that disturbed the shared-parenting plan.

{¶11} Similarly, appellee, in her brief, cites to instances where appellant's conduct is responsible for disturbing the shared parenting plan. Accordingly, appellee maintains the judgment was proper because the child should not be continuously exposed to appellant's troublesome behavior.

{¶12} Preliminarily, the parties' finger pointing has been a consistent theme animating the underlying litigation. And such conduct has been detrimental to the parties' child, as expressed by the guardian ad litem:

> **{¶13}** [T]hese are two parents that have demonstrated over and over again that their dislike of each other is far greater than the love of their son. There is virtually no provision in the plan in a single paragraph that has not been misconstrued, batted over, viewed in ten different ways, all to make that conflict, continue and continue and continue. * * *

> **{¶14}** We sat here for four days of testimony, and nobody, Steve or Marilyn, offered anything that they could do personally that they could do differently; the[ir] personal responsibility. It's all about what is wrong with the other person. We will wrap up this court case and have a decision, made by a third party, with a recommendation made by me, a third party, that everyone will live with, without any real hope that the situation with [their child] is going to improve.

{¶15} The parties' minor child suffers from asthma, ADHD, requires substantial help with his school work, and struggles socially with this classmates. Further, the record demonstrates that he is unable to stay on task at school, is easily distracted, and is unable to pay attention.

{¶16} R.C. 3109.04(E)(2)(c), which addresses termination of a shared parenting plan, requires the trial court to find that shared parenting is not in the best interest of the child. The trial court must consider all relevant factors in R.C. 3109.04(F)(1); the trial court possesses discretion in determining which factors are relevant; *See e.g. Hammond v. Harm*, 9th Dist. Summit No. 23993, 2008-Ohio-2310, ¶51. Also not all factors carry the same weight or have the same relevance; rather, their relative import depends upon the facts of the case. *Id.*

{¶17} Although the trial court must consider all relevant factors, there is no requirement that the trial court set out an analysis for each of the factors in its judgment entry, so long as the judgment entry is supported by some competent, credible evidence. *Portentoso v. Portentoso*, 3d Dist. Seneca No. 13-07-03, 2007-Ohio-5770, ¶22.

{¶18} The best interest factors are as follows:

{¶19} (a) The wishes of the child's parents regarding the child's care;

{¶20} (b) If the court has interviewed the child in chambers * * * the child's wishes and concerns as to the allocation of parental rights and responsibilities * * *;

{¶21} (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;

{¶22} (d) The child's adjustment to the child's home, school, and community;

{¶23} (e) The mental and physical health of all persons involved in the situation;

{¶24} (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶25} (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;

{¶26} (h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child * * *;

{¶27} (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;

{¶28} (j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶29} In considering the foregoing best-interest factors, the magistrate noted appellant's desire to modify the shared-parenting plan. To wit, he desired to have the court enter a specified, set schedule that would not necessarily be dependent upon appellee's ever-changing work schedule. Appellee, alternatively, wished the court to terminate the shared-parenting plan. Because the parties did not request an in-camera interview, the magistrate noted he did not conduct such an interview.

{¶30} The magistrate found that while the minor child does have a close relationship with both parents, appellee has been more active in addressing the child's school-related needs through expert intervention. In particular, the magistrate observed that appellee has prioritized homework and focused the child on school-oriented tasks. Alternatively, the magistrate found that although appellant empathized with the child's school difficulties, he does not acknowledge the substantial deficits the child has experienced in school.

{¶31} The magistrate also underscored appellant's belief that the child requires discipline, but found he is unwilling to provide the discipline necessary to adequately address school work. The court echoed the GAL's belief that focus and discipline are necessary and recommended that appellee be the parent to ultimately have the responsibility for school-issue decision making.

{¶32} The magistrate further noted that the parenting time between the parties has been dependent on appellee's work schedule, pursuant to the original shared-parenting schedule. And, while there has not been a denial of parenting time, disagreements regularly occur regarding parenting time. The magistrate found appellant's claim that he had insufficient information regarding appellee's work schedule to be not credible. And the record indicates appellee received her work schedule in six week periods, and she regularly provided appellant with this schedule. Regardless of these points, however, given the animosity between the parties and their inability to effectively communicate, the magistrate determined that it was unlikely either parent would do well facilitating a refigured court-approved parenting schedule.

{¶33} The magistrate noted that the child suffered from asthma, which appellant minimizes; whereas appellee regularly addresses the child's medical needs. The court further found the child requires counseling due to his inability to focus in school, the inconsistency between the two households, the continuous conflicts between the parties, and his ADHD.

{¶34} The magistrate determined appellant has regularly failed to pay child support and his arrearage, at the time of the hearing, was over $25,000. According to the magistrate, appellant has never acknowledged his duty to pay support and has been found in contempt. The magistrate found that appellant's recalcitrance relating to child support has prevented the parties from cooperating effectively and promoting the child's best interest under the shared-parenting plan.

{¶35} After considering the circumstances of the case in relation to the statutory factors, the magistrate determined that it was in the best interest of the children that the shared-parenting plan should be terminated. He further recommended appellee be designated as the sole residential parent and legal custodian. The trial court subsequently adopted the same. We hold the record supports this determination and therefore the court did not abuse its discretion.

{¶36} It is undisputed the child in this matter requires structure and consistency, especially in light of his medical issues as well as his academic and social struggles. The GAL emphasized that the child required stability and continuity in homework and preparing for school. The GAL testified that appellee is the parent who takes extra care to address the child's school work and activities. The record demonstrates that each

parent sets different expectations for the child and there is no consistency between the homes, which is detrimental to the child.

{¶37} The GAL additionally testified the child is stressed, anxious, and even exhibits markers of depression due to the constant turmoil between the parties. The GAL additionally noted the child's social difficulties are also a function of the parties' inability to amicably coexist as parents. She poignantly testified "if you say something bad about [a child's] mom, bad about [a child's] dad, you're saying something bad about [the child]. And you're making [the child] feel unproud and ashamed of an entire one-half of [his] person." According to the GAL, consistency between the two households is a necessity; given the parties completely dysfunctional relationship, however, it is unclear how this important goal could ever be reached.

{¶38} According to the GAL, however, appellee "does the best she can to support the relationship between this little boy and his father." Still, in the GAL's view, appellee does not say anything bad about appellant, but says nothing particularly good or supportive either. Alternatively, the GAL observed that appellant regularly makes inappropriate remarks about appellee in the child's presence. The GAL noted that these comments hurt and bother the child. In her view, appellant's conduct in this respect show a lack of insight into the child.

{¶39} The parties' respective testimony reflected the inherent and seemingly unresolvable antipathy for one another. The testimony of the independent GAL underscored how this hostility is extremely harmful to the child. The GAL nevertheless recommended that the shared-parenting plan continue, apparently because she believed the benefit of the regular influence of both parents in the child's day-to-day

outweighed the damaging influence of the parties' enmity for one another. The magistrate, however, did not accept this recommendation.

{¶40} The trier of fact is in the best position to weigh evidence and assess witness credibility. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). This court, therefore, cannot, and will not, substitute its judgment for that of the trier of fact. *Id*.

{¶41} Here, the magistrate considered all the testimony presented and his decision reflects its position that the stability of a single residential parent served the child's interests best under the circumstances. With respect to parenting, the GAL testified appellee is the parent who is more assistive with the child's school issues and learning; she further testified appellee is more proactive assisting with and appreciating the child's medical needs; and, finally, the GAL stated appellee does not actively belittle, or alienate the child from, appellant. Accordingly, and notwithstanding the GAL's recommendation, the record supports the magistrate's decision as well as the trial court's adoption of the same. We therefore discern no abuse of discretion in the trial court's adoption of the magistrate's decision.

{¶42} Appellant's assignments of error lack merit.

{¶43} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas, Juvenile Division, is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.