[Cite as *Digenova v. Digenova*, 2016-Ohio-1080.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DAVID DIGENOVA	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff - Appellant	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
ANGELA M. DIGENOVA	:	Case No. 2015 AP 07 0045
	:	
Defendant - Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas, Case No. 2014-TM-04-0127
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	March 11, 2016

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
JEFFREY JAKMIDES 325 East Main Street Alliance, Ohio 44601	STEVEN A. STICKLES 500 Market Street, Suite 10 Steubenville, Ohio 43952

Baldwin, J.

{¶1} Plaintiff-appellant David P. DiGenova appeals from the July 17, 2015 Judgment Entry of the Tuscarawas County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant David P. DiGenova and appellee Angela M. DiGenova were married on February 14, 2001. Two children were born as issue of such marriage, one in 2001 and the other in 2006.

{¶3} On April 2, 2014, appellant filed a complaint for divorce against appellee. The Magistrate, as memorialized in an Order filed on September 16, 2014, scheduled a trial for October 2, 2014 and indicated that the only contested issues concerned child custody and division of appellant's pension. The Magistrate further indicated that the parties had stipulated that the pension was to be divided. The trial was later continued to December 4, 2014.

{¶4} At the trial, appellee testified that in August of 2013, she began a relationship with Steven Hardy. Appellee testified that she moved from Sugarcreek to New Philadelphia in February of 2013 because her lease was up and denied telling appellant or the Guardian Ad litem that the reason that she wanted to move was to get away from Hardy because he was abusive. Appellee, who was evicted from her apartment in New Philadelphia, testified that she did not do any damage to the apartment and had been current on her rent and utility bills. She was sued by the landlord for $15,000.00 in damages to the apartment allegedly caused by her and for past due water

bills, unpaid rent and other bills. Appellee agreed that the apartment was the third place she had lived since 2012.

{¶5} Appellee then moved into another apartment with Hardy, who was on the lease. When asked, she stated that she was unaware that he had a prior history of domestic violence. Appellee testified that the two had "probably" more than ten different incidents of domestic violence before she called the police. Transcript from December 4, 2014 trial at 16. According to appellee, the children were not involved and she told them that Hardy had done something inappropriate and went to jail after she had him arrested. Appellee agreed that she had not exercised good judgment in her relationship with Hardy.

{¶6} At the trial, the Guardian ad Litem testified that he believed that appellant should have primary custody of the children. The following is an excerpt from his testimony:

> Q: And if you could just simply summarize to the Court why you feel that this change is in the best interest of the children.
>
> A: I think that ah, during the course of my investigation we've seen a number of troubling factors, a relationship with Steven Hardy, the frequent moves, the issue of not communicating the transfusions[1], and the false accusations of child molestation, and all of those are troubling indicators in terms of her judgment and her ability to care for the children appropriately.

{¶7} Transcript from December 4, 2014 trial at 24.

{¶8} On cross-examination, the Guardian ad Litem noted that there had been a complaint regarding sexual molestation of the younger child in March of 2014. At the time,

[1] The younger child receives blood transfusions for autoimmune problems.

the parties each had the children alternating weeks. He stated in his report that appellant took steps once he became aware of the allegation of molestation. The Guardian ad Litem testified that the younger child never told him that appellee had told her to make up the story about abuse. He further testified that the children were not present for an incident of domestic violence in October of 2014 and that appellee got a protection order for herself and her children. When Hardy violated the same, appellee took appropriate steps. The Guardian ad Litem further agreed that it was his understanding that the parties were alternating weeks with the children and that the children seemed to be enjoying the schedule. He stated that he believed the fact that appellee lied about the abuse of the younger child should be taken into consideration.

{¶9} On redirect, the Guardian ad Litem testified that appellee had told him that there had been seven or eight incidents of domestic violence between her and Hardy and that he did not believe that the children witnessed any. He further testified that after learning of the alleged abuse, appellee did not contact the authorities. He indicated that he was concerned about appellee's credibility because she gave him misinformation for his report.

{¶10} At trial, appellant testified that he wanted the court to award him custody with visitation to appellee. He testified that while appellee had testified that she either did not know or was not involved with Hardy when she was living in Sugarcreek, appellee lied. According to appellant, who works at the Tuscarawas County Jail, both appellee and Hardy were charged with and pleaded guilty to disorderly conduct in 2012.

{¶11} Appellant further testified that appellee contacted him and asked him to sign a lease for her on an apartment in New Philadelphia so that she could get away from

Hardy. Appellant did and also put up the security deposit. According to appellant, appellee had told him that one of the children observed an incident of domestic violence between appellee and Hardy. Appellee, however, moved Hardy into the new apartment. Appellant testified that he was a defendant in a lawsuit over damage to the apartment. With respect to the allegations of sexual abuse against his younger daughter by a little boy, appellant testified that the matter was investigated and it was determined that the abuse never occurred. The Guardian ad Litem, in his report, had concluded that appellee had manipulated her daughter to make false accusations against the boy, who lived with appellant and his mother.

{¶12} At trial, appellant testified that he moved in November of 2014 and was living in Dover with a woman he was involved with and her son.

{¶13} Appellee testified again, this time as a defense witness. She testified that her older daughter was in school in the New Philadelphia school district and had been since she was in the first grade. According to appellee, she had good grades and no discipline issues. Her younger daughter also had been in the New Philadelphia school district the entire time that she had been in school, but was struggling. Appellee testified that she was the primary one who dealt with the children's schooling. Appellee denied making up story about her daughter being sexually abused and testified that she called child services. When asked if she wanted the marital portion of appellant's pension, appellant stated that "[a]t this point all I want is my kids". Transcript of December 4, 2014 trial at 68. She further testified that appellant's money did not matter to her and was not the issue.

{¶14} The Magistrate, in a December 16, 2014 Decision containing Findings of Fact and Conclusions of Law, recommended that appellant receive custody of the two children and that appellee receive companionship. She further recommended that appellant retain all interest in his pension/retirement, finding that appellee had waived any interest in the same.

{¶15} On December 19, 2014, appellee filed a Request for Findings of Fact and Conclusions of Law. Appellant filed an objection to the same on January 20, 2015. Appellant, in his objection, stated that the trial court had held a conference call on January 7, 2014 and that, at such time, the Magistrate indicated that there would not be any supplemental Findings of Fact and Conclusions of Law. Appellant, on January 29, 2015, filed a Motion to Strike appellee's objections.

{¶16} A hearing was held on April 10, 2015. The trial court, pursuant to a Judgment Entry filed on April 13, 2015, granted appellant until May 11, 2015 to file a memorandum in opposition to the Request for Findings of Fact and Conclusions of Law and granted appellee until May 25, 2015 to file a reply memorandum. Appellant filed a memorandum in opposition on May 4, 2015 and a Notice of Non-Compliance on June 1, 2015, noting that appellee had not filed a reply memorandum on May 25, 2015.

{¶17} The trial court, as memorialized in a Judgment Entry filed on June 9, 2015, overruled appellee's December 19, 2014 Request for Findings of Fact and Conclusions of Law and appellant's January 29, 2015 Motion to Strike. The trial court granted appellee leave until June 24, 2015 to file supplemental objections, granted appellant leave until July 8, 2015 to file a response to the objections, and set an oral hearing for July 13, 2015.

Appellant, on July 8, 2015, filed a response to appellee's objections to the Magistrate's Decision.

{¶18} The trial court, via a Judgment Entry filed on July 17, 2015, sustained appellee's objections in part and overruled them in part and adopted the Magistrate's Decision in part and rejected it in part. The trial court granted appellee exclusive child custody/residential placement of the minor children and ordered that appellant's pension be deemed marital property and be divided equally between the parties.

{¶19} Appellant now raises the following assignments of error on appeal:

{¶20} THE TRIAL COURT ERRED IN PERMITTING APPELLEE TO FILE OBJECTIONS TO THE MAGISTRATE'S DECISION WELL AFTER THE TIME PERIOD FOR DOING SO HAD ELAPSED.

{¶21} THE TRIAL COURT ERRED IN REVERSING THE MAGISTRATE'S ASSIGNMENT OF CUSTODY TO THE MINOR CHILD TO APPELLANT, DESPITE THE FACT THAT APPELLEE NEVER REQUESTED CUSTODY IN HER IMPROPERLY FILED OBJECTIONS TO THE MAGISTRATE'S DECISION AND THERE WAS CLEAR EVIDENCE THAT THE CHILDREN WERE SIMPLY NOT SAFE IN HER CUSTODY DUE TO HER EXTREMELY POOR JUDGMENT, AS TESTIFIED TO BY THE GUARDIAN AD LITEM.

{¶22} THE TRIAL COURT ERRED IN AWARDING APPELLEE AN INTEREST IN APPELLANT'S PENSION DESPITE THE FACT THAT SHE SPECIFICALLY AND EXPLICITLY DISALLOWED ANY INTEREST IN SAID PENSION.

I

{¶23} Appellant, in his first assignment of error, argues that the trial court erred in allowing appellee to file untimely objections to the Magistrate's Decision.

{¶24} Civ. R. 53(D) states, in relevant part, as follows:

(3) *Magistrate's decision; objections to magistrate's decision*.

(a) Magistrate's decision.

(i) *When required*. Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under Civ.R. 53(D)(1).

(ii) *Findings of fact and conclusions of law*. Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

(iii) *Form; filing, and service of magistrate's decision*. A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual

> finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).
>
> (b) *Objections to magistrate's decision*.
>
> *(i) Time for filing*. A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

{¶25} As noted by this Court in *Hutta v. Hutta,* 5th Dist. Delaware No. 10CAF040031, 2011-Ohio-3041 at paragraph 15: ”If a magistrate has not prepared findings of fact or has prepared findings of fact that are insufficient, the burden is on the party objecting to request findings of fact from the magistrate pursuant to Civ. R. 52 and Civ. R. 53(E)(2). *Rush v. Schlagetter* (April 15, 1997), Ross App. No. 96CA2215, unreported.”

{¶26} In the case sub judice, the Magistrate issued her Decision, which contained Findings of Fact and Conclusions of Law, on December 16, 2014. Appellee, on December 22, 2014, which was within seven days of such Decision, filed a Request for Findings of Fact and Conclusions of Law as permitted by Civ.R. 53(D), presumably seeking

supplemental Findings of Fact and Conclusions of Law. Pursuant to Civ.R. 53(D)(3)(b)(i), the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law. After her request for Request for Findings of Fact and Conclusions of Law had not yet been ruled on, appellee filed her objections on January 20, 2015. We find, therefore, that appellee's objections were not untimely.

{¶27} Appellant's first assignment of error is, therefore, overruled.

II

{¶28} Appellant, in his second assignment of error, contends that the trial court erred in reversing the Magistrate's assignment of custody of the two minor children to appellant.

{¶29} In reviewing objections to a magistrate's decision, Civ.R. 53 instructs the trial court to conduct an independent review of the facts and conclusions contained in the magistrate's report and enter its own judgment. *Kovacs v. Kovacs,* 6th Dist. Erie No. E–03–051, 2004–Ohio–2777, ¶ 6. Thus, the trial court's standard of review of a magistrate's decision is de novo. *Howard v. Wilson,* 186 Ohio App.3d 521, 2010–Ohio–1125, 928 N.E.2d 1180, ¶ 7. However, "[w]hen a court of appeals reviews the decision of a trial court overruling objections to a magistrate's decision, the standard of review is abuse of discretion." *Palmer v. Abraham,* 6th Dist. Ottawa No. OT–12–029, 2013–Ohio–3062, ¶ 10. An abuse of discretion connotes that the court's attitude was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶30} As an initial matter, we note that appellant argues that appellee never requested custody in her objections to the Magistrate's Decision. However, we note that appellee, in her objections, specifically objected to the award of custody to appellant.

{¶31} The Magistrate, in her Decision, recommended that custody of the children be awarded to appellant based on appellee's "unstable living arrangement and her recent exposure to domestic violence,…" However, as argued by appellee's counsel at the objection hearing on July 13, 2015, "[a]t the time of the conclusion of this matter, her relationship with Hardy had basically terminated." Transcript of July 13, 2015 hearing at 10. There was testimony before the trial court that the children were spending alternate weeks with the parents during the pendency of the divorce and that such schedule was working out well. At the December 4, 2014 trial, appellant testified that the one week on, one week off schedule benefitted the children and that the children had a good relationship with appellee.

{¶32} Testimony also was adduced that the children had been enrolled in the New Philadelphia, Ohio school district without interruption during their school years. The trial court, in its July 17, 2015 Judgment Entry, stated that it was awarding custody to appellee "for the express reason that she is residing in the New Philadelphia, Ohio school district, where the minor children have been enrolled without interruption during their school years;…" We find that the trial court did not abuse its discretion in awarding custody to appellee because the trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶33} Appellant's second assignment of error is, therefore, overruled.

III

{¶34} Appellant, in his third assignment of error, argues that the trial court erred in awarding appellee an interest in appellant's pension when she "specifically and explicitly disavowed any interest" in the same.

{¶35} In the case sub judice, prior to testimony before the Magistrate, appellee's counsel, in opening statements, stated that appellant's retirement account was at least partially marital and needed to be divided. The following testimony was adduced when appellee's counsel asked appellee if she was aware that appellant had a retirement plan through this place of employment:

{¶36} A. Yes.

{¶37} Q: Would you like your marital portion of this.

{¶38} A: At this point all I want is my kids.

{¶39} Q: So is your testimony that you don't want this money at all.

{¶40} A: His money doesn't matter to me. That's not the issue. I've supported myself for four years.

{¶41} Transcript of December 4, 2014 trial at 68.

{¶42} The Magistrate, in her Decision, found that appellee had waived any interest in appellant's pension and recommended that appellant retain all interest in the same. However, the trial court, in its July 17, 2015 Judgment Entry, found that appellant's "pension/retirement account(s) should be deemed marital property and divided equally between the parties."

{¶43} We find that the trial court did not abuse its discretion reversing the Magistrate's Decision on the issue of the pension. The trial court's decision was not

arbitrary, unreasonable or unconscionable. We find that appellee did not explicitly waive any interest in the pension, but rather reiterated to the court her desire for custody of her children. As noted by appellee, there is no discussion in the record as to the value of appellant's pension. Moreover, we note that the Magistrate, in an Order filed on September 16, 2014, stated that the parties had stipulated that appellant's pension was to be divided.

{¶44} Appellant's third assignment of error is, therefore, overruled.

{¶45} Accordingly, the judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Baldwin, J.

Hoffman, P.J. and

Wise, J. concur.