[Cite as *Knouff v. Walsh-Stewart*, 2010-Ohio-4063.]

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

KEVIN J. KNOUFF	C. A. No. 09CA0075
Appellee/Cross-Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MICHELLE WALSH-STEWART, et al.	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellants/Cross-Appellees	CASE No. 97-1385-PAR

DECISION AND JOURNAL ENTRY

Dated: August 30, 2010

BAIRD, Judge.

INTRODUCTION

{¶1} Kevin Knouff and Michelle Walsh-Stewart had a child out of wedlock. After they broke up, Mr. Knouff filed for an allocation of parental rights and responsibilities. While Mr. Knouff and Ms. Walsh-Stewart agreed on many of the details, they disagreed about whether Mr. Knouff should receive credit for child support for checks he gave to Ms. Walsh-Stewart after he moved out of her house. They also disagreed about whether the court should impute additional income to Ms. Walsh-Stewart because she had voluntarily taken a lesser-paying job. They further disagreed about the terms of their shared parenting plan. A magistrate determined that the checks Mr. Knouff gave Ms. Walsh-Stewart were for child support, that additional income should not be imputed to Ms. Walsh-Stewart, and that Mr. Knouff's proposed shared parenting plan was in the best interest of the child. Both parties objected to the magistrate's decision, but the trial court overruled all but one of Mr. Knouff's objections. Ms. Walsh-Stewart has

appealed, assigning four errors. Mr. Knouff has cross-appealed, assigning one error. This Court affirms because the trial court complied with Section 3109.04 of the Ohio Revised Code when it approved a shared parenting plan, correctly calculated the amount of child support, and its finding that Ms. Walsh-Stewart is not voluntarily underemployed is supported by competent and credible evidence.

SHARED PARENTING PLAN

{¶2} Ms. Walsh-Stewart's first and second assignments of error both challenge the trial court's adoption of Mr. Knouff's shared parenting plan. Accordingly, this Court will address them together. Her first assignment of error is that the trial court's adoption of Mr. Knouff's proposed plan was an abuse of discretion and is against the manifest weight of the evidence. Her second assignment of error is that the trial court's adoption of a shared parenting plan was contrary to law.

{¶3} Regarding her second assignment of error, Ms. Walsh-Stewart has argued that the trial court did not comply with Section 3109.04 when it adopted Mr. Knouff's proposed shared parenting plan. "[W]hether the trial court complied with statutory mandates in adopting a shared parenting plan is a question of law" that this Court reviews de novo. *Syverson v. Syverson*, 9th Dist. No. 09CA009527, 2009-Ohio-6701, at ¶7.

{¶4} Under Section 3109.04(A), the trial court was directed to "allocate the parental rights and responsibilities" of the parties' child. The method the court had to use depended on whether one or both of the parties moved "the court to grant both parents shared parental rights and responsibilities . . . ." R.C. 3109.04(A), (G). In this case, both parties moved for shared parenting. Because their proposed plans were different, the court had to "review each plan . . . to determine if either [was] in the best interest of the child[ ]." R.C. 3109.04(D)(1)(a)(ii). If it

determined that one of the plans was in the best interest of the child, it had discretion to approve it under Section 3109.04(D)(1)(b). *Id*.

{¶5} In determining whether either of the proposed plans was in the best interest of the child, the court had to consider "all relevant factors," including, but not limited to, the factors listed in Section 3109.04(F)(1)(a-j). R.C. 3109.04(F)(1). Those factors included the wishes of the child's parents, the wishes of the child, the child's interaction and interrelationship with her parents and siblings, the child's adjustment to her home, school, and community, the mental and physical health of all persons involved in the situation, the parent more likely to honor and facilitate court-approved parenting time rights, whether either parent has failed to make all child support payments, 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, whether one of the parents has continuously and willfully denied the other's right to parenting time, and whether either parent has established a residence, or is planning to establish a residence, outside Ohio. R.C. 3109.04(F)(1)(a-j).

{¶6} Ms. Walsh-Stewart has argued that the magistrate failed to consider the factors listed in Section 3109.04(F)(1). This Court rejects her argument because, when appealing a trial court's adoption of a magistrate's decision, "[a]ny claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision." *Citibank v. Masters*, 07CA0073-M, 2008-Ohio-1323, at ¶9 (quoting *Mealey v. Mealey*, 9th Dist. No. 95CA0093, 1996 WL 233491 at *2 (May 8, 1996)).

{¶7} Ms. Walsh-Stewart has also argued that the trial court failed to consider the factors listed in Section 3109.04(F)(1). In its decision, however, the trial court specifically noted

that, "[i]n determining the best interest of the child, the [c]ourt is to consider 'all relevant factors'" and specifically cited Section 3109.04(F). This Court has held that a trial court "need not explicitly reiterate its findings with regard to [the Section 3109.04(F)] factors absent a Civ.R. 52 request for findings of fact and conclusions of law." *Matis v. Matis*, 9th Dist. No. 04CA0025-M, 2005-Ohio-72, at ¶6.

{¶8} Even if the trial court had to address each factor explicitly, it did so in this case. The trial court noted that the factors listed in Section 3109.04(F)(1) included "(1) [t]he wishes of the child's parents; (2) [t]he wishes and concerns of the child . . . ; (3) [t]he child's interaction with parents and siblings; (4) [t]he child's adjustment to home and school; (5) [t]he mental and physical health of the persons involved; (6) [t]he parent who is more likely to honor visitation; [and] (7) [w]hether a parent has paid child support as ordered." It discussed each of those factors in separate paragraphs. While the trial court did not note that it had to consider whether either parent had been convicted of or pleaded guilty to any criminal offense involving child abuse or neglect or whether either parent had established a residence, or was planning to establish a residence, outside Ohio, there is nothing in the record, or argument from Ms. Walsh-Stewart, to suggest that those factors were relevant. Furthermore, while the court also did not explicitly note that it had to consider whether one of the parents has continuously and willfully denied the other's right to parenting time, it discussed that factor in the same paragraph that it discussed "[t]he parent more likely to honor and facilitate court-approved parenting time rights" factor, finding that there was "no pattern of abuse of visitation." R.C. 3109.04(F)(1)(f). This Court, therefore, concludes that the trial court complied with Section 3109.04 when it considered whether to adopt either of the parties' proposed shared parenting plans. Ms. Walsh-Stewart's second assignment of error is overruled.

{¶9} Regarding her first assignment of error, Ms. Walsh-Stewart has repeated her argument that the trial court ignored the factors outlined in Section 3109.04 in determining the best interests of the parties' child. She has also argued that the trial court's best interest finding is not supported by competent and credible evidence. She has identified five areas of the shared parenting plan which, she has argued, do not promote the best interests of the child: (1) correlation of visits with her other children; (2) start and end times of visitation; (3) transportation; (4) right of first refusal; and (5) designation of residential parent.

{¶10} Ms. Walsh-Stewart has argued that the shared parenting plan adopted by the trial court does not promote the best interests of the parties' child because it does not maximize the amount of time that the child will spend with her half-brothers. Specifically, she has argued that it does not guarantee that the child will spend the same weekends or summer vacation weeks with Ms. Walsh-Stewart as her half-brothers. She has noted that a child psychologist recommended that the child's relationship with her half-brothers be "fostered and preserved."

{¶11} Under Section 3109.04(D)(1)(b), the trial court had discretion to approve Mr. Knouff's proposed shared parenting plan if it determined that the plan was in the best interest of the parties' child. R.C. 3109.04(D)(1)(b); see *Haas v. Bauer*, 9th Dist. No. 02CA008198, 2004-Ohio-437, at ¶21. "What is in the best interests of a child is primarily a question of fact . . . ." *In re Gill*, 4th Dist. No. 84 X 4, 1985 WL 6533 at *2 (Feb. 11, 1985). "A trial court's decision on a question of fact should be reversed only if it is against the manifest weight of the evidence." *Stocker v. Cochran's Decorative Curbing Inc.*, 7th Dist. No. 09 MA 128, 2010-Ohio-1542, at ¶34. According to the Ohio Supreme Court, the test for whether a judgment is against the weight of the evidence in civil cases "was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279." *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶24. That "explanation"

was that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Id*. (quoting *C.E. Morris Co.*, 54 Ohio St. 2d 279, at syllabus). Accordingly, we review the record to determine whether the trial court's finding that Mr. Knouff's proposed shared parenting plan is in the best interest of the parties' child is supported by competent, credible evidence.

{¶12} The trial court acknowledged that it is important for the child to maintain her bond with her half-brothers. It found, however, that the child psychologist had ignored that the child and her half-brothers are "together all week in the same home for long periods of time." It also found that there was no evidence that the child's "occasional time apart" from her brothers was disruptive to the bond that she shares with them.

{¶13} Regarding weekend visitation, we note that the shared parenting plan approved by the trial court takes into consideration that Mr. Knouff's "current visitation schedule correlates with the weekends that [Ms. Walsh-Stewart's] children from a prior marriage [are] with their father for weekend visitation" and provides that, "[a]bsent emergency circumstances, the parties will make reasonable endeavors to continue on said schedule." Regarding summer visitation, Ms. Walsh-Stewart has not pointed to any testimony from the psychologist suggesting that five weeks of consecutive visitation with Mr. Knouff will threaten her relationship with her half-brothers. In fact, the psychologist specifically said that it would not. Under the plan approved by the trial court, Mr. Knouff does not receive five weeks of summer vacation until the child is six years old. That is consistent with the psychologist's testimony that "[m]y hope would be that perhaps by the time she is six she could have the five week consecutive weeks in the summer because an ongoing relationship has been established . . . that type of adjustment will not be as

emotionally difficult for a child that age." Accordingly, this Court concludes there is competent, credible evidence in the record to support the trial court's finding that the parenting plan submitted by Mr. Knouff would adequately foster and preserve the child's relationship with her half-brothers.

{¶14} Ms. Walsh-Stewart has next argued that the shared parenting plan is not in the best interest of the child because, when combined with the terms of visitation of her two sons, it forces her to be in two places at the same time. She has also argued that the child's visitation with Mr. Knouff ends too late in the day for the child to settle down for bed after arriving home. She has not pointed to any evidence in the record, however, that establishes that the shared parenting plan approved by the court conflicts with her sons' visitation schedule. Moreover, under the plan, other parties are allowed to transport the child with the other parent's permission. The parties agreed that they must be flexible in handling the aspects of the shared parenting plan and that they must "make all reasonable efforts to accommodate each other's needs." We urge the parties to abide by those terms because their failure to reasonably accommodate the other's transportation needs could result in contempt proceedings.

{¶15} Regarding the end time of Mr. Knouff's visits, it appears that Ms. Walsh-Stewart is objecting to the fact that he will have the child until 8:00 p.m. on Wednesdays and, after the child turns four, every other Sunday. Considering that the plan Ms. Walsh-Stewart submitted before the final hearing also proposed that Mr. Knouff have the child until 8:00 p.m. on Wednesdays, the trial court was entitled to reject her argument that 8:00 p.m. was too late in the day for visitation to end.

{¶16} Ms. Walsh-Stewart has next argued that the plan should provide that her mother may transport the child if she is unable. There is nothing in the record indicating that

transportation has been a significant problem for either of the parties. Furthermore, as noted above, others are permitted to transport the child with the permission of the other party, who is required to make reasonable accommodations. The parties should work together to establish a list of persons who are approved to transport the child. A party's failure to make reasonable accommodations on that issue would violate the plain language of the plan.

{¶17} Ms. Walsh-Stewart has also argued that the plan's four-hour right of first refusal period is too short. According to her, four hours is not even enough time to go to dinner and a movie. Because she and Mr. Knouff live 30 minutes apart, Ms. Walsh-Stewart has alleged that the child will have to be on the road constantly. She has argued that a six-hour period would be more reasonable. This Court concludes, however, that her argument is merely speculative. Furthermore, she has pointed to no evidence in the record that a 30- to 35-minute car ride twice a day will be detrimental to the child.

{¶18} Ms. Walsh-Stewart has further argued that the trial court should have named her the residential parent. She is concerned about what will happen if she and Mr. Knouff are unable to agree upon issues involving their child's education, health care, and other basic needs. The trial court properly rejected her argument because the shared parenting plan provides that she is the "legal custodian and residential parent for school purposes." It also provides that, if the parties are unable to resolve decisions regarding the child's welfare, "the decisions of [Ms. Walsh-Stewart] shall control." Ms. Walsh-Stewart's first assignment of error is overruled.

CHILD SUPPORT PAYMENTS

{¶19} Ms. Walsh-Stewart's third assignment of error is that the trial court incorrectly granted Mr. Knouff a credit toward his child support obligation. According to her, after Mr. Knouff moved out of her house, he gave her a series of checks totaling $2450. She argued the

payments were to reimburse her for household expenses that he had failed to contribute to while he lived with her. According to Mr. Knouff, however, the payments were for child support. The trial court found that the payments were for child support.

{¶20} Ms. Walsh-Stewart has noted that, under Section 3121.44 of the Ohio Revised Code, child support payments shall "be made to the office of child support in the department of job and family services . . . ." She has also noted that, under Section 3121.45, "[a]ny payment . . . that is not made to the office of child support . . . shall not be considered a payment of support under the support order and . . . shall be deemed to be a gift." She, therefore, has argued that, because Mr. Knouff paid her the $2450 directly, the trial court should have considered it a gift.

{¶21} Ms. Walsh-Stewart is incorrect. As Mr. Knouff has pointed out, Section 3121.44 only applies once a support order is issued. R.C. 3121.44. He has also correctly pointed out that he paid the $2450 before there was a support order in effect. Accordingly, Section 3121.45 does not apply.

{¶22} Ms. Walsh-Stewart has also argued that the trial court incorrectly found that the payments were for the benefit of their child. Mr. Knouff testified, however, that he made the payments for the child's benefit. Ms. Walsh-Stewart also testified that, after Mr. Knouff moved out "[h]e gave me a couple of checks for [the child], kind of as his child support, as he called it." Accordingly, there was some competent, credible evidence in the record to support the trial court's finding that the $2450 was for child support. Ms. Walsh-Stewart's third assignment of error is overruled.

CHILD SUPPORT ORDER

{¶23} Ms. Walsh-Stewart's fourth assignment of error is that the trial court incorrectly calculated the amount of child support that Mr. Knouff owed her from their child's birth until

December 28, 2007. She has argued that the calculation is incorrect because the court failed to include the child's health insurance costs in it.

{¶24} On March 10, 2008, the magistrate ordered Mr. Knouff to pay child support in the amount of $704.68 per month, effective December 28, 2007. At the final hearing, the parties agreed that he should also pay child support for the period between when the child was born in May 2007 and December 28, 2007. In its judgment entry, the trial court ordered him to pay $704.68 for each of those months.

{¶25} Ms. Walsh-Stewart has argued that Mr. Knouff's child support obligation for May 2007 to December 2007 should be $821.33 per month. The worksheet she submitted in support of her calculation, however, is not supported by her exhibits or testimony. According to Ms. Walsh-Stewart's worksheet, Mr. Knouff's income for 2007 was $72,000. The only document she submitted to support that amount was a W-2 form indicating that he had only $66,979 in wages. She also testified that he made only $66,979 that year. Regarding the cost of insurance, she wrote on the worksheet that she spent $2188 to provide health insurance for the parties' child. That figure is inconsistent with her testimony that the cost of her insurance went from $13.11 to $84.91 after adding the child. Even assuming it was "for 24 pays," as she testified, that is only $1723.20. Even that number fails to take into account that, because the child was born in May, Ms. Walsh-Stewart would only have paid the higher premium for seven months. This Court, therefore, concludes that Ms. Walsh-Stewart has not shown that the trial court's child support calculation was incorrect. Her fourth assignment of error is overruled.

VOLUNTARILY UNDEREMPLOYED

{¶26} Mr. Knouff's cross-assignment of error is that the trial court incorrectly failed to impute additional income to Ms. Walsh-Stewart because she is voluntarily underemployed. The

trial court found that, although Ms. Walsh-Stewart earns 33% less in her new position, her "decision was made to benefit the care of the child."

{¶27} Section 3119.01(C)(5)(b) of the Ohio Revised Code provides that the "[i]ncome" of a parent who is unemployed or underemployed is "the sum of the gross income of the parent and any potential income of the parent." "Whether a parent is 'voluntarily underemployed' . . . and the amount of 'potential income' to be imputed to [her], are matters to be determined by the trial court based upon the facts and circumstances of each case." *Rock v. Cabral*, 67 Ohio St. 3d 108, syllabus (1993). Its determination is a finding of fact to be reviewed for some competent, credible evidence. *Ostmann v. Ostmann*, 168 Ohio App. 3d 59, 2006-Ohio-3617, at ¶57. The burden of proof is on the parent who is claiming that the other is voluntarily underemployed. *Groves v. Groves*, 12th Dist. No. CA2008-06-059, 2009-Ohio-931, at ¶9 (collecting cases).

{¶28} Mr. Knouff has argued that the trial court should have found Ms. Walsh-Stewart is voluntarily underemployed because she left a job in which she was earning $75,732 to work two part-time jobs in which she earns only $47,625. According to Ms. Walsh-Stewart, before she had the parties' child, she was working full time as a physical therapist at a clinic in Canton. It took her 60 to 75 minutes to drive to the clinic and she sometimes worked 10- or 11-hour days. After she gave birth, she reduced her schedule to 32 hours a week to make it easier for her to nurse the child. She said that, in addition to being far from home, her job at the clinic was very demanding and was in a "high stress environment."

{¶29} Ms. Walsh-Stewart testified that she decided to find a different job that was closer to home with better hours. She obtained a position as a therapist at a school that is only 15-20 minutes from her home. Because it is for only nine months out of the year, she still works at the clinic in Canton one day a week. She said that, because of her job at the school, she is able to be

with the parties' child more and has less transportation and babysitting expenses. She also said that she has more flexibility in her schedule in case the child has to go to the doctor.

{¶30} In determining whether a parent is voluntarily underemployed, "the court is permitted . . . to give [her] stated reasons for changing jobs whatever weight it wishes." *Robinson v. Robinson*, 168 Ohio App. 3d 476, 2006-Ohio-4282, at ¶49. Just because a parent has a drop in income due to a voluntary choice, does not necessarily mean she is voluntarily underemployed. *Aldo v. Angle*, 2d Dist. No. 09-CA-103, 2010-Ohio-2008, at ¶35. "The test is not only whether the change was voluntary, but also whether it was made with due regard to [her] income-producing abilities and her . . . duty to provide for the continuing needs of the child . . . concerned." *Id*. (quoting *Woloch v. Foster*, 98 Ohio App. 3d 806, 811 (1994)). "[She] must show an objectively reasonable basis for terminating or otherwise diminishing [her] employment," which is measured "by examining the effect of [her] decision on the interests of the child." *Id*. (quoting *Holt v. Troha*, 2d Dist. No. 96-CA-19, 1996 WL 430866 at *4 (Aug. 2, 1996)). "The system for the determination and enforcement of child support obligations of parents who are separated or divorced . . . was never intended to shackle parents to jobs that they held at the time of divorce or separation, when child support amounts were originally ordered. Parents who are subject to support orders are as free as those who are not to adjust their employment to conform to their opportunities and to their disadvantages as well. However, they may not use their separation or divorce to avoid their responsibilities, and their children should not suffer from needs that would have been met by their parents had their marriage not ended or separation not ensued." *Id*. at ¶37 (quoting *Palmer v. Palmer*, 2d Dist. No. 94-CA-112, 1995 WL 396509 at *3 (June 14, 1995)).

{¶31} Although Ms. Walsh-Stewart earns less at her new job, there is evidence in the record that she will have less travel and child care expenses and that she will be able to spend more time caring for the parties' child. This Court, therefore, concludes that there is competent, credible evidence that supports the trial court's finding that Ms. Walsh-Stewart's change in employment is to the child's advantage. Mr. Knouff's assignment of error is overruled.

CONCLUSION

{¶32} The trial court properly approved Mr. Knouff's proposed shared parenting plan, it correctly credited Mr. Knouff for his past child support payments, it correctly calculated the amount of child support that Mr. Knouff owed, and its finding that Ms. Walsh-Stewart is not voluntarily underemployed is supported by competent and credible evidence. The judgment of the Wayne County Juvenile Court 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 Wayne, 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/Cross-Appellee.

WILLIAM R. BAIRD
FOR THE COURT

WHITMORE, J.
BELFANCE, P. J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

ROSANNE K. SHRINER, Attorney at Law, for Appellant/Cross-Appellee.

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