[Cite as *Chirico v. Chirico*, 2003-Ohio-3238.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

SHAUN CHIRICO	:	
Plaintiff-Appellant	:	C.A. Case No. 19722
vs.	:	T.C. Case No. 01-DR-1256
REWA CHIRICO	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 20th day of June, 2003.

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BROGAN, J.

{¶1} This case comes before us on the appeal of Shaun Chirico from a final judgment and decree of divorce. The primary issue on appeal is whether the trial court abused its discretion in granting custody of the parties' minor child, Natalie, to Shaun's ex-wife, Rewa. In addition, Shaun challenges the trial court's failure to impute income to Rewa.

{¶2} After considering the record and applicable law, we find both assignments of error without merit. Accordingly, the trial court judgment will be affirmed.

I

{¶3} Shaun and Rewa Chirico were married on July 21, 1999, and separated approximately two years later, in August, 2001. They had one child, Natalie, who was born before the marriage. All divorce issues except custody were resolved by the time of the final hearing on March 25, 2002. The main custody issue concerned Rewa's plan to move from Ohio to Utah. After considering testimony from both parents, the paternal grandmother, and a family friend, as well as the report of a guardian ad litem, the trial court granted custody to Rewa, and allowed her to move. The court then granted Shaun six consecutive weeks of visitation during summers, and visitation during Christmas and Easter vacations.

{¶4} At the time of the custody hearing, Natalie was three years old and had some medical problems, including asthma and severe eczema. The testimony indicated that Shaun did not take Natalie for doctor's visits and was less familiar than Rewa was with Natalie's medical needs. Rewa was also the primary caretaker, although Shaun took care of Natalie during evenings that Rewa worked. During the marriage, Shaun worked days for a business owned by his family, and Rewa worked at Meijer in the evenings for a year and a half, until she was injured. After being off work for about a year and a half, Rewa was employed briefly by Burger King and by Children's World Learning Center, at minimum wage levels. However, she had not been employed outside the home for several months before the March 25, 2002 divorce hearing.

{¶5} As we mentioned, the parties separated in August, 2001. At that time, Shaun moved into his parent's house. From that time, up until the divorce hearing, Natalie visited every other weekend and on Wednesday nights, along with Rewa's six year old daughter, Sarah. Shaun had a close relationship with Sarah, even though she was not his biological child.

{¶6} Rewa planned to move to Utah after the divorce was final, and marry her fiancee, George Tullis. Rewa had no particular reason to stay in Ohio, since most of her family lived in Oregon. Further, Rewa's mother was moving from Oregon to Utah. Rewa's fiancee had four children of his own from a prior marriage, ranging in age from three to nine years old. Rewa also had another child of her own besides Natalie and Sarah – a son, Tylor, who was ten years old. Consequently, seven children would be in the Tullis home in Utah every other weekend. However, the house was large enough to accommodate all the children.

{¶7} The guardian ad litem conducted home visits, interviewed both parents, and observed interaction among the parents, Natalie, and Natalie's siblings. Although the guardian ad litem felt both parents possessed the necessary qualities to be fitting parental figures, the guardian recommended that Rewa be given custody and that the move to Utah be permitted. In this regard, the guardian ad litem placed importance on Natalie's close and secure relationship with her half-siblings and the potentially traumatic effect of disrupting those relationships. The guardian ad litem also stressed that Natalie had formed a primary attachment to Rewa because Rewa had been Natalie's primary caregiver since birth.

{¶8} After considering the evidence, the trial court found that it was in Natalie's

best interest for Rewa to receive custody. The court also permitted Rewa to move to Utah. As we said, Shaun contends this decision was an abuse of discretion. Among the factors Shaun points to are Rewa's documented history of frequent moves and marriages, Rewa's alleged interference with the visitation rights of her children's other fathers, alleged improper methods of discipline by Rewa, and the material impact of the move to Utah on Shaun's ability to be involved in parenting Natalie.

{¶9} Trial court judgments on allocation of parental rights and responsibilities cannot be reversed absent an abuse of discretion. See, *e.g*., *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260. Abuse of discretion means more than just an error of law or of judgment. Instead, "it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} Furthermore, where competent, credible evidence supports a custody award, there is no abuse of discretion. *Davis,* 77 Ohio St.3d at 418.

The Ohio Supreme Court has indicated that a child's best interest is the primary concern in a custody case. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 75. The "best interest" of the child is determined by considering all relevant factors, including those listed in R.C. 3109.04(F). *Seibert v. Seibert* (1990), 66 Ohio App.3d 342, 344. See also, R.C. 3109.94(F)(1).

{¶11} A relevant factor not listed in R.C. 3109.04(F) is whether one parent is the primary caretaker for a child of tender years. *Kelly v. Kelly*, Miami App. No. 2001-CA-52, 2002-Ohio-1204. We have held that this factor is "an important consideration in awarding custody." Id. at ¶78.

{¶12} In awarding custody to Rewa and allowing the move to Utah, the trial court

noted that Rewa had been the primary caretaker for Natalie and that Rewa would continue to facilitate parenting between Natalie and her father. In this context, the court stressed that Rewa had facilitated Shaun's visitation during the divorce proceedings in such a way as to make her testimony credible. Accordingly, the court found that Natalie's best interest would be served by designating Rewa as the residential parent and by granting Shaun the standard parenting time typically given to out-of-state parents.

{¶13} We must give great deference to these findings, since trial courts are in the best position to determine credibility of witnesses. *Davis*, 77 Ohio St.3d 418-19. Admittedly, out-of-state parenting is less than an ideal situation. However, it is not uncommon, due to the mobile nature of our society.

{¶14} As support for her decision to leave the state, Rewa relies on *In re Marriage of Barber* (1983), 8 Ohio App.3d 372. In *Barber*, the Eighth District Court of Appeals held that:

{¶15} "[t]he overwhelming weight of authority is to the effect that a nonresident or one who intends to become a nonresident will not be deprived of the right to the custody of a child merely because of his nonresidence; and that if the best interests of the child will be promoted, custody will be awarded to nonresidents, the same as it would be to residents; one intending to become a nonresident will be permitted to remove the child to his or her new residence." Id. at 375.

{¶16} Shaun contends that *Barber* has never been cited or followed by any court, including the Eighth District. However, this is simply not correct, as *Barber* has been cited and followed by many districts, including the Eighth District. See, *e.g.*,

Marshall v. Marshall (1997), 117 Ohio App.3d 182, 187 (Seventh District decision following *Barber*); *Rowe v. Franklin* (1995), 105 Ohio App.3d 176, 184 (First District decision citing and applying *Barber*); *Brooks v. Brooks* (Dec. 14, 1995), Franklin App. No. 95APF03-381, 1995 WL 739880, *6 (Tenth District decision citing *Barber*); *Chambers v. Chambers* (March 16, 1992), Butler App. No. 91-07-120, 1992 WL 50024, *3 (Twelfth District decision citing and applying *Barber*); *Kriz v. Kriz* (August 15, 1990), Lorain App. No. 90CA004758, 1990 WL 118824, *1 (Ninth District decision citing *Barber*); and *Kanel v. Kanel* (Oct. 19, 1989), Cuyahoga App. No. 56013, 1989 WL 125130, *2 (Eighth District decision following *Barber*).

{¶17} According to Shaun, *Barber* is also distinguishable due to the difference in circumstances. Specifically, Shaun says he is not challenging the grant of custody merely because of the proposed relocation. Instead, Shaun believes the court's decision ignored Rewa's well-documented history of moving from "state to state, marriage to marriage, and father to father with all of her children." We disagree with this claim.

{¶18} As we noted, the trial court specifically found Rewa to be a credible witness. Therefore, we must also credit her testimony, which provides reasonable explanations for the prior moves and marriages. Rewa testified that she had joined the Navy when she was 17 and was stationed in Florida for three months. She was discharged for medical reasons, and then moved back to Oregon, where her family lived.

{¶19} Shortly thereafter, Rewa took a job as a nanny and moved to New York, where she met her and married her first husband, in 1989. Notably, she was still only

17 at the time – not, perhaps, the best age for making long-term decisions. After becoming pregnant, Rewa moved back to Oregon in order to have the support of her family. She then gave birth to her son, Tylor, and moved back to New York for a few months while she and her husband sold their home.

{¶20} Subsequently, Rewa moved back to Florida, and lived there until December, 1994. While in Florida, Rewa met her second husband, Jeffrey Tyndall, who is the father of Rewa's daughter, Sarah. Rewa left Florida, and moved to North Carolina, because she could not afford to live in Florida. Again, this is not an unreasonable basis for a move. After living in North Carolina for about a year, Rewa moved to Dayton, Ohio, in March, 1996. At the time, Rewa was in an abusive marriage. In fact, her son, Tylor, had been hospitalized in North Carolina because of the abuse. She testified that she left North Carolina to protect her family – a reasonable choice in view of the abuse.

{¶21} Initially, Rewa planned to move back to Oregon, to be close to her family and have a support system. However, she met Shaun in November, 1995, and instead moved to Dayton, where Shaun lived. At the time Rewa moved to Dayton, her second child, Sarah, was only three weeks old.

{¶22} Rewa then lived in Dayton, Ohio, from March, 1996, through at least the time of the divorce decision in September, 2002 – a total of more than six years. This is not an insignificant period of time. Rewa and Shaun were married in July, 1999, and admittedly, the marriage lasted only a few years. However, their relationship had apparently lasted for six or seven years, i.e., since they met in 1995.

{¶23} During the time that Rewa lived in Dayton, her second husband did not

have visitation with Sarah, due to the abuse and his failure to complete court-ordered parenting classes. Shaun assumed a parental role for Sarah, and they developed a close relationship. As a result, Rewa liberally allowed Shaun visitation with Sarah after their separation, even though Sarah was not Shaun's biological daughter. She also allowed Shaun to liberally visit Natalie.

{¶24} Based on the above testimony, the record does not demonstrate a history as erratic as Shaun suggests, nor does it indicate that Rewa would fail to facilitate visitation. The trial court also did not choose to credit testimony about an alleged discipline problem that Rewa had with her son. Since the record indicates that Rewa was a concerned and competent mother, we cannot disagree. Accordingly, we find no abuse of discretion in the trial court's decision to award custody to Rewa and to allow her to move out-of-state.

{¶25} Although we are affirming the trial court decision, we feel compelled to make a comment on the ordered visitation. While a six week summer visitation period may be appropriate for a very young child, it is probably not adequate parenting time with older children. Consequently, the parties should consider modifying the visitation schedule in the future, to let Natalie spend most or all of summer vacation with her father. In fact, this was the guardian ad litem's recommendation. While expanded summer visitation is not a state of affairs a custodial parent might desire, children of divorce should have a chance to enjoy loving and meaningful relationships with both parents. If the parties cannot agree on expanded summer visitation, a motion for modification of visitation would be appropriate.

{¶26} In light of the preceding discussion, the first assignment of error is without

merit and is overruled.

II

{¶27} In the second assignment of error, Shaun contends that the trial court abused its discretion by failing to impute income to Rewa. In calculating income for child support purposes, the trial court credited Shaun and Rewa with $13,000 and zero dollars annual income, respectively. After making various adjustments, the court ordered Shaun to pay monthly child support of $193. The court did not impute any income to Rewa.

{¶28} Upon consideration, we find that any error was waived. Specifically, Shaun did not ask the trial court to impute income. Instead, he only asked in his pretrial statement for custody of Natalie and for an order of child support. At trial, Shaun also did not ask the court to impute income to Rewa. In this regard, we note that various agreements of the parties were read into the record at trial. After this occurred, the trial court asked both parties if anything else needed to be decided other than the parental rights and responsibilities. Both sides said no, and the court then took testimony on the custody issue.

{¶29} Although Shaun may have assumed that the issue of imputed income was part of the support calculation, and was, therefore, connected to "parental responsibilities," he should have specifically said that he wanted imputed income to be considered. Courts have many pending cases and do not have the ability to read litigants' minds. We have often stressed that " '[a] party will not be permitted to take advantage of an error which he himself invited or induced.' " *O'Herron v. Tomson*, Montgomery App. No. 19111, 2002-Ohio-1796, ¶23, citing *Hal Artz Lincoln-Mercury,*

Inc. v. Ford Motor Co., Lincoln Mercury Div. (1986), 28 Ohio St.3d 20, syllabus. In *O'Herron*, the obligor failed to raise the issue of imputed income at trial, and we held that he could not later object to the court's failure to impute income to the obligee. The same holding is applicable here.

{¶30} Furthermore, even if the issue were properly before us, we would find no error in a failure to impute income under the circumstances of the present case. Whether a parent is "voluntarily unemployed" and the amount of income to be imputed are factual questions for trial courts. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, syllabus. We cannot disturb the court's findings unless the court has abused its discretion. Id.

{¶31} As we stressed earlier, Natalie was quite young and had been used to her mother's primary care since birth. Rewa had also been at home with Natalie for a significant period of time. Rewa testified that she did not intend to work outside the home when she moved to Utah, due to the need to rebuild her family unit. In particular, Rewa mentioned her son's trauma over the divorce. Notably, this was a child who had already been subjected to physical abuse by one step-father. Then, when the parties separated in connection with the most recent divorce, the son's current stepfather did not take him for visitation, even though he continued to see the other non-biological step-child in the family. Although step-parents are not obliged to maintain relationships with non-biological children, the fact that one non-biological step-child is chosen and another is not, is an obvious source of difficulty.

{¶32} Under the circumstances, and given the young age of the parties' own biological child, there was nothing inappropriate in the mother's decision to be a stay-at-

home parent. As the court in *Rock* noted, the overriding concern of legislation governing child support is "to ensure the best interest of the child(ren) for whom support is being awarded." 67 Ohio St.3d at 110. In the present case, the best interest of the children was served by having a full-time caretaker in the home. Consequently, the second assignment of error is without merit and is overruled.

{¶33} Accordingly, since both assignments of error have been overruled, the trial court judgment is affirmed.

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FAIN, P.J., and WOLFF, J., concur.

Copies mailed to:

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