[Cite as *Kiewel v. Kiewel*, 2010-Ohio-2945.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

KEVIN T. KIEWEL	C.A. No. 09CA0075-M
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RUTH E. KIEWEL	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellee	CASE No. 03 DR 0622

DECISION AND JOURNAL ENTRY

Dated: June 28, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, Kevin Kiewel ("Husband"), appeals from the judgment of the Medina County Court of Common Pleas, Domestic Relations Division, sustaining Defendant-Appellee, Ruth Kiewel's ("Wife"), objections to the magistrate's decision and granting her an upward deviation in child support. This Court affirms.

I

{¶2} Husband and Wife were married in July 2001. Their marriage produced two children; the first born in 2002 and the second in 2003. In late 2003, Husband filed a complaint for divorce, and Wife filed a counterclaim for the same. The trial court appointed a guardian ad litem and later ordered a custody evaluation be performed by a child psychologist for the purposes of determining parental rights. The trial court entered the parties' divorce decree in April 2005, but postponed its decision on matters pertaining to spousal support and parenting time until a further hearing could be held on those matters.

{¶3} In July 2005, a hearing was held, at which the parties entered into a shared parenting plan. As a result of that hearing, Husband was deemed to be the residential parent for the purposes of the children's education. Shortly thereafter, Husband moved to terminate the shared parenting plan and sought to suspend Wife's parenting time until a supervised visitation schedule could be established. The magistrate reappointed a guardian ad litem to evaluate the situation in light of Husband's pending motion. In February 2006, Wife filed a motion to modify the shared parenting agreement, namely seeking to be named the residential parent and primary caregiver.

{¶4} On August 8, 2007, Husband filed a motion to modify support based on a change in circumstances and a motion to show cause, alleging that Wife was in contempt of the parties' shared parenting plan for failing to return the children to him following her shared parenting time or to return his calls about the same. On August 17, 2007, Husband filed an emergency motion to restore the parenting time he lost when Wife failed to return the children after their visitation with her on July 31. Wife eventually returned the children to Husband on August 24, 2007.

{¶5} The magistrate held several hearings in October 2007, to deal with the outstanding motions filed by each party. In April 2008, the magistrate ordered, inter alia, that the shared parenting plan remain in effect and unchanged. The magistrate further determined that Wife was to be the residential parent for the purposes of the children's school during the 2008-2009 school year. The magistrate did not rule on Husband's motion for modification of support or his show cause motion. Husband objected to the magistrate's decision on all of the foregoing grounds, as well as several others.

{¶6} In July 2008, the trial court held a hearing on Husband's objections. Following that hearing, on August 13, 2008, the trial court overruled Husband's objection to Wife being

deemed the residential parent for schooling in the upcoming year, but sustained his objections vis-à-vis the magistrate's failure to address his motions to modify support and to show cause. The trial court remanded the matter for further consideration of the support and contempt issues. Based on the longstanding, multiple, and highly contentious issues surrounding the shared parenting plan, the trial court also appointed a parenting coordinator to aid the parties with such issues, including ad hoc modifications to the parenting schedule based on any medical or education-related appointments of the children.

{¶7} In September 2008, Wife filed a motion to modify child support and the shared parenting plan, as well as limit Husband's interference with Wife's ability to act as the residential parent for school purposes in the upcoming year. Additionally, Wife filed a show cause motion alleging Husband had "unilaterally modified" the parties' shared parenting order in an attempt to reclaim time that he had lost with the children when Wife kept the children from him in August 2007.

{¶8} On October 10, 2008, a hearing was held on the matters remanded by the trial court and Wife's outstanding motions. On February 19, 2009, the magistrate issued her decision in which, pertinent to this appeal, she determined that: (1) Wife was in contempt for withholding the children from Husband from July 31-August 24, 2007; (2) Husband was to pay $54.75 per child per month in child support based on the computations set forth in the child support worksheet; (3) Wife was entitled to a $200 per month retroactive upward deviation in child support for the extraordinary cost she incurred in transporting children to school in Medina from August 2007-September 2008; and (4) Wife's show cause motion was denied. Based on the contempt finding, Wife was sentenced to two days in jail, with the ability to purge her sentence by providing Husband with "make-up parenting time" for the days he missed with the children in

August 2007 and to pay $500 toward Husband's attorney fees. Wife timely objected to the contempt finding and purge conditions, as well as other findings by the magistrate. Husband did not file any objections.

{¶9} In June 2009, the trial court held a hearing on Wife's objections. Following the hearing and a review of the magistrate's decision, the trial court sustained Wife's objections to the magistrate's contempt finding and vacated the contempt order and its purge conditions. The court independently reviewed and adopted the magistrate's decision to grant Wife an upward deviation in child support for the months she was responsible for transporting the children to school in Medina. Husband now timely appeals from the trial court's judgment, asserting two assignments of error for our review.

II

Assignment of Error Number One

> "THE DOMESTIC RELATIONS COURT ERRED AND ABUSED ITS DISCRETION BY SUSTAINING APPELLEE-WIFE'S OBJECTIONS TO THE MAGISTRATE'S DECISION FINDING HER IN CONTEMPT FOR ADMITTEDLY WITHHOLDING PARENTING TIME FROM APPEL[L]ANT-FATHER IN VIOLATION OF THE SHARED PARENTING PLAN PREVIOUSLY AGREED TO BY THE PARTIES AND ADOPTED AS AN ORDER OF THE COURT, AND BY VACATING THE PURGE CONDITIONS OF PROVIDING MAKE-UP PARENTING TIME AND PAYING ATTORNEY FEES INCURRED BY APPELLANT-HUSBAND."

{¶10} In his first assignment of error, Husband asserts that the trial court erred in sustaining Wife's objections to the magistrate's decision to find Wife in contempt of the parties' shared parenting plan. Specifically, Husband argues that Wife admitted to withholding their children from him in violation of the shared parenting plan to which the parties had agreed. Additionally, Husband argues that the trial court erred in vacating the purge conditions the magistrate had established, whereby Wife was required to provide Husband with supplemental,

or "make-up" parenting time to compensate him for the period of time Wife withheld the children and to pay $500 toward the attorney fees Husband incurred as a result of his having to file emergency motions for the return of the children. We disagree.

{¶11} 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. An abuse of discretion means that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} "Contempt of court may be defined as disobedience of a court order or conduct that brings the administration of justice into disrespect or impedes a court's ability to perform its functions." *Freeman v. Freeman*, 9th Dist. No. 07CA0036, 2007-Ohio-6400, at ¶45, quoting *Willis & Linnen Co., L.P.A. v. Linnen*, 9th Dist. No. 22452, 2005-Ohio-4934, at ¶17. "Civil contempt is designed to benefit the complainant and is remedial in nature *** [through the use of] fines or prison sentences which are conditioned upon performing some act." (Internal citations omitted.) *Schaffter v. Rush*, 9th Dist. No. 04CA0028-M, 2004-Ohio-6542, at ¶22. Because the contemnor's sentence is conditional, she is afforded the opportunity to purge herself of the contempt. Id. "This [C]ourt will not overturn a lower court's determination in a contempt proceeding absent an abuse of discretion." *Malson v. Berger*, 9th Dist. No. 22800, 2005-Ohio-6987, at ¶6.

{¶13} In its journal entry, the trial court noted that both Husband and Wife filed show cause motions alleging that the other had failed to return the children in a timely fashion following one another's designated parenting time. Similarly, both parties have repeatedly

lodged claims of physical and/or sexual abuse against one another, all of which have been found to be unsubstantiated upon investigation. The trial court acknowledged that the magistrate's decision appeared to credit Husband for having reported his concerns to Job and Family Services, whereas Wife simply withheld the children from Husband based on her same concerns of abuse. In doing so, the court likewise recognized that Wife had been cautioned by the court in its previous entries to refrain from making unfounded allegations to children's services or other agencies. In conclusion, the trial court opined that:

> "[T]here is sufficient evidence to find both parties in contempt of court for their unsubstantiated allegations and denial of parenting time which violate both the letter and the spirit of the shared parenting plan. To recommend only one party be held in contempt in this case is to empower the other parent and such disruption of the balance of power is not in the children's best interest.
>
> "It would not be in the children's best interest to hold the parties in contempt for their actions in 2007 and 2008, however, when what this family needs to do is move on and learn to parent without Court involvement. The Court appointed a parenting coordinator to help the parties with parenting disputes and the parties should use that resource before filing motions."

The record is replete with references to Husband and Wife's struggle to gain control over one another with respect to managing the educational and medical needs of the children, as well as their frequent attempts to assert allegations of abuse against one another. The record further reveals that the trial court intentionally divided control of the medical and educational decisions of the children to prevent one parent from controlling the children's lives to the exclusion of the other. Thus, it is apparent that the trial court's decision acted to sustain the delicate balance of parental control that the parties have repeatedly sought to disrupt.

{¶14} Husband argues that the trial court erred by reversing the contempt finding against Wife because Wife admitted to withholding parenting time, despite having entered into an agreed-upon shared parenting plan. He relies upon our decision in *Brilla v. Mulhearn*, 9th Dist.

No. 23018, 2006-Ohio-3816. In *Brilla*, we reversed the trial court's decision to dismiss Husband's claims against Wife for contempt, attorney fees, and costs because Wife had admitted, as a part of a settlement agreement between the parties, that she was in contempt of the trial court's order permitting Husband to claim their son as a tax deduction on his taxes. *Brilla* at ¶24. In that case, the record revealed that the parties entered into a settlement agreement on the foregoing matters which was read into the record and journalized as part of the magistrate's decision. Id. at ¶11. As part of that settlement agreement, Wife admitted to her contempt and agreed that there would be no other consequences for her contempt, other than the payment of money to satisfy the terms of the parties' settlement agreement. Id. at ¶14. Wife later filed objections to the magistrate's decision, and the trial court sustained Wife's objections, in effect, reversing the terms of the parties' settlement agreement. Id. at ¶7. On appeal, we held that a settlement agreement is "a contract between two parties," and that Wife had failed to establish any basis upon which the settlement agreement was unenforceable. Id. at ¶16. Accordingly, we concluded that the trial court erred in sustaining Wife's objections to the magistrate's decision. Id. at ¶24. Unlike *Brilla*, in this case there was no settlement agreement wherein Wife admitted she was in contempt of the terms of the parties' shared parenting agreement.

{¶15} Based on the evidence in the record and the rationale articulated by the trial court, we conclude that the trial court acted within its discretion when it sustained Wife's objection to the magistrate's contempt finding and vacated the magistrate's order on this matter. Accordingly, Husband's first assignment of error lacks merit and is overruled.

Assignment of Error Number Two

> "THE DOMESTIC RELATIONS COURT ERRED AND ABUSED ITS DISCRETION BY ORDERING AN UPWARD CHILD SUPPORT DEVIATION OF $200 PER MONTH TO BE PAID BY APPELLANT-HUSBAND TO APPELLEE-WIFE FOR A TWELVE MONTH PERIOD FOR HER ALLEGED

> TRAVEL EXPENSES IN TRANSPORTING THE CHILDREN TO SCHOOL, WHERE THERE WAS NO ADEQUATE FINDINGS OF FACTS (sic) TO SUPPORT THAT UPWARD DEVIATION[.]"

{¶16} In his second assignment of error, Husband argues the trial court abused its discretion by granting Wife an upward deviation in child support of $200 per month for the year in which Husband was deemed the residential parent for school purposes. He alleges that there were inadequate findings of fact to support such a deviation. We disagree.

{¶17} Civ.R. 53 governs proceedings before a magistrate and the trial court's duties in relationship to the magistrate's decision. Civ.R. 53(D)(3)(b)(iv) states:

> "*Waiver of right to assign adoption by court as error on appeal*. Except for a claim of plain error, 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 has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." (Emphasis in original.)

The record reveals that Husband did not file any objections to the magistrate's decision awarding Wife an upward deviation in support. Furthermore, he has not argued plain error on appeal. This Court acknowledges that, in the past, we have been inconsistent in our use of the terms waiver and forfeiture where an appellant has failed to object to the trial court in the first instance with respect to a magistrate's findings of facts or conclusions of law, then later challenges the magistrate's decision on appeal. Compare *Daniels v. O'Dell*, 9th Dist. No. 24873, 2010-Ohio-1341, at ¶12 (concluding that Husband had "waived the right" to challenge the amount of his child support obligation because he failed to object to the magistrate's decision on that basis) with *Quintile v. Quintile*, 9th Dist. No. 08CA0015-M, 2008-Ohio-5657, at ¶15 (noting that "because Husband did not specifically object to the disputed findings of the magistrate *** those claims have been forfeited"). See, also, *Werts v. Werts*, 9th Dist. No. 23610, 2007-Ohio-4279, at ¶26 (generally stating that "[a]ppellant has failed to preserve this issue for appeal" where the

appellant had not filed objections to the magistrate's decision with the trial court). Despite the inherent conflict in the language of the Civ.R. 53(D)(3)(b)(iv), which incorporates the term "waiver" into its title, while in the body of the provision permitting a party to assert "a claim of plain error," we deem the failure to object to a magistrate's decision in accordance with Civ.R. 53(D)(3) to be appropriately termed forfeiture. See *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23, quoting *State v. McKee* (2001), 91 Ohio St.3d 292, 299 (Cook, J., dissenting) (explaining that "waiver of a right cannot form the basis of any claimed error under Crim.R. 52(B)" but noting that "forfeiture does not extinguish a claim of plain error under Crim.R. 52(B)"); and *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121-22 (establishing that the doctrine of plain error rooted in Crim.R. 52(B) can be applied to civil cases in "extremely rare" instances, and specifying that "it is well established that failure to follow procedural rules can result in forfeiture of rights"). Accordingly, because Husband failed to properly object to the magistrate's decision in accordance with Civ.R. 53(D)(3), Husband has forfeited the right to assign as error on appeal the upward deviation in child support for the year during which he was the children's residential parent for school purposes. Accordingly, Husband's second assignment of error lacks merit and is overruled.

III

{¶18} Husband's two assignments of error are overruled. The judgment Medina 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 Medina, 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:

JOSEPH F. SALZGEBER, Attorney at Law, for Appellant.

DAVID V. GEDROCK, Attorney at Law, for Appellee.