[Cite as *Stahl v. Stahl*, 2017-Ohio-4170.]

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

GEORGE A. STAHL Appellant v. DANA L. STAHL Appellee	C.A. No. 27876 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2013-05-1363

DECISION AND JOURNAL ENTRY

Dated: June 7, 2017

HENSAL, Presiding Judge.

{¶1} George Stahl appeals a decree of divorce entered by the Summit County Court of Common Pleas, Domestic Relations Division. For the following reasons, this Court affirms.

I.

{¶2} George and Dana Stahl married in May 2007 and had two children together. They separated in January 2012, and after their attempt to reconcile in 2013 failed, Husband filed for divorce. At trial, Husband sought shared parenting while Wife sought sole parental rights and responsibilities. Husband argued that he should be the residential parent because Wife's residence was dirty, she smoked in front of the children, she allowed the children to ride on an all-terrain vehicle (ATV), she allowed the children to get injured, she allowed them to be around firearms, and she allowed her children from other relationships to babysit their children even though the older children spanked them. Wife argued that she should have custody of the

children because she had always been their primary caregiver and because Husband was emotionally and verbally abusive to her, her older children, and the parties' children.

{¶3} Following trial, the court entered a decree that granted the parties a divorce. It rejected Husband's shared parenting plan and allocated sole parental rights and responsibilities to Wife. It also divided the parties' property. Husband has appealed the trial court's decree, assigning four errors. Because the first two assignments of error both concern custody, this Court will consider them together.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED WHEN IT NAMED THE MOTHER THE LEGAL CUSTODIAN OF THE CHILDREN AND ONLY GRANTED THE FATHER STANDARD ORDER PARENTING TIME.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED WHEN IT DENIED FATHER'S PROPOSED SHARED PARENTING PLAN.

{¶4} Husband argues that the trial court incorrectly rejected his proposed shared parenting plan and incorrectly made Wife the legal custodian of the children. A trial court possesses broad discretion with respect to its determination of the allocation of parental rights and responsibilities, and its decision will not be overturned absent an abuse of discretion. *See Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988). Thus, the trial court's determination will not be disturbed unless the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶5} If only one parent requests shared parenting and files a proposed plan, the court may approve the plan if it is in the best interest of the children. R.C. 3109.04(D)(1)(a)(iii). Whether to approve the plan "is discretionary with the court." R.C. 3109.04(D)(1)(b). If the

plan is not in the best interest of the children, the court shall not approve the plan. *Id*. In determining whether to adopt a shared parenting plan, the trial court must consider the factors listed in Revised Code Section 3109.04(F)(2). Those factors include the ability of the parents to cooperate and make decisions jointly about the children, the ability of each parent to encourage the sharing of love, affection, and contact between the children and the other parent, any history of or potential for abuse by either parent, the geographic proximity of the parents to each other, and the recommendation of the guardian ad litem of the children, if there is one. R.C. 3109.04(F)(2).

{¶6} In determining the best interest of children, the court must consider "all relevant factors," including those listed in Section 3109.04(F)(1). R.C. 3109.04(F)(1). The factors listed in Section 3109.04(F)(1) include the wishes of the children's parents, the wishes of the children, the children's interaction and interrelationship with their parents and siblings, the children's adjustment to their 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).

{¶7} Husband argues that he was the primary caregiver of the children when they were born because he was not employed at the time. He argues that Wife does not watch the children adequately and that, under her supervision, they have experienced more bumps, scrapes, and

bruises than is typical for small children. This included one of the children suffering a concussion when he fell out of the back of a parked vehicle and the other requiring stitches after tripping into a dresser. He argues that the amount of clutter in Wife's residence increases the risk of injury to the children. He also argues that Wife puts the children's health in danger by smoking around them and allowing them to ride an ATV. While he admits that he has used the children to acquire information about Wife, it is because Wife keeps information from him, including the fact that she allowed the children to continue riding the ATV even after the trial court ordered her stop.

{¶8} Regarding shared parenting, Husband notes that the guardian ad litem suggested a form of shared parenting and that Wife expressed a willingness to work with the guardian ad litem's suggested arrangement. He also notes that the psychologist who testified concurred with the guardian ad litem's recommendations.

{¶9} In its decree, the trial court meticulously went through each of the factors listed in Sections 3109.04(F)(1) and (2). Husband does not contest the court's factual findings with respect to any specific factor, only its overall conclusion about the best interest of the children and whether shared parenting is appropriate. He asserts that the court should have adopted the guardian ad litem's recommendation. The guardian ad litem proposed that, instead of the parties jointly making decisions about the children's care, each parent be allowed exclusive decision-making power over specific child-care realms. For instance, she recommended that Husband be responsible for the children's haircuts and their religious upbringing.

{¶10} In its decree, the court actually gave Husband responsibility for making decisions about the children's religious practices. Although it deviated from the guardian ad litem's recommendation about personal appearance decisions, the testimony at trial revealed that the

reason the parties' daughter suffered damage to her hair one time while under Wife's care was because their son had cut the daughter's hair, not because of Wife's decisions.

{¶11} Husband's shared parenting plan proposed that the parties engage in joint decision making regarding major child care decisions. The parties had an abysmal communication record, however, even requiring law enforcement to actively monitor their custody exchanges because they were so contentious. Upon review of the record, we conclude that the trial court did not abuse its discretion when it rejected Husband's shared parenting plan and ordered a limited form of split-decision making.

{¶12} Regarding the trial court's decision to make Wife the custodian of the children, the court found that Husband bribed the children with ice cream to make them voice that they desired to live with him and that he actively alienated the children against their mother. According to the reports of the psychologist and guardian ad litem, both parties had done things that were potentially harmful to the children. The difference, however, was that Wife recognized that her actions could be harmful. She, therefore, was more amenable to change. Husband, on the other hand, was unable to grasp that showing scary movies to small children, who were not old enough to fully appreciate the difference between real and pretend, could be harmful. Instead of admitting that there could be some danger in the practice, he claimed that the children were not at risk because they would fall asleep shortly after the movies started. He also continued using the parties' son as an information-gatherer despite being told that the activity produces high anxiety in the son.

{¶13} Although Wife violated the court's order concerning ATVs, the psychologist opined that she was the parent best equipped to meet the emotional needs of the children as well as the parent most likely to accept consultation about how to facilitate their emotional

adjustment. Upon review of all the relevant factors, we cannot say that the trial court exercised improper discretion when it allocated sole parental rights and responsibilities to Wife.

{¶14} Husband also argues that the trial court should have granted him more parenting time. He argues that he should get more than standard parenting time because Wife works a long weekend every other week and also sometimes needs to have her older children put the parties' children to bed. He argues that he should be allowed to put them to bed and get them ready for school on nights when Wife works. Husband argues that he lives close enough to the children's school district that he can get them to school on time even if they spend the night at his residence. He notes that, if he had the children on some weekday nights, it would not only allow them to spend more time with him but would relieve Wife of the burden of finding other caregivers on the nights that she works.

{¶15} Section 3109.051 governs a trial court's decisions as to visitation. *Braatz v. Braatz*, 85 Ohio St.3d 40, 44 (1999); R.C. 3109.12(B). "When a trial court determines parenting time under R.C. 3109.051, it must do so consistent with the best interests of the children involved with consideration of the factors mentioned in R.C. 3109.051(D)." *Pirkel v. Pirkel*, 9th Dist. Lorain No. 13CA010436, 2014-Ohio-4327, ¶ 9. In order to further a child's best interests, the court has the discretion to limit or restrict visitation rights, including "the power to restrict the time and place of visitation, to determine the conditions under which visitation will take place and to deny visitation rights altogether if visitation would not be in the best interests of the child." *Marrero v. Marrero*, 9th Dist. Lorain No. 02CA008057, 2002-Ohio-4862, ¶ 9, quoting *Anderson v. Anderson*, 147 Ohio App.3d 513, 2002-Ohio-1156, ¶ 18 (7th Dist.). "We review a decision regarding parenting time for an abuse of discretion." *Pirkel* at ¶ 9.

{¶16} Although Wife admitted that she works long weekends, she testified that she only does so on the weekends when Husband has the children. She testified that she works two other nights a week and has her grown children watch the parties' children for a couple of hours those nights before they go to bed. Wife testified that, although the older children used to spank the parties' children, everyone in her household had stopped using corporal punishment on the court's recommendation. In its decree, the court found that Wife's older children were appropriate caregivers for the children, a finding that Husband has not contested on appeal.

{¶17} Even if Husband's parenting-time proposal appears reasonable on its face, in light of the animosity between the parties and their history of troubled custody exchanges, it was reasonable for the trial court to believe that it would not succeed in this case. Upon review of the factors listed in Section 3109.051, many of which are similar to the factors in Section 3109.04(F), we cannot say that the trial court improperly exercised its discretion when it granted Husband standard parenting time. Husband's first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED IN ITS ALLOCATION OF CHILD AND SPOUSAL SUPPORT.

{¶18} Husband next argues that the trial court erred when it calculated the parties' child and spousal support amounts. Specifically, he argues that the court incorrectly imputed $35,360 in income to him. He also argues that it improperly denied him the benefit of a child dependency exemption.

{¶19} "In determining the appropriate level of child support, a trial court must calculate the gross income of the parents." *Bajzer v. Bajzer*, 9th Dist. Summit No. 25635, 2012–Ohio–252, ¶ 11. "Gross income" is "the total of all earned and unearned income from all sources

during a calendar year[.]" R.C. 3119.01(C)(7). A parent's total gross income figure includes any "potential income" that a trial court imputes upon a finding that the parent is voluntarily unemployed or underemployed. *Collins v. Collins*, 9th Dist. Wayne No. 10CA0004, 2011–Ohio–2087, ¶ 26, quoting R.C. 3119.01(C)(5)(b). The burden of proof is on the parent who is claiming that the other is voluntarily unemployed or underemployed. *Knouff v. Walsh-Stewart*, 9th Dist. Wayne No. 09CA0075, 2010-Ohio-4063, ¶ 27. This Court reviews a trial court's factual finding that a parent is voluntarily unemployed to determine if it was against the manifest weight of the evidence. *Kent v. Kent*, 9th Dist. Summit No. 25231, 2010-Ohio-6457, ¶ 10-12. The amount of potential income the court imputes once it finds voluntary unemployment, however, is a discretionary determination that this Court will not disturb on appeal absent an abuse of discretion. *Rock v. Cabral*, 67 Ohio St.3d 108 (1993), syllabus.

{¶20} It was not disputed that Husband was not responsible for his loss of employment in February 2014. He testified that, between his layoff and the date of trial in October 2014, he had sought employment at 30 different companies. He also testified that there had been a number of job losses in his field that year, which made his search for new employment more challenging.

{¶21} According to Wife, she randomly subpoenaed information from two of the companies where Husband alleged he had sought employment only to receive letters that the companies had not received any sort of application from him. When confronted with this information, Husband explained that he did not actually fill out an application at the companies, but claimed to have given his resume to employees of the companies, including a woman who he met at a park one day. The trial court was in the best position to assess his credibility, and it

found his explanations for the discrepancies not credible. *See Sandhu v. Sandhu*, 9th Dist. Summit No. 27207, 2015-Ohio-90, ¶ 15-16.

{¶22} In its decree, the trial court went through Husband's entire employment history after leaving college. Several of Husband's jobs were working on the dock for a trucking company, including his most recent position. Although Husband was making approximately $46,800 a year when he was laid off, it was as a supervisor. The court noted that Husband, overall, had a steady work history. It found that he was in good physical health despite having had a knee replacement and needing a hip replacement. The court found that, even if Husband could not find another position in a supervisory role, he had a potential income of $35,350, which was just slightly less than the yearly income he had many years earlier when he was a regular dock worker.

{¶23} Husband argues that, as a former supervisor, companies would be reluctant to hire him for a normal dock position because he would be overqualified. He has not pointed to any evidence in the record beside his own testimony, however, that supports his position. He also argues that his domestic violence conviction might hurt his employment chances even though it is not a felony. Again, his argument is not supported by any evidence in the record. Upon review of the record, we conclude that the trial court did not lose its way when it found that Husband is voluntarily unemployed and that it did not exercise improper discretion when it determined how much income to impute to him.

{¶24} Regarding the child dependency tax exemptions, we note that a trial court has "broad discretion when allocating tax dependency exemptions[.]" *Geschke v. Geschke*, 9th Dist. Medina Nos. 3266-M, 3268-M, 2002-Ohio-5426, ¶ 32. "[I]n the absence of evidence showing that the nonresidential parent would receive a net tax savings from the dependency exemption,

the court must employ the presumption that the dependency exemption belongs to the residential parent." *Dunlap v. Dunlap*, 9th Dist. Summit No. 23860, 2008-Ohio-3201, ¶ 13, quoting *Hurte v. Hurte*, 164 Ohio App.3d 446, 2005-Ohio-5967, ¶ 33 (4th Dist.); *see also* R.C. 3119.82 (explaining that, unless the parties agree, the court may only permit a non-residential parent to claim the children as dependents if it furthers the best interest of the children). Husband did not present any evidence at trial that establishes that there would be a net tax savings if he received the exemptions instead of Wife, who typically had a higher annual income than Husband.

{¶25} Husband also argues that the court should have ordered Wife to pay him more spousal support. The court found that Wife should pay Husband spousal support for 23 months and that the amount should be the exact same amount as Husband owed Wife in child support. To justify its award, the court looked at how much cash each of the parties would have if Wife bore the entire burden of supporting the children. It also noted that Wife owed $637 a month in student loans. Subtracting the $1325 in monthly child support expenses and the $637 in student loan expenses from Wife's $4,197 monthly after-tax income left her with $2,235, which was comparable to the $2,328 Husband would have if he did not have to pay child support. Husband argues that this balance was not equitable because Wife incurred her student loans before they were married. He argues that he should not have to subsidize her pre-marital decision to take student loans by receiving less in spousal support.

{¶26} Section 3105.18(B) provides that "[i]n divorce and legal separation proceedings, * * * the court of common pleas may award reasonable spousal support to either party." "In determining whether spousal support is appropriate and reasonable," the court shall consider the factors listed in Section 3105.18(C)(1)(a-n). R.C. 3105.18(C)(1). "This Court reviews a spousal

support award under an abuse of discretion standard." *Hirt v. Hirt*, 9th Dist. Medina No. 03CA0110-M, 2004-Ohio-4318, ¶ 8.

{¶27} Although Wife incurred her student loans before the marriage, Husband received the benefit of her decision throughout the marriage. As noted earlier, Wife regularly earned more than Husband, even after taking into account her monthly loan repayments. In addition, one of the factors that a court must consider in deciding spousal support is the "assets and liabilities of the parties[.]" R.C. 3105.18(C)(1)(i). It may also consider any other factor that it finds to be relevant and equitable. R.C. 3105.18(C)(1)(n). We, therefore, conclude that the trial court did not err when it considered Wife's student loans in determining an appropriate award of spousal support. We also conclude that the court did not exercise improper discretion when it determined the amount of the spousal support award. Husband's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED IN ITS ALLOCATION OF ASSETS AND LIABILITIES.

{¶28} Husband's final argument is that the trial court did not award him an equitable distribution of the marital property. "In any divorce action, the starting point for a trial court's analysis is an equal division of marital property." *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶ 5; R.C. 3105.171(C)(1). If an equal division would be inequitable, however, the court may not divide the marital property equally but instead must divide it in a manner that it determines to be equitable. *Id.* Because a trial court "has broad discretion in the allocation of marital assets, its judgment will not be disturbed absent an abuse of discretion." *Id.*

{¶29} Husband argues that he was not awarded several items that belonged to him before the marriage that were his separate property. Wife, however, contested his claim to some

of those items. According to the parties' joint exhibit regarding Husband's alleged separate property, there were five items in dispute: a dryer, two televisions, a tractor, and a stove. The trial court awarded the dryer and stove to Husband and the other items to Wife. There is no information in the record about the monetary value of each of the items. We, therefore, cannot conclude that the court's distribution was inequitable.

{¶30} Husband argues that, besides the five contested items, Wife has other items in her possession that belong to him. At trial, there was testimony about the fact that Husband had a number of boxes at Wife's residence. Before trial, Husband went to Wife's residence and retrieved some of the boxes, but he left without taking all of them. At trial, no one knew what was inside the remaining boxes. The court awarded them to Husband. To the extent that Husband claims to be missing items that are his separate property, the record does not establish that the court improperly awarded them to Wife.

{¶31} Husband also argues that the trial court improperly found that the marriage ended on April 12, 2013. He argues that the court's date selection "was inequitable given the period of reconciliation between the parties." April 12, 2013, however, is when the couple separated for the last time after Husband was arrested for domestic violence. The April 2013 date, therefore, included the period of time in which the parties attempted to reconcile.

{¶32} Husband also argues that, because the court selected the April 2013 date, it reduced the marital value of the home for property-dividing purposes. He argues that "during the marriage" should include the time up to and including the date of the divorce decree. Under Section 3105.171(A)(2), "[d]uring the marriage" means the time between the date of the marriage through the date of the final hearing, unless the court finds that using those dates would be inequitable. This Court has recognized that the plain language of Section 3105.171(A)(2)

gives the trial court discretion to use the date of the final hearing or a "de facto termination date" if that date would be inequitable. *Tustin v. Tustin*, 9th Dist. Summit No. 27164, 2015-Ohio-3454, ¶ 14. "Generally, trial courts use a de facto termination of marriage date when the parties separate, make no attempt at reconciliation, continually maintain separate residences, separate business activities and/or separate bank accounts." *Wells v. Wells*, 9th Dist. Summit No. 25557, 2012-Ohio-1392, ¶ 11, quoting *Eddy v. Eddy*, 4th Dist. Washington No. 01CA20, 2002-Ohio-4345, ¶ 24.

{¶33} The trial court found that the parties separated on April 12, 2013, and made no additional attempts at reconciliation. Husband filed for divorce a month after their final separation, and the parties maintained separate households from that point on. Wife testified that the mortgage on the marital home was in her name only and that she was the only one who ever contributed to the payments, both before and after the parties separated. Under these circumstances, we conclude that the trial court did not exercise improper discretion when it used April 12, 2013, as the date of the termination of the marriage. Husband's fourth assignment of error is overruled.

III.

{¶34} Husband's assignments of error are 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(C). 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.

JENNIFER HENSAL
FOR THE COURT

SCHAFER, J.
TEODOSIO, J.
CONCUR.

APPEARANCES:

DANIEL F. GIGIANO, Attorney at Law, for Appellant.

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