

[Cite as *Sindelar v. Gall*, 2010-Ohio-1960.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

SHAWN M. SINDELAR

C. A. No. 25022

Appellee

v.

ANDREA M. GALL

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2007-02-0471

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 5, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, Andrea Gall (“Mother”), appeals from the judgment of the Summit County Court of Common Pleas, Domestic Relations Division, adopting a magistrate’s decision to deny Mother’s motion to terminate a shared parenting plan. This Court affirms.

I

{¶2} Mother and Shawn Sindelar (“Father”) are the natural parents of A.S., who was born on August 2, 2004. Mother and Father never married, but initially lived together with Father’s parents and were briefly engaged. Their relationship later deteriorated, and Mother left to live with her own parents. Both Mother and Father sought to maintain their respective relationships with A.S. despite the deterioration of their own relationship.

{¶3} On February 16, 2007, Father filed a complaint on behalf of himself and A.S. to seek a shared parenting plan, establish child support, obtain health insurance coverage, and allow Father to claim A.S. as a dependent for tax purposes. On April 6, 2007, a magistrate issued a

decision, indicating that he had held a hearing and that the parties had reached a full agreement on all parenting motions. The magistrate ordered the parties to submit a shared parenting plan. The trial court adopted the magistrate's decision the same day. On June 6, 2007, the court entered an agreed judgment entry based upon a shared parenting plan that Mother and Father signed and submitted.

{¶4} On October 2, 2007, Mother filed a motion to terminate shared parenting, award her custody, and award her child support. Father responded and asked the court to uphold the shared parenting plan, or in the alternative, to grant him sole custody. The magistrate issued temporary orders and appointed a guardian ad litem ("GAL"). On July 24, 2008 and September 15, 2008, the magistrate held hearings and both parties submitted evidence.

{¶5} On October 20, 2008, the magistrate issued his decision, upholding the parties' shared parenting plan. The trial court adopted the magistrate's decision the same day. Mother filed objections, arguing that shared parenting was not in A.S.'s best interest. Father responded to Mother's objections. On July 9, 2009, the trial court entered an order upholding the parties' shared parenting plan. Mother appealed from the court's order, but this Court dismissed the appeal because the trial court did not explicitly rule upon Mother's objections. See *Sindelar v. Gall* (Aug. 17, 2009), 9th Dist. No. 24876. On September 22, 2009, the court overruled Mother's objections and denied her motion to terminate the shared parenting plan.

{¶6} Mother's appeal is now before this Court and raises one assignment of error for our review.

II

Assignment of Error

“THE LOWER COURT ERRED IN AFFIRMING THE MAGISTRATE’S DECISION AND DENYING APPELLANT’S MOTION TO TERMINATE SHARED PARENTING.”

{¶7} In her sole assignment of error, Mother argues that the trial court erred by adopting the magistrate’s decision because shared parenting is not in A.S.’s best interest. We disagree.

{¶8} Generally, this Court reviews a trial court’s action with respect to a magistrate’s decision for an abuse of discretion. *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. “In so doing, [however,] we consider the trial court’s action with reference to the nature of the underlying matter.” *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. “This Court reviews the trial court’s termination of a shared parenting plan for an abuse of discretion.” *Hammond v. Harm*, 9th Dist. No. 23993, 2008-Ohio-2310, at ¶7 (considering whether court acted within its discretion by terminating a shared parenting plan after considering statutory best interest factors), quoting *Stanley v. Stanley*, 9th Dist. No. 23427, 2007-Ohio-2740, at ¶7. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} R.C. 3109.04(E)(2)(c) permits a court to terminate a shared parenting plan upon the request of one or both of the parents if termination is in the best interest of the child. In determining whether a parenting arrangement is in the best interest of a child, the court must consider all relevant factors, including, but not limited to, those set forth in R.C. 3109.04(F)(1) and (F)(2). *Hammond* at ¶8. R.C. 3109.04(F)(1)’s relevant factors are as follows:

“(a) The wishes of the child’s parents regarding the child’s care;

“***

“(c) The child’s interaction and interrelationship with the child’s parents *** and any other person who may significantly affect the child’s best interest;

“(d) The child’s adjustment to the child’s home, school, and community;

“(e) The mental and physical health of all persons involved in the situation;

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

“***

“(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[.]”

R.C. 3109.04(F)(2)’s factors provide as follows:

“(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 the other parent;

“(c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;

“(d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

“(e) The recommendation of the [GAL] of the child, if the child has a [GAL].”

The trial court’s judgment entry indicates that the court considered all of the foregoing factors in denying Mother’s motion. Thus, this Court must review the record to determine whether the trial court abused its discretion by concluding, after a consideration of the factors set forth in R.C. 3109.04(F)(1) and (F)(2), that it was not in A.S.’s best interest to terminate the parties’ shared parenting plan. *Hammond* at ¶12.

{¶10} Mother testified that she agreed to enter into a shared parenting plan for A.S. because Father “manipulated her” by threatening to have her drug tested if she did not do so. Mother agreed, however, that she eventually did have to submit to drug testing and received negative test results. According to Mother, Father harassed her frequently after the parties entered into their shared parenting plan. Mother testified that Father: (1) repeatedly sent her text messages in which he used derogatory terms and accused her of using drugs; (2) threatened to publicize an intimate video recording that the two had created when they were still together; (3) assaulted her by tearing her blouse, shoving her, and trying to have sex with her after inviting her over to his house at 2:30 a.m.; and (3) acted belligerently toward her family, telling her mother that she was promiscuous and took drugs. Mother also testified that she had a tumultuous relationship with A.S.’s paternal grandmother and often experienced problems when she brought A.S. over to Father’s house, where the paternal grandmother resided. According to Mother, however, the parties had managed to eliminate some of their problems by having A.S.’s paternal grandfather help with A.S.’s transportation.

{¶11} Mother expressed concern over Father’s parenting because he did not consistently enforce A.S.’s potty training and weaning from the bottle. Mother also felt that Father had dressed A.S. inappropriately on several occasions when it was cold outside and did not always teach A.S. the importance of mutual respect. Mother specified that on one occasion, her family purchased a potted flower for A.S. to give to his paternal grandmother as an Easter gift, but Father left the flower sitting on her family’s driveway after he picked up A.S. Mother was concerned that this incident upset A.S. and counteracted her attempt to teach A.S. the importance of “do[ing] the right thing.” Overall, however, Mother admitted that Father has indicated a willingness to make the shared parenting arrangement work. Mother agreed that Father stopped

sending her inappropriate text messages and that their situation had improved in the last few months. Mother further admitted that the main reason she disliked shared parenting was that it did not give her enough time with A.S. She testified that she did not have a problem with A.S. being with Father while she was at work, but wished she could spend more time with him. Mother testified that she considers A.S. to be above average in terms of his developmental growth.

{¶12} Father admitted that he sent Mother several inappropriate text messages and that it was immature of him to do so. Father testified that he allowed himself to act out because he was upset with Mother for seeking the termination of the shared parenting plan. Father denied assaulting Mother and further denied ever inviting her over to his house on the night of the alleged assault. According to Father, Mother let herself into his home and woke him up by coming into his bedroom. Father admitted that he did not strictly enforce A.S.'s potty training and bottle weaning at first, but that he had done so eventually and A.S. was potty trained and weaned at the time of the hearing. Father acknowledged that he and Mother had difficulties getting along, but testified that they were usually able to work out any parenting issues that arose. Father testified that he and Mother agreed to switch visitation weekends if either of them had a certain event that they wished to attend with A.S. and that they had selected a preschool for A.S. together. Father testified that he understood the importance of having both parents involved in the parenting process and hoped that he and Mother could adopt mutual sets of rules for A.S. so as to foster consistency between the two households. Father believed that A.S. was very well adjusted and enjoyed his time at Father's residence, partially because it allowed him to interact with his aunt and uncles. Father testified that A.S. was very imaginative and had excellent developmental growth.

{¶13} Carol Miller testified as the GAL for A.S. Miller, a GAL with almost twenty-three years of experience, testified that the majority of the problems the parents experienced occurred shortly after they filed their shared parenting plan. Miller admitted that Mother, Father, and their families expressed hostility towards one another on several occasions and that it would be better for A.S. if the parties refrained from such behavior in the future. Even so, Miller opined that much of the conflict that arose between Mother and Father was the result of their immaturity and would hopefully improve with time. Miller specified that Mother and Father had been able to agree on most parenting issues and that there were no issues which might cause her to question either Mother or Father's ability to parent. Miller stressed that she did not have any concerns about A.S.'s living environment and that she considered A.S. to be "above normal" in terms of his developmental growth.

{¶14} Denise Gwinnup, a social worker with twenty-five years experience, testified that she conducted an assessment for the court, during which she separately interviewed both Mother and Father. Gwinnup shared Miller's opinion that both Mother and Father displayed a lack of maturity, but that they were making their shared parenting plan work overall. Gwinnup also testified that neither party called her after she conducted her assessment to advise her of any additional problems and noted that people generally contact her directly if they experience additional difficulties after her initial interviews with them. Gwinnup recommended that the parties continue to engage in shared parenting.

{¶15} At oral argument, Mother's counsel admitted that A.S. is a well-adjusted child, but argued that shared parenting allows Father to maintain too much control over Mother. Mother's counsel argued that a custodial arrangement in which Father only had visitation rights would somehow limit Father's ability to harass Mother. This Court is not persuaded by

counsel's argument. Moreover, this Court does not look favorably upon the conclusory statements set forth in counsel's brief. In particular, counsel criticizes Miller and Gwinnup for being obviously biased towards Mother. Upon review of the record, however, this Court does not have any of the exhibits entered at trial, including Miller's report and Gwinnup's assessment. This Court has held that "[i]n the absence of the guardian ad litem's report, 'we cannot say that the trial court's findings of fact are unsupported by evidence in the record.'" *Najmi v. Najmi*, 9th Dist. No. 07CA009293, 2008-Ohio-4405, at ¶11, quoting *Saluppo v. Saluppo*, 9th Dist. No. 22680, 2006-Ohio-2694, at ¶40. Thus, to the extent Mother challenges the court's findings with regard to Miller and Gwinnup's conclusions, her argument lacks merit.

{¶16} There is no evidence of abuse in the record apart from the conflicting testimony that Mother and Father were involved in an altercation the night she came over his house. While allegations of abuse must be taken seriously, even Mother failed to raise the alleged altercation as a point of concern with either Miller or Gwinnup when they conducted their assessments. Furthermore, neither party contacted either Miller or Gwinnup after their initial interviews to report any further problems. Both Miller and Gwinnup testified in support of shared parenting, and the record supports the conclusion that the shared parenting plan has, overall, produced positive results. Mother, Father, and their families expressed a common desire to ensure A.S.'s continued development and well being. All the evidence indicates that A.S. has flourished under the shared parenting plan and that Mother, Father, and their families all have excellent relationships with A.S. despite the fact that, at times, they have difficulty maintaining amicable relationships amongst themselves. Admittedly, the parties and their respective families have struggled in their interactions with one another. This difficulty alone, however, does not currently warrant such a severe measure as the termination of shared parenting. Based on all the

evidence in the record, we cannot conclude that the court abused its discretion by concluding that it was not in A.S.'s best interest to grant Mother's motion to terminate shared parenting. Accordingly, Mother's assignment of error lacks merit.

III

{¶17} Mother's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR

APPEARANCES:

DUANE L. DOYLE, Attorney at Law, for Appellant.

BARBARA M. HEINZERLING, Attorney at Law, for Appellee.