

[Cite as *In re E.K.*, 2017-Ohio-7709.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:)	CASE NO. 17 JE 0005
)	
E.K., E.K., E.K., MINOR CHILDREN,)	
)	
ANDREW F. KIMMERLE,)	
)	
PLAINTIFF-APPELLANT,)	
)	
VS.)	OPINION
)	
FALLON M. GRIGLIA,)	
)	
DEFENDANT-APPELLEE.)	

CHARACTER OF PROCEEDINGS: Domestic Relations Appeal from the Court of Common Pleas of Jefferson County, Ohio, Juvenile Division Case No. 2015 CU 00018

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant: Atty. Kristopher M. Haught
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For Defendant-Appellee: Atty. Emanuela Agresta
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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 11, 2017

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ROBB, P.J.

{¶1} Plaintiff-Appellant Andrew Kimmerle appeals the decision of Jefferson County Common Pleas, Juvenile Division, denying his motion for modification of parenting time and granting Defendant-Appellee Fallon Griglia's motion for contempt. The issue before this court is whether a question asked by Appellee's counsel opened the door and invited error. The trial court determined it did not. Appellant disagrees. For the reasons expressed below, the trial court's decision is affirmed.

Statement of the Case

{¶2} Appellant and Appellee were married, resided in Pennsylvania, and had three children together. In 2012, when the youngest child was approximately a year old the parties separated and eventually divorced. The Pennsylvania court granted Appellant's motion for custody of the three children. Appellee was granted supervised visitation once a week for two hours.

{¶3} In 2014, Appellant filed a notice of intent to relocate to Jefferson County, Ohio to live with his current wife. The matter was transferred to Jefferson County. 2/19/15 J.E.

{¶4} In September 2015, Appellee filed two motions in Jefferson County Common Pleas Court, Juvenile Division. The first motion was for contempt; Appellee claimed Appellant was interfering with her parenting time. 9/25/15 Motion. The second motion was a motion to modify parenting time. 9/25/15 Motion.

{¶5} A hearing was held in November 2015. Appellee agreed to withdraw her motion for contempt and the parties entered a temporary agreement regarding visitation. 11/17/15 Magistrate Decision; 12/8/15 J.E. The parties agreed to extend parenting time to three and a half hours every Sunday, but it would still be supervised visitation. 11/17/15 Magistrate Decision; 12/8/15 J.E. The court indicated the matter would be reviewed again in January 2016. 11/17/15 Magistrate Decision; 12/8/15 J.E.

{¶6} Due to multiple continuances by the parties, the matter was not reviewed until April 21, 2016. A hearing was held on that day and at that hearing the parties indicated they agreed on a new visitation schedule which would gradually

increase Appellees' visitation from supervised to unsupervised and extend the time period of visitation for the entire weekend. 6/7/16 J.E. The magistrate and the trial court approved the party's visitation schedule. 6/7/16 J.E. The graduated schedule provided, starting on April 22, 2016 and ending on July 15, 2016, Appellee would have supervised visitation every Sunday from 2 p.m. until 8 p.m. 6/7/16 J.E. Beginning on July 16, 2016 and ending on August 12, 2016 Appellee would have unsupervised visitation every Sunday from 2 p.m. until 8 p.m. 6/7/16 J.E. Beginning on August 13, 2016 and ending on September 8, 2016, Appellee would have unsupervised visitation starting on Saturday at noon until Sunday at 6 p.m. 6/7/16 J.E. Then on September 9, 2016 Appellee's visitation would be governed by the Jefferson County long distance visitation schedule. 6/7/16 J.E. The visitation schedule was not appealed.

{¶7} On September 16, 2015, Appellant filed a motion for modification of parenting time; he wanted supervised parenting time reinstated. He cited multiple events that had occurred following the April 21, 2016 order as the basis for his request. The first incident occurred on August 13, 2016. Allegedly Appellee permitted the children, ages 5, 8, and 9, to watch the movie Jackass 2.0. Similarly, there were no parental blocks on You Tube and the oldest child accessed adult content. The second incident involved the middle child and occurred in August 2016. The child became sick during Appellee's visitation and she allegedly failed to provide the necessary care for the minor child. Lastly, on September 3, 2016, when Appellee was exercising her visitation, she left the youngest child at the baseball field while Appellant was tending the field without telling Appellant she was leaving the child. 9/16/15 Motion.

{¶8} On October 3, 2016, Appellee filed a Motion for Contempt because Appellant had prevented her from exercising her court ordered visitation since September 4, 2016. 10/3/16 Motion.

{¶9} A hearing on the motions was held on October 20, 2016. During the hearing, the magistrate limited the testimony and evidence to events that occurred after the April 21, 2016 hearing which modified the prior supervised visitation order.

However, upon cross-examination as to why he was not sending the children for the court ordered visitation, Appellant responded it was based on her past history. Tr. 47. Appellee's counsel asked, "What past history?" Tr. 47. Appellant then began to discuss an event that occurred prior to April 21, 2016 and was the basis for him being awarded custody in Pennsylvania. Counsel and Magistrate stopped Appellant from answering any further and despite Appellant's counsel's argument that Appellee invited the error or opened the door when asking about the history, the Magistrate once again limited the time frame relevant to its consideration of the modification and contempt motions to events occurring after April 21, 2016. Tr. 48.

{¶10} During the hearing all events mentioned in the motion for modification were discussed. After hearing the evidence, the magistrate denied the motion to modify parenting time. 10/27/16 J.E. It found as to the inappropriate movie, Appellee and her finance' admitted the children turned on the movie, but they immediately stopped the movie. 10/27/16 J.E. The magistrate indicated the children had bypassed the parental controls on the television to access the movie. 10/27/16 J.E. As to the access to You Tube on the X Box, the evidence indicated that once Appellee discovered the one child had been accessing it, parental controls were put on that device and the child was grounded. 10/27/16 J.E. As to these events, the magistrate concluded, "The Court does not find the mother permitted the children to watch the movie and access inappropriate sites. The mother took appropriate step to avoid it from happening and addressed the situation with the child." 10/27/16 J.E.

{¶11} As to neglecting the middle child, the magistrate also found the facts did not warrant modifying parenting time. 10/27/16 J.E. The evidence indicated the child played a baseball game and then went with Appellee for visitation time. 10/27/16 J.E. During that time, Appellee's family went to a fair where the child stated he did not feel well. 10/27/16 J.E. However, after eating some fruit and having something to drink, he felt better. 10/27/16 J.E. The family stayed at the fair for hours without incident. 10/27/16 J.E. The next morning, although offered breakfast, the child did not want to eat. 10/27/16 J.E. At his football game later in the morning the child passed out unbeknownst to Appellant and Appellee. 10/27/16 J.E. Spectators at the

game informed Appellant about it, but no one told Appellee. 10/27/16 J.E. The next day the child was diagnosed with hand, foot, and mouth disease and had a temperature. 10/27/16 J.E. The magistrate found Appellee did not act inappropriate in the situation.

10/27/16 J.E.

{¶12} Lastly, as to leaving the youngest child at the ball field while Appellant was working on the field, there is a dispute as to whether Appellant knew Appellee was leaving without the child. 10/27/16 J.E. The child has ADHD and Appellee was 9 months pregnant. 10/27/16 J.E. It was her scheduled visitation time. 10/27/16 J.E. The two older children got into her car, but the youngest would not and began climbing a fence. 10/27/16 J.E. According to Appellee she asked Appellant to help her get the child in the car, but he would not and told her it was “her problem.” 10/27/16 J.E. Appellee called the paternal grandparents to ask if they would call Appellant and get him to help, but they did not answer the phone. 10/27/16 J.E. Appellee ultimately left without the child, but stated Appellant knew she left without him because the child was on the fence directly in front of him. 10/27/16 J.E. The magistrate found Appellee actions did not warrant a loss of unsupervised parenting time. 10/27/16 J.E.

{¶13} Thus, the magistrate denied Appellant’s motion to modify parenting time; the graduated parenting time order remained in effect. The magistrate then found Appellant was in contempt of the parenting time order. 10/27/16 J.E.

{¶14} Appellant filed a timely general objection to the magistrate’s decision, asked for the transcript of the October 20, 2016 hearing, and requested additional time to file specific objections. 11/7/16 Objection and Request for Transcript; 11/10/16 Motion to Continue Objection Period. The trial court granted the request and ordered the objections due 14 days from the date of the filed stamped transcript. 11/14/16 J.E. The transcript was filed on December 13, 2016. On December 30, 2016 Appellant requested an additional 10 days to prepare the objections. 12/30/16 J.E. The trial court granted the extension and ordered objections to be filed by January 13, 2017. 1/3/17 J.E. On the due date, Appellant filed his specific

objections arguing Appellee's counsel opened the door and invited the error when she asked Appellant what past history was his basis for seeking modification of parenting time. 1/13/17 Objections.

{¶15} Appellee filed a motion to strike the objections arguing the objections were untimely. 1/23/17 Motion.

{¶16} The trial court addressed the objections, overruled them, and deemed Appellee's motion to strike moot. 1/27/17 J.E. The trial court adopted the magistrate's recommendation to deny Appellant's motion to modify parenting time and recommendation to grant Appellee's contempt motion. 1/27/17 J.E.

{¶17} Appellant timely appealed the decision.

Assignment of Error

"The trial court erred in overruling Appellant's objections thus prohibiting the Appellant from answering a question when attorney for Appellee 'opened the door' for such an answer."

{¶18} Appellant, the custodial parent, filed a motion for modification of parenting time; he wanted Appellee to only have supervised visits. Modification of parenting time is governed by R.C. 3109.051. *Braatz v. Braatz*, 85 Ohio St.3d 40, 706 N.E.2d 1218 (1999), paragraph one of the syllabus. Section (D) of that statute sets forth the factors the trial court is to consider in determining parenting time. *Id.* at paragraph two of the syllabus. The decision to modify parenting time, which is also referred to as visitation, is within the sound discretion of the trial court. *Id.* A trial court abuses its discretion when it makes a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶19} Here, the assigned error is not that the trial court's modification ruling was an abuse of discretion. Rather, it is the magistrate's and the trial court's decision to not allow Appellant to introduce certain evidence that is alleged to be an abuse of discretion. Specifically, Appellant asserted the magistrate and trial court did not permit Appellant to testify about Appellee's history when Appellee's counsel allegedly opened the door to such information.

{¶20} Generally, the admission of evidence is within the discretion of the trial court; the trial judge is in a significantly better position to analyze whether testimony or evidence is relevant or irrelevant. *State ex rel. Elsass v. Shelby Cty. Bd. of Comms.*, 92 Ohio St.3d 529, 533, 751 N.E.2d 1032 (2001); *Renfro v. Black*, 52 Ohio St.3d 27, 31, 556 N.E.2d 150 (1990). However, this case involves a magistrate's decision and therefore, pursuant to Civ.R. 53(D)(3)(b)(iv) failing to file timely objections to a magistrate's decision waives all but plain error on appeal. Therefore, prior to addressing the merits of the assignment, the timeliness of the objections must be addressed.

{¶21} As aforementioned, within 14 days of the magistrate's decision Appellant filed a general objection to the magistrate's decision, asked for the hearing to be transcribed, and requested additional time to review the transcript and file specific objections. The trial court granted the request and ordered the objections to be filed within 14 days of the filing of the transcript. The above procedure complies with Civ.R. 53.

{¶22} The transcript was file stamped December 13, 2016. Accordingly, pursuant to the trial court's order, the objections were required to be filed on December 27, 2016. Appellant, however, did not file his objections on that date. On December 30, 2016, he filed another request for an extension of time to file specific objections.

{¶23} Objections filed after December 27, 2016 could be deemed untimely because neither the objections nor a request for an extension of time was filed on December 27, 2016. The December 30, 2017 motion for extension of time to file objections was not timely because the three day mail rule in Civ.R. 6(D) is not applicable; the three-day mail rule does not enlarge time to file objections to a magistrate's decision. *Wiltz v. Ohio Accountancy Bd.*, 10th Dist. Nos. 16AP-169, 16AP-278, 16A-320, 2016-Ohio-8345, ¶ 25; *Duganitz v. Ohio Adult Parole Auth.*, 92 Ohio St.3d 556, 557, 751 N.E.2d 1058 (2001) (prior version of Civ.R. 6 where three day mail rule was in division (E)); *Wajda v. M&J Automotive, Inc.*, 7th Dist. No. 10 MA

7, 2010-Ohio-6584, ¶ 29 (prior version of Civ.R. 6 where three day mail rule was in division (E)).

{¶24} That said, the trial court granted the extension of time and ordered objections to be filed by January 13, 2017. Appellant filed his objections on January 13, 2017. Consequently, the objections are deemed timely because it was within the trial court's discretion to consider the objections and rule on them when it had not already adopted, reversed or modified the magistrate's decision. See *Olson v. Olson*, 7th Dist. No. 15 CO 2, 2015-Ohio-5550, ¶ 36-39 (Holding where untimely objections are filed after the magistrate's decision has been adopted by the trial court, the trial court has no discretion to consider the untimely objections. In holding so, this court noted trial courts have discretion to consider untimely objection when the trial court has not already ruled on the magistrate's decision.).

{¶25} As such, even though Appellant did not file a timely request for a second extension of time to file his objections, it was within the trial court's discretion to consider the objections. Therefore, Appellant did not waive all but plain error and the merits of the assignment of error should be reviewed for an abuse of discretion.

{¶26} Having addressed the timeliness issue, we now look to the alleged assigned error. Near the beginning of the October 20, 2016 hearing, during the direct examination of Appellant, the magistrate set forth the parameters of the hearing indicating nothing before April 21, 2016 was relevant:

Q. And what are some of the things that you have observed as part of that parenting time?

THE MAGISTRATE: Since April.

MR. HAUGHT [Counsel for Appellant]: Since April.

THE MAGISTRATE: Nothing before April is – is relevant to what we're dealing with here today. So from the last time we were in court on I believe it was April 21st?

MR. HAUGHT: Yes, Your Honor.

THE MAGISTRATE: So, from April 21st moving forward for all –

MRS. AGRESTA [counsel for Appellee]: Your Honor, if I may –

THE MAGISTRATE: – for all testimony.

MRS. AGRESTA: – I think we should stick to the four corners of the motion. He raised specific issues and I think we should stick to those dates which is August 13th forward.

THE MAGISTRATE: Unless there's some –

MR. HAUGHT: That's fine, Your Honor.

THE MAGISTRATE: – something that raises concerns beyond that.

MRS. AGRESTA: Thank you.

THE MAGISTRATE: Okay.

Tr. 7-8.

{¶27} The testimony then continued with questions and answers concerning the events raised specifically in the September 2016 motion to modify which was for events after August 2016. However, during cross-examination and after discussing the events listed in the September 2016 motion to modify parenting time, Appellant was asked why he was denying Appellee her parenting time and Appellant responded it was based on her past history. This is the portion of the questioning Appellant believes Appellee opened the door to discuss events occurring before April 21, 2016:

Q. [Appellee counsel] Okay. Now, after all that has happened then you decide unilaterally that, you know what, you're not sending the kids for a visit; do you?

A. [Appellant] That's correct.

Q. And why is that?

A. Because based off of her past history –

Q. What past history?

A. With burning EK and being –

Q. Oh, no, no, no. We're talking –

MR. HAUGHT [counsel for Appellant]: Objection, Your Honor.
She opened the door.

A. You asked about the history.

MR. HAUGHT: She asked a question. He gets to answer it.

MRS. AGRESTA: I get to ask the question.

MR. HAUGHT: She did ask the question.

MRS. AGRESTA: But we –

THE MAGISTRATE: Stop.

MRS. AGRESTA: – are still limited in time.

THE MAGISTRATE: Stop, stop. We are from April going forward. I set those parameters at the very beginning for all aspects of this. We are not going back and rehashing a divorce or what happened in Pennsylvania or anything else. We are going from April 21st and we are moving forward. We're not talking 12 bites at the same apple.

Tr. 47-48.

{¶28} The magistrate's decision and the trial court's adoption of that decision does not appear to be an abuse of discretion. When read in context, including the

parameters set out by the magistrate at the beginning of the hearing, Appellee's counsel was asking Appellant if there were any other events since April 21, 2016 which contributed to Appellant's decision to deny Appellee her parenting time. Admittedly, when he answered past history, the language used in her responding question could have contained limiting language. Regardless, the question should not be considered to have opened the door to discuss and consider acts that occurred prior to April 21, 2016.

{¶29} Furthermore, the limitation to events occurring after April 21, 2016 was not an abuse of discretion. As stated above, courts have broad discretion in determining parenting time and evidentiary issues. Prior to April 21, 2016 the court ordered visitation was supervised and only occurred once a week for a couple of hours. At the April 21, 2016 hearing, the parties indicated to the magistrate they had come to an agreement on visitation. They agreed visitation would graduate from supervised to unsupervised and would eventually lead to extended long distance weekend visitation. The magistrate and trial court signed off on this graduated visitation schedule; given the record, both the trial court and magistrate were aware of Appellee's history. Considering there was a court ordered supervised visitation order, and Appellant agreed to a graduated schedule going from supervised to unsupervised weekend visitation despite Appellee's history, it was fair for the court to limit the evidence to only events that occurred after April 21, 2016.

{¶30} Considering the record, it does not appear the trial court abused its discretion in overruling Appellant's objections. The sole assignment of error lacks merit. The trial court's adoption of the magistrate's decision is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.