[Cite as *In re N.M.*, 2010-Ohio-5048.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: N.M.	:	
	:	C.A. CASE NO. 24110
	:	T.C. NO. 20086860
	:	(Civil appeal from Common Pleas Court, Juvenile Division)
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O P I N I O N

Rendered on the 15th day of October, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Michael J. McCormick, filed June 16, 2010. On July 28, 2008, McCormick filed, in juvenile court, a Complaint to Establish Paternity, Support, and Allocation of Parental Rights regarding N.M., his son, whose date of birth is December 13, 2005. Lisa Freeman

is N.M.'s mother, and she and McCormick were never married. On November 6, 2008, following a hearing, McCormick's paternity was established. The magistrate's decision notes that the parties' mediation agreement was read into the record under oath, and shared parenting of N.M. was ordered, with Freeman as the residential custodian for school purposes.

{¶ 2} On May 15, 2009, Freeman filed a "Motion for Allocation of Parental Rights and Responsibilities; Motion to Terminate Shared Parenting Plan; Motion to Relocate; and Motion to Change Name." Freeman sought to become the sole custodial parent of N.M. and to relocate to Tennessee.

{¶ 3} A Guardian ad Litem ("GAL") was appointed, and after meeting with N.M. and Freeman at Freeman's home, and also with McCormick, the GAL recommended that the motion to terminate the shared parenting plan be denied, that the motion to relocate be granted, and that the shared parenting plan be modified to grant McCormick seven weeks of parenting time in the summer and "every extended 3 day weekend during the school year."

{¶ 4} At the hearing on Freeman's motions, the following witnesses testified: Freeman; the GAL; Lora Freeman, Freeman's mother; Linda McCormick, McCormick's mother; Rhonda Myers, McCormick's sister; and McCormick. According to Freeman, the parties agreed in mediation that McCormick was entitled to visitation consistent with the standard order of parenting time, namely every Wednesday and every other weekend. She stated that McCormick did not consistently exercise his rights until "recently." Freeman asserted that she takes N.M. to his doctor and dentist appointments and has been primarily responsible for

his care. Freeman testified that she believed it was in her and N.M.'s best interest to move to Tennessee. Freeman is an R.N., and her sister, upon whom she relied heavily for child care, had moved to Tennessee in August, 2009. Freeman's mother also moved to Tennessee in 2009, and Freeman's two brothers and another sister also live there. Freeman testified, "I have a support system down there, and I would like to continue my education at University of Memphis. For employment, they offer many incentives down there, with tuition reimbursement * * * . I have a great family who I've been close to my whole, entire life, and we have always supported each other." The record establishes that McCormick failed to pay for N.M.'s child care as provided in the shared parenting plan. Freeman noted that if custody were awarded to her, she would be willing to give McCormick extended periods of visitation.

{¶ 5} Freeman's mother testified that she lived in Columbus, Ohio from 2004 to 2006, and that Freeman moved from San Diego, California to Ohio to be closer to her in 2005. Freeman's mother next moved to Texas for employment reasons, and she moved again "as soon as she was able to find a job in the Tennessee area."

{¶ 6} McCormick is a third grade teacher in the Miamisburg school district. He testified that he, too, has a tremendous support system from his family. He stated that while the previous year he also coached varsity football, freshman football, varsity swimming and freshman baseball, he "quit everything. * * * [N.M.] is number one. He will always be number one. And if that's what it takes, that's not even an issue at all. Coaching is done." McCormick admitted that he has not

paid for N.M.'s childcare expenses as required by the shared parenting plan, and that he has not attended his doctor appointments. McCormick admitted that he did not attend a sports banquet for N.M. because he thought it would be "too boring."

{¶ 7} The GAL testified that he met with Freeman and N.M. at their home, and with McCormick, and that Freeman and McCormick each indicted that "the other parent is a good parent." He further stated that in the period of time from the previous allocation of parental rights until the present, "mother has been the major parenting individual in [N.M.'s] life.

{¶ 8} "[N.M.] spends his days and evenings at the mother's home, other than when visitation occurs with father, which is basic standard order." While he testified that it would be in N.M.'s best interest for Freeman to have custody, he stated, "if I could, I would have * * * the family stay together and stay close so that they could experience everything together. This is a family that that can't happen in."

{¶ 9} Following the hearing, the Magistrate granted legal custody of N.M. to Freeman, finding a "change of circumstances based on the father's failure to abide by the terms of shared parenting." The magistrate further found that it was in N.M's best interest to be in Freeman's legal custody, citing in particular the factors in R.C. 3109.04(F)(1)(c) and (f), and noting that Freeman "has provided all the primary care for the child." Finally, the magistrate considered whether the harm to be caused by the change in environment is outweighed by the advantages.

{¶ 10} McCormick filed objections to the Magistrate's decision on December 16, 2009, along with a motion to restrain Freeman from relocating to Tennessee

and a motion for additional parenting time. McCormick also filed a second motion to restrain Freeman from relocating. With leave of court, on March 16, 2010, McCormick filed "Particularized Objections to Decision of Magistrate's Finding." On March 23, 2010, McCormick filed "Amended Particularized Objections to Decision of Magistrate's Finding." Freeman filed a Reply. McCormick filed a "Final Response," which Freeman moved to strike. On May 20, 2010, Freeman filed a Motion to Show Cause, asking the court to find McCormick in contempt for failing to pay child support and day care expenses for N.M.

{¶ 11} On May 25, 2010, the trial court overruled McCormick's objections and adopted the decision of the Magistrate, noting that the parties' inability to agree to shared parenting "represents a change in circumstance no longer in the best interest of" N.M. It was significant to the trial court that Freeman served as N.M.'s primary caretaker.

{¶ 12} McCormick asserts three assignments of error. His first assignment of error is as follows:

{¶ 13} "THE CHILD'S BEST INTEREST WAS NOT EXAMINED OR DETERMINED AT THE NOVEMBER 18, 2009 HEARING."

{¶ 14} We initially note, when a juvenile court rules on objections to a magistrate's decision, "the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Juv.R. 40(D)(4)(d). R.C. 2151.23(F)(1) provides that the "juvenile court shall exercise its jurisdiction in child custody matters in accordance" with section R.C. 3109.04, which authorizes

domestic relations courts to allocate parental rights and responsibilities for the care of minor children. We review the juvenile court's decision for an abuse of discretion. *In re A.K.*, Champaign App. No. 09-CA-32, 2010-Ohio-2913, ¶ 22.

{¶ 15} "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. (Internal citation omitted). It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 16} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 17} R.C. 3109.04(E)(1)(a) provides, "The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following [in relevant part] applies:

{¶ 18} " * * *

{¶ 19} "(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child."

{¶ 20} R.C. 3109.04(E)(2)(c) provides that in addition to a modification authorized under division (E)(1) of this section, the court may terminate a prior final shared parenting decree upon the request of one of the parents or "whenever it determines that shared parenting is not in the best interest of the children."

{¶ 21} R.C. 3109.04(E)(2)(d) provides that "[u]pon the termination of a prior final shared parenting decree under division (E)(2)(c) of this section, the court shall proceed and issue a modified decree for the allocation of parental rights and responsibilities for the care of the children under the standards applicable under divisions (A), (B), and (C) of this section as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made."

{¶ 22} Pursuant to R.C. 3109.04(F)(1), in determining the best interest of the child, the "court shall consider all relevant factors, including, but not limited to: (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, siblings, 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 or visitation and companionship rights; (g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support

order under which that parent is an obligor; (h) Whether 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; * * * ; (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; (j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

{¶ 23} "When determining the best interest of the child or children in allocating parental rights and responsibilities, in addition to the specific statutory factors in R.C. 3109.04(F)(1), the court should give strong consideration to whether one of the parents was the primary caregiver for the child or children. *In re Maxwell* (1982), 8 Ohio App.3d 302." *Williams-Booker v. Booker*, Montgomery App. Nos. 21752, 21767, 2007-Ohio-4717, ¶ 13. A "court that fails to consider the primary care giving of a parent ignores the benefits likely to flow to the child from maintaining day to day contact with the parent on whom the child has depended for satisfying his basic physical and psychological needs." *Kelly v. Kelly*, Miami App. No. 2001-CA-52, 2002-Ohio-1204.

{¶ 24} We initially note that McCormick's assertion in his brief, that "the Child's Maternal Grandmother follows her job around the Country and the Daughter/Mother follows her Mother, from Dallas to San Diego to Columbus and Alabama" is a misrepresentation of the facts adduced herein. Freeman did not follow her mother to Dallas, and her mother lives in Tennessee, not Alabama.

{¶ 25} We further note that R.C. 3109.04(E)(1)(a) allows a court to *modify* a

shared parenting plan upon a change of circumstance, when the modification is in the child's best interest, while R.C. 3109.04(E)(2)(c) allows a court to *terminate* a shared parenting plan whenever it determines that "shared parenting is not in the best interest" of the child. It was not necessary for the trial court to find a predicate change in circumstances before addressing N.M.'s best interest and terminating the shared parenting plan. See *Murphy v. Murphy*, Greene App. No. 2007 CA 43, 2007-Ohio-6692, ¶ 12.

{¶ 26} Having thoroughly reviewed the judgment of the trial court, which repeatedly and specifically cites to the transcript of the hearing herein, it is clear that the court considered all of the relevant factors to determine N.M.'s best interest. The trial court initially noted that both parents sought custody. R.C. 3109.04(1)(a). The court further noted that Freeman and McCormick both indicated "that the other is a good parent that can effectively care for the basic needs of said child. * * * Said child has a great relationship with and is bonded to Ms. Freeman, Ms. Freeman's relatives, Mr. McCormick, and Mr. McCormick's relatives. * * * Both parents have ample familial support systems. * * * Ms. Freeman alleges Mr. McCormick has been verbally abusive toward her, and has a history of illicit narcotics use. * * * However, Mr. McCormick denies recent drug use, and Ms. Freeman contends said child is safe in Mr. McCormick's care." R.C. 3109.04(F)(1)(c). As the trial court noted and the record reflects, "[n]o evidence or testimony was presented to suggest said child is experiencing any adjustment issues." R.C. 3109.04(F)(1)(d). Further, no "evidence or testimony was presented to suggest any party suffers from a mental or physical dilemma." R.C.

3109.04(F)(1)(e). Regarding which parent is more likely to facilitate court-approved parenting time, the court noted, and the record reflects, that Freeman asserted that McCormick failed to exercise his parenting time. McCormick, however, asserted that he "has always babysat said child more than he is supposed to * * *. Further, Ms. Freeman contends Mr. Freeman has recently increased his parental involvement since she filed for legal custody * * * ." Freeman also testified that she was willing to give McCormick extended visitations periods. R.C. 3109.04(F)(1)(f). The record reflects that McCormick admitted that he "failed to assist Ms. Freeman in childcare costs, pursuant to the shared parenting agreement." R.C. 3109.04(F)(1)(g). The trial court correctly noted that there was "no testimony or evidence to suggest either parent has been convicted of or pleaded guilty to a criminal offense involving a child." R.C. 3109.04(F)(1)(h). Further, there "was no testimony or evidence to suggest either parent has continuously and willfully denied the other parent's rights to parenting time." R.C. 3109.04(F)(1)(i). Finally, the trial court noted that Freeman intends to relocate to Tennessee. R.C. 3109.04(F)(1)(j).

{¶ 27} The trial court noted that N.M.'s GAL recommended "a modified shared parenting agreement to maximize parenting time with both parents. However, the court notes that Ms. Freeman and Mr. McCormick could not reach an agreement regarding parental rights and responsibilities." After considering all relevant factors, the trial court determined in part "that the parties no longer agree to the November 6, 2008 shared parenting agreement. Said divergence represents a change in circumstances no longer in the best interest of said child.

As said parents will reside in different states, it will be difficult for them to cooperate and make joint parental decisions. Additionally, from October 2008 until present, Ms. Freeman has been the 'major parenting individual' in said child's life. Although both parents are actively involved with said child and his activities, Ms. Freeman has been said child's primary custodian. The Court believes both parents love said child equally, and said child loves both parents equally. However, due to the geographic locations of said parties, the court believes it would serve said child's best interest to grant Ms. Freeman legal custody of said child, and grant Mr. McCormick standard order of parenting time with said child." It is clear from the record that Freeman will facilitate McCormick's visitation rights, and that she is N.M.'s primary caretaker, and the trial court's discretionary judgment is consistent with the evidence.

{¶ 28} Finally, we disagree with McCormick's assertion that "the motive for moving was simply triggered by the custodial parent[']s selfish desire to be with someone else, a personal desire not related to the child's best interest," in reliance upon *Duning v. Streck*, Warren App. Nos. CA2001-06-061, CA2001-06-062, 2002-Ohio-3167. In *Duning*, the mother was designated as the child's residential parent, while the father was awarded parenting time. Upon learning that the mother intended to move to Seattle, Washington, to be with a former boyfriend, the father sought custody. The trial court's decision denying the father's motion to modify parental rights was reversed on appeal. It was significant to the Twelfth District that the mother signed an offer of employment in Seattle on the same day the agreed entry regarding parental rights was filed, but that she concealed the

information regarding her intent to move from the father and the court. According to the appellate court, "[g]iven her fraudulent conduct, it seems evident that she will not be forthright and cooperative with the court and appellant regarding future visitation and custody matters," pursuant to R.C. 3109.04(F)(1)(f). Id., at ¶ 22. There is no evidence of similar misconduct on the part of Freeman herein.

{¶ 29} There being no abuse of discretion in the juvenile court's allocation of parental rights, McCormick's first assigned error is overruled.

{¶ 30} McCormick's second assigned error is as follows:

{¶ 31} "INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 32} "The Sixth Amendment to the United States Constitution provides a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 2063. However, there is no constitutional right to be represented by counsel in a civil proceeding between individual litigants. (Citation omitted). The right to effective assistance of trial counsel attaches only to criminal proceedings and to proceedings for the permanent, involuntary termination of parental rights. (Citations omitted). If a litigant chooses to seek representation by an attorney, the litigant cannot complain that the attorney was ineffective and consequently require the other litigant to bear the loss for the negligent selection of an attorney. (Citation omitted). The proper remedy for a complaint of ineffective assistance in a civil suit may be a legal malpractice action." *Smith v. Smith*, Clark App. No. 2005 CA 47, 2005-Ohio-6840, ¶ 56. Further, this appeal does not involve the termination of McCormick's parental rights, but rather a reallocation of those rights wherein McCormick will still

have liberal visitation rights with N.M. Accordingly, this assigned error lacks merit. McCormick's second assigned error is overruled.

{¶ 33} McCormick's third assigned error is as follows:

{¶ 34} "THE GAL REPORT WHICH FAVORED THE MOTHER WAS GROSSLY FLAWED."

{¶ 35} According to McCormick, the "GAL admits the move is for the best interest of Mother; he lamely states its [sic] good for the child but pointedly gives no reason * * * . Moreover, the Report indicates no thoroughgoing [sic] probe or inquiry of the Child's 'best interest,' in fact no enquiry at all.

{¶ 36} "Finally, the GAL Report reveals an essential failure in that there was no time taken to evaluate the Father's home and environment with or without the child."

{¶ 37} We initially note that the trial court disregarded the GAL's recommendation to modify the shared parenting plan. While both parties sought full custody of N.M., the GAL's recommendation that the shared parenting plan be modified, with greater rights to visitation awarded to McCormick, attests to the GAL's approval of McCormick's capabilities as a parent.

{¶ 38} Juv.R. 40(D)(3)(b)(ii) provides, "An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." Juv.R. 40(D)(3)(b)(iv) provides, "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 Juv.R. 40(D)(3)(a)(ii), unless the party has objected to that finding or

conclusion as required by Juv.R. 40(D)(3)(b)."

{¶ 39} In his first set of objections, McCormick asserted, without elaboration, that "The GAL's investigation of the family relationships was woefully inadequate." His subsequently filed "particularized" objections did not address the GAL's actions or report, and the trial court did not address his initial, unspecific challenge in its decision overruling McCormick's objections. We conclude that McCormick did not preserve for appeal the issue of the GAL's report. Even if we were to find that no waiver occurred, the GAL testified at the hearing regarding his actions and report, and McCormick was able to cross-examine him. The GAL testified that he did not investigate McCormick's home because neither party "indicated that there were any problems with the residence." In other words, his residence was not a factor that weighed against McCormick, nor was it a determinative factor in the reallocation of parental rights. McCormick does not assert how further investigation by the GAL would have served a useful purpose. Finally, as discussed above, the evidence in the record demonstrates that terminating the shared parenting plan and awarding custody to Freeman, N.M.'s primary caregiver, is in N.M's best interest.

{¶ 40} There being no merit to McCormick's third assigned error, it is overruled.

{¶ 41} The judgment of the trial court is affirmed.

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FAIN, J. and FROELICH, J., concur.

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