

[Cite as *Albert v. Albert*, 2010-Ohio-6112.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

MELANIE R. ALBERT	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24000
v.	:	T.C. NO. 08DR1285
WILLY CURTIS ALBERT	:	(Civil appeal from Common Pleas Court, Domestic Relations)
Defendant-Appellant	:	

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OPINION

Rendered on the 10th day of December, 2010.

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FROELICH, J.

{¶ 1} Willy Curtis Albert appeals from a Final Judgment and Decree of Divorce of the Montgomery County Court of Common Pleas, Domestic Relations Division, which named Melanie Albert as the residential parent for the parties' minor daughter. Mr. Albert claims that the trial court's decision to name his former wife as the residential parent was against the manifest weight of the evidence. For the

following reasons, the trial court's judgment will be affirmed.

I

{¶ 2} Curt¹ and Melanie Albert were married on August 20, 2005, and their sole child was born in January 2006. The parties separated on June 1, 2008.

{¶ 3} In December 2008, Mrs. Albert filed a complaint for divorce. The following month, the trial court entered an agreed temporary order designating Mrs. Albert the primary residential and custodial parent of the parties' child. Mr. Albert was given parenting time pursuant to the court's standard order of visitation. By separate entry, the court required Mr. Albert to pay temporary child support of \$50 per month.

{¶ 4} On September 22, 2009, Mr. Albert moved for an ex parte hearing and an emergency order for temporary interim custody. By separate motion, Mr. Albert also sought a change of custody and to change the non-contested divorce hearing to a contested divorce hearing. Mr. Albert alleged that his daughter had complained that Mrs. Albert's live-in boyfriend had molested her. Mr. Albert reported the allegations to the Centerville Police Department and the Montgomery County Department of Job and Family Services, Children Services Division. The trial court scheduled a hearing on Mr. Albert's emergency motion for temporary interim custody, and set a contested divorce trial date of February 19, 2010. Children Services implemented a safety plan placing the child with Mr. Albert pending the outcome of its investigation; Children Services terminated the safety

¹At the divorce trial, Mrs. Albert and both counsel referred to Mr. Albert as "Curt."

plan on October 16, 2009. However, due to a misunderstanding by Mrs. Albert of the court's order granting a hearing on the emergency motion, Mr. Albert continued to act as the residential parent and Mrs. Albert appeared to exercise visitation until December 2009. Mrs. Albert, in fact, had legal custody of the couple's daughter at all times.

{¶ 5} Hearings on Mr. Albert's emergency motion were held before a magistrate on October 15, 2009, and December 30, 2009.² Based on the evidence presented, the magistrate found that the Children Services investigator had concluded that the sex abuse allegations were unsubstantiated. The investigation showed that the child "had normal physical findings and that children her age misinterpret actions and are highly suggestible. [The investigator] had no reservations about [Mrs. Albert's] ability to protect [the child] or [Mrs. Albert's] continued custody of [the child]." The magistrate found "no reason to change the temporary custody at this time." The trial court adopted the magistrate's decision without objection.

{¶ 6} A contested divorce trial was held on February 19, 2010. The only contested issue was the allocation of parental rights and responsibilities for the parties' minor child. Both of the parties testified, and the court considered a report from the guardian ad litem, dated August 27, 2009, which recommended that Mrs. Albert be designated the child's residential parent. After considering the evidence, the trial court issued a decision designating Mrs. Albert as the residential and

²The record does not contain transcripts of these hearings.

custodial parent. On May 3, 2010, the trial court issued a Final Judgment and Decree of Divorce, which ordered that Mrs. Albert be the residential and custodial parent and that Mr. Albert have parenting time in accordance with the court's standard order with some modifications to provide him additional parenting time.

{¶ 7} Mr. Albert appeals from the trial court's judgment.

II

{¶ 8} In his sole assignment of error, Mr. Albert claims that the trial court's designation of his former wife as their daughter's residential parent was against the manifest weight of the evidence.

{¶ 9} R.C. 3109.04 requires a trial court in a divorce proceeding to allocate the parental rights and responsibilities for the care of minor children of a marriage based on the best interest of the children. The Revised Code contains a non-exclusive list of factors a trial court must consider when making a best-interest determination. R.C. 3109.04(F)(1)(a) through (j). These factors "relate primarily to the health and well being of the child and the parents." *Meyer v. Anderson*, Miami App. No. 01 CA53, 2002-Ohio-2782. The "best-interest" factors include the following:

{¶ 10} "(a) The wishes of the child's parents regarding the child's care;

{¶ 11} "(b) If the court has interviewed the child in chambers * * *, the wishes and concerns of the child, as expressed to the court;

{¶ 12} "(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;

{¶ 13} “(d) The child’s adjustment to the child’s home, school, and community;

{¶ 14} “(e) The mental and physical health of all persons involved in the situation;

{¶ 15} “(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶ 16} “(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;

{¶ 17} “(h) 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 * * * ;

{¶ 18} “(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;

{¶ 19} “(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.” R.C. 3109.04(F)(1).

{¶ 20} Although a trial court is required to consider these factors, it retains broad discretion in making a best-interest determination. *White v. White*, Clark App. No. 2009 CA 17, 2009-Ohio-4311, ¶9.

{¶ 21} An award of custody will not be reversed by a reviewing court where the judgment is supported by competent, credible evidence. *Goldsboro v.*

Goldsboro, Miami App. No.2006-CA-48, 2007-Ohio-2135, ¶32, citing *Lamoreaux v. Lamoreaux* (Mar. 29, 1993), Miami App. No. 92 CA 7. Weight and credibility of evidence, and factual disputes in the testimony, are matters for the trial court to resolve. *Id.* “The discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court’s determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record.” *Miller v. Miller* (1988), 37 Ohio St.3d 71, 75 (citations omitted). Indeed, the trial court’s determination of credibility is “even more crucial in a child custody case, where there may be much evident in the parties’ demeanor and attitude that does not translate to the record well.” (Emphasis sic.) *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 419. Thus, a reviewing court will not reverse a custody determination unless the trial court has abused its discretion by acting in a manner that is arbitrary, unreasonable, or unconsionable. *Pater v. Pater* (1992), 63 Ohio St.3d 393, 396; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 22} At the divorce trial, Mrs. Albert testified that she is employed full-time as a licensed social worker at Crestview Manor Nursing Home and earns \$42,744 annually. Mrs. Albert has medical and dental insurance through her employment, which provides coverage for the daughter. Mrs. Albert’s work hours are 7:30 a.m. to 5:00 p.m. Mrs. Albert acknowledged that, prior to the couple’s separation in June 2008, Mr. Albert cared for their daughter while she was at work. She stated that they both assumed responsibility for their daughter after she came home from

work. The child currently attends Ohio Creek Child Care Preschool, at a cost of \$160 per week, while Mrs. Albert is at work. Since starting daycare, the child has had several colds, coughs, or earaches. Mrs. Albert testified that, under the temporary custody order, Mr. Albert was required to pay \$50 per month as temporary child support; Mr. Albert paid once.

{¶ 23} Mrs. Albert's current boyfriend is Mr. William Hill. Mrs. Albert stated that Mr. Hill "is in the household" and essentially lives in her home, although he has his own residence. Mrs. Albert indicated that she is the primary caregiver of her daughter. In September 2009, Mr. Albert contacted the Centerville Police Department with allegations that Mr. Hill had abused the couple's daughter. The allegations were investigated by the police and Children Services, which the police contacted. A safety plan was put into effect on September 21, 2009, and was terminated on October 16, 2009, when the allegations were found to be unsubstantiated. Mr. Hill was not charged.

{¶ 24} Mr. Albert testified that he has been employed by Abbey Road Chimney Sweeps since 2003, earning an average annual gross income of about \$18,000. He stated that he did not have particular working hours at that time, but the job was flexible and it was "usually a nine-to-five type of job." Mr. Albert earns \$12 or \$15 per hour, depending on the particular job assignment. Prior to the parties' separation, however, Mr. Albert took a leave of absence in order to be a full-time father for his daughter.

{¶ 25} For two months while the couple resided together, Mr. Albert worked the third-shift at Tim Horton's. Mr. Albert stated that his wife would take their

daughter to her grandmother's house while he slept; Mrs. Albert would not take care of the child during that time. Mr. Albert testified that he left Tim Horton's because it caused him to be extremely tired during the day and he did not feel it was right to be tired and taking care of his daughter. Mr. Albert further stated that, when Mrs. Albert returned from work, she would either go to her room or take a shower due to the stress of her job, and he would continue to care for their daughter. Mr. Albert testified that Mrs. Albert received counseling for work-related stress in 2007.

{¶ 26} Mr. Albert took correspondence accounting classes on the computer; he did so after the child had gone to bed. Mr. Albert stopped taking the accounting courses after he and his wife separated. Mr. Albert has completed coursework to become a pharmacy technician; however, he indicated that the Dayton job market is flooded and he would likely need to pursue a job in Cincinnati or a community other than Dayton.

{¶ 27} Mr. Albert currently lives with his mother; he does not pay rent. Mr. Albert stated that he cares for his child and that his mother has provided only approximately eight hours of care over the past year. Mr. Albert explained that he had not paid child support, because he never received a copy of the support order. Mr. Albert currently has a girlfriend who lives in Idaho; their contact is mainly online.

{¶ 28} Mr. Albert acknowledged that the child has referred to Mr. Hill as "Daddy Bill" and that he (Mr. Albert) punishes her for calling him "Daddy Bill" because he believes that the statement is a lie. Mr. Albert stated that he and his wife had agreed that Mr. Hill would not be at her apartment when he is returning or

picking up their daughter for parenting time. Mr. Albert acknowledged that he has conversations in front of his daughter about the divorce. He stated that he answers any questions she has about the divorce truthfully. Mr. Albert has made tape recordings of conversations between himself and his daughter and between himself and Mrs. Albert.

{¶ 29} The guardian ad litem did not testify at trial, but his detailed report was admitted without objection and considered by the trial court. The guardian ad litem interviewed each parent individually, interviewed Mr. Hill, had parent-child observation sessions with each parent and the child, and conducted home investigations. The guardian ad litem's report discussed Mrs. Albert's concerns that Mr. Albert had made negative comments about her and Mr. Hill to or in front of the child, concerns that she had about Mr. Albert's mother's alcohol consumption, and concerns she had regarding how Mr. Albert handled their daughter's toilet training and medical care. The report further discussed Mr. Albert's concerns about Mr. Hill's alleged "anger and violence issues," about Mrs. Albert's ability to handle work-related stress, and that Mrs. Albert was trying to "push him out of [the child's] life." The guardian ad litem found the child to be well-adjusted and attached to both parents. He stated that, "[r]egarding the concerns and allegations presented by both parents, it appears that the primary issue with this family is the lack of constructive communication between the parents." Based on his assessments, the guardian ad litem recommended that Mrs. Albert be designated the residential parent and legal custodian of the child, that Mr. Albert be afforded parenting time in accordance with the court's standard order plus additional

parenting time, that the parties attend family/divorce counseling to improve their communication skills, that both parents refrain from making derogatory comments about the other parent, significant others, or family members in the child's presence, and that neither parent should discuss matters of an adult nature with their daughter.

{¶ 30} In its decision, the trial court stated that it had reviewed the guardian ad litem's report in its entirety and took into consideration the testimony presented by both parties at the trial. The court found that "the guardian's recommendation is well supported by the testimony that was offered, in particular the credibility and demeanor of the witnesses." The court noted that Mr. Albert "bases his case for custody on the fact that he claims to have been the primary caregiver for the minor child from shortly after the time she was born until the parties separated." The court reviewed the parties' employment history, Mr. Albert's education during the marriage, and Mr. Albert's child support payments. The court further noted that Mr. Albert had also sought custody based on allegations that Mr. Hill had sexually abused the parties' child and that Mrs. Albert had issues with work-related stress. The court recognized that the allegations against Mr. Hill were investigated and determined to be unsubstantiated. As to Mr. Albert's other complaints about Mrs. Albert, the court concluded that "[n]one of these allegations made by the defendant [Mr. Albert] are sufficient to overcome the overall recommendation that the plaintiff [Mrs. Albert], who has in fact been providing both financially for [the child] all of her life and now primarily physically for [her] since the parties separated almost two years ago, should be awarded custody of the minor child." The court ordered that

Mrs. Albert be the sole residential parent and legal custodian of the parties' daughter.

{¶ 31} On appeal, Mr. Albert argues that he proved that he was the child's principal caregiver for most of her life, that Mrs. Albert "was always too stressed out to spend much time with her child when she returned home," and that he raised significant questions about Mrs. Albert's paramour. Mr. Albert asserts that the trial court was more concerned with his unemployment than the child's best interest.

{¶ 32} Although the court did not expressly reference the statutory factors, the trial court's decision reflects that it fully considered the relevant factors set forth in R.C. 3109.04(F)(1) and all of the evidence before it in rendering its decision. The court gave strong consideration to the guardian ad litem's thorough report, which was consistent with the parties' testimony at trial; the report recommended that Mrs. Albert be designated the sole residential parent. Although Mr. Albert alleged that Mr. Hill had abused his daughter, the court recognized that the allegations had been investigated and were found to be unsubstantiated. The court properly considered Mr. Albert's failure to pay the temporary child support, in accordance with R.C. 3109.04(F)(1)(g). We defer to the trial court's determinations of the parties' credibility and of the appropriate weight to be given to the statutory factors. Based on the record, the trial court's conclusion that it was in the child's best interest to designate Mrs. Albert the sole residential parent was not against the manifest weight of the evidence.

{¶ 33} The assignment of error is overruled.

{¶ 34} The trial court's judgment will be affirmed.

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DONOVAN, P.J. and OSOWIK, J., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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