[Cite as *Shirvani v. Momeni*, 2010-Ohio-2975.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mahmood Shirvani,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	No. 09AP-791
	:	(C.P.C. No. 05JU-09-13822)
v.		
	:	(REGULAR CALENDAR)
Shahnaz Momeni,	:	
Defendant-Appellee/ Cross-Appellant.	:	

D E C I S I O N

Rendered on June 29, 2010

Harold R. Kemp, and *Jacqueline L. Kemp*, for appellant.

Sowald, Sowald, Anderson & Hawley, and *Beatrice K. Sowald*, for appellee.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

BROWN, J.

{¶1} Mahmood Shirvani, plaintiff-appellant/cross-appellee ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, in which the court overruled his objections to a magistrate's decision. Shahnaz Momeni, defendant-appellee/cross-appellant ("appellee"), also

appeals the judgment of the trial court, in which the court overruled her objections to the magistrate's decision and granted, in part, her motion for attorney fees.

{¶2} Appellant and appellee divorced on December 13, 2001 pursuant to a divorce decree issued by the Muskingum County Court of Common Pleas. One child was born as issue of the marriage: Donya, born June 2, 1999. The decree designated appellee primary residential parent for school placement purposes, and appellant was ordered to pay child support in the amount of $413.39 per month, which was later modified to $470.95 per month. The parties subsequently moved to Franklin County, and the Muskingum County court transferred the case to Franklin County in early 2006.

{¶3} On April 24, 2006, appellant filed a motion to reallocate parental rights and responsibilities, and the trial court appointed the child a guardian ad litem ("GAL"). On October 26, 2006, appellee filed a motion to modify child support and a motion for contempt against appellant for failure to pay day-care expenses.

{¶4} A hearing on the motions was held before a magistrate on various days in September 2007. The GAL filed a report and recommendation October 9, 2007. In the report, the GAL opined that the child should reside primarily with appellant during the school year and have parenting time with appellee on Thursdays overnight every week and on alternate weekends from Thursday through Monday, with the schedule reversing during the summer. On September 9, 2008, the magistrate filed a decision, in which she, in pertinent part, denied appellant's motion to reallocate parental rights; modified child support to $784.85 per month, which included day-care expenses, retroactive to October 26, 2006; found appellant in contempt for failure to pay one-half of the day-care costs as required by the decree; ordered appellant to pay appellee's attorney fees

through August 31, 2007, which included $1,500 for the contempt motion, and $4,828.68 for the motion to modify child support and the defense of appellant's motion to reallocate parental rights; and ordered appellant to pay GAL fees of $1,128.75 and reimburse appellee for any GAL fees already paid. Both appellant and appellee filed objections to the magistrate's decision, and appellee also filed a motion for interim attorney fees incurred during the magistrate's hearing, in responding to appellant's objections, and seeking an increase in child support.

{¶5} A hearing on the objections and motion was held before the trial court December 12, 2008. On April 6, 2009, the trial court issued a judgment in which it overruled appellant's objections (except for his objection to the reallocation of the GAL fees), overruled appellee's objections, and granted, in part, appellee's motion for attorney fees in the amount of $1,800. Appellant filed a request for findings of fact and conclusions of law and, on July 21, 2009, the trial court issued an amended decision and judgment entry with findings of fact and conclusions of law. The court issued a nunc pro tunc decision August 25, 2009, correcting the amount of child support ordered. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] The Trial Court erred as a matter of law and abused its discretion by disregarding the report and recommendation of the guardian ad litem.
>
> [II.] The Trial Court's Decision regarding the reallocation of parental rights and responsibilities was against the manifest weight of the evidence and an abuse of discretion.
>
> [III.] The Trial Court erred and abused its discretion by finding Appellant in contempt of court and awarding attorneys fees related to same.

> [IV.] The Trial Court erred and abused its discretion by awarding Appellee attorneys fees.

{¶6} Appellee also appeals the judgment of the trial court, asserting the following cross-assignment of error:

> THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO AWARD DEFENDANT/CROSS-APPELLANT SUFFICIENT AND ADEQUATE ATTORNEY FEES TO ASSIST THE DEFENDANT/CROSS-APPELLANT IN THIS DOMESTIC RELATIONS MATTER.

{¶7} Appellant argues in his first assignment of error that the trial court erred as a matter of law and abused its discretion by disregarding the report and recommendation of the GAL. A trial court is not bound to follow the recommendations of a GAL. *Galloway v. Khan*, 10th Dist. No. 06AP-140, 2006-Ohio-6637, ¶70. However, the trial court should review the report of a GAL in connection with all other evidence presented to it. *Smith v. Quigg*, 5th Dist. No. 2005-CA-002, 2006-Ohio-1495, ¶66. As the fact finder, the trial court determines the GAL's credibility and the weight to be given to the GAL's recommendation. *Galloway* at ¶70.

{¶8} In the present case, appellant argues the trial court disregarded the GAL's findings and recommendations without justification and in contravention of R.C. 3109.04. Appellant also argues the magistrate erred when it refused to consider the GAL's recommendations. After noting that the GAL recommended that the child reside primarily with appellant and that appellee be allowed parenting time, the magistrate rejected the GAL's recommendation, finding:

> The GAL's recommendation contains information that leads the GAL to believe [the child] would be better off living primarily with [appellant], but the Guardian is basing her

> recommendation on some evidence that was not presented at the hearing.

{¶9} After reiterating verbatim the magistrate's finding that the GAL recommended the child reside primarily with appellant and that appellee be allowed parenting time, the trial court also rejected the GAL's recommendation, finding:

> The Court notes that while the recommendation of the Guardian *ad Litem* certainly is an important factor in the analysis of the best interest of the child, it is still but one of many factors for the Court to consider. Based on its review of the transcript, the Court finds that the testimony and evidence presented to the Magistrate, which is now before this Court, points to a different conclusion than presented in the Report and Recommendation by the Guardian *ad Litem*.

{¶10} Here, appellant argues that it is unclear as to what evidence "not presented at the hearing" the magistrate was referring, and, regardless, neither party objected to the GAL's report. Furthermore, appellant asserts, the trial court then committed the same error as the magistrate by limiting its analysis to its "review of the transcript" and "the testimony and evidence presented to the Magistrate."

{¶11} We are uncertain why both the magistrate and the trial court limited their review to evidence presented only at the hearing and why the magistrate rejected the GAL's recommendation on the basis that it contained evidence not presented at the hearing. Without any analysis by the trial court, our ability to review its decision is hampered. The trial court appointed the GAL, pursuant to Loc.Juv.R. 27, which provides that a GAL has a duty to perform several tasks, including: interview the child and observe each parent with the child; investigate and interview independently all significant persons; obtain school, criminal, medical, psychological, and child protective agency records; and perform home visits. See Loc.Juv.R. 27(D). The rule also gives the GAL the power to

prepare and file written reports at the conclusion of the hearing detailing "observations" and recommendations. See Loc.Juv.R. 27(F). Thus, it is clear from these provisions that a GAL is permitted to base her recommendations on evidence gathered outside the record based upon her "observations," and the GAL may do so via a report submitted at the conclusion of the hearing. As these rules specifically provide, this evidence may come from, among other sources, interviews conducted and records gathered by the GAL outside of the hearing. See *Bates-Brown v. Brown*, 11th Dist. No. 2006-T-0089, 2007-Ohio-5203, ¶36, citing *In re: Ridenour*, 11th Dist. No. 2003-L-146, 2004-Ohio-1958, ¶25 (because one of the responsibilities of the GAL is to provide the court with an independent evaluation of the issues, including what custody arrangement is in the child's best interests, the GAL's recommendation should not be based on the testimony given at the hearing, but on the guardian's own experience in the case); *Martin v. Martin*, 3d Dist. No. 9-03-47, 2004-Ohio-807, ¶19, citing *Webb v. Lane* (Mar. 15, 2000), 4th Dist. No. 99CA12 (appellate courts in Ohio have held that trial courts may consider the report of a court-appointed investigator despite the hearsay inherent in the report); *Scarbrough v. Scarbrough* (July 18, 2001), 9th Dist. No. 00CA007743 (the language of both R.C. 3109.04(C) and Civ.R. 75(D) implicitly gives the trial court the authority to admit custody investigation reports as evidence). Therefore, absent any further explanation or citation to authority to the contrary, we see no reason why the magistrate and the trial court should have rejected the GAL's recommendation outright and limited their decisions to evidence presented only at the hearing.

{¶12} In addition, a review of the record indicates that the parties did not object to the GAL's submission of her recommendation after the hearing. Also, the GAL submitted

her written recommendation two weeks before the parties submitted their written closing arguments. Thus, the parties were free to contest the GAL's recommendation and contest any evidence gathered by the GAL outside of the hearing. Moreover, the GAL was present at the hearing and was subject to cross-examination, but was not called to the stand by either party. In addition, after the GAL submitted her report, neither party raised any objection or sought permission to question the GAL. Therefore, we can see no prejudicial effect by allowing the GAL to submit her written recommendation after the hearing when the parties had a full and fair opportunity to challenge the GAL's conclusions. See *Webb* (a trial court, in order to consider a GAL's report without violating the parties' due process rights, must afford all parties the opportunity to cross-examine the GAL regarding his or her report). For all of these reasons, we sustain appellant's first assignment of error.

{¶13} Appellant argues in his second assignment of error that the trial court's decision regarding the reallocation of parental rights and responsibilities was against the manifest weight of the evidence and an abuse of discretion. However, given our above finding and the necessary remand to the trial court, appellant's second assignment is moot at this juncture.

{¶14} Appellant argues in his third assignment of error that the trial court erred and abused its discretion by finding appellant in contempt of court and awarding attorney fees related to same. When reviewing a finding of contempt, including the imposition of penalties, we apply an abuse of discretion standard. *Fidler v. Fidler*, 10th Dist. No. 08AP-284, 2008-Ohio-4688, ¶12, citing *In re Contempt of Morris* (1996), 110 Ohio App.3d 475, 479.

{¶15} The prima facie elements of contempt in this context include the existence of a court order and appellant's non-compliance with the terms of that order. See *LeuVoy v. LeuVoy* (May 25, 2000), 10th Dist. No. 99AP-737, citing *Morford v. Morford* (1993), 85 Ohio App.3d 50. The burden then shifts to appellant to establish any defense he may have for non-payment. See *Morford* at 55, citing *Rossen v. Rossen* (1964), 2 Ohio App.2d 381. Intent is not a prerequisite to a finding of contempt, but a court may consider whether the party has attempted to comply or attempted to flout the court order. Id. at 55, citing *Pugh v. Pugh* (1984), 15 Ohio St.3d 136.

{¶16} In the present case, the magistrate found appellant in contempt of court for failing to pay one-half of appellee's work-related childcare expenses directly to the childcare provider. Appellant first argues that the trial court improperly relied upon appellee's "uncorroborated" affidavit, which indicated the amounts she purported to be appellant's day-care expense obligations. However, appellant did not specifically contest the reliance upon appellee's affidavit at anytime at the trial court level, including in his objections to the magistrate's decision. An appellant cannot raise any new issues for the first time on appeal. The failure to raise an issue at the trial level waives it on appeal. *Gangale v. State Bur. of Motor Vehicles*, 10th Dist. No. 01AP-1406, 2002-Ohio-2936, ¶58, citing *State v. Williams* (1977), 51 Ohio St.2d 112. Furthermore, Civ.R. 53(D)(3)(b)(iv) provides that a party cannot assign as error on appeal the court's adoption of any factual finding or legal conclusion, unless the party has objected to that finding or conclusion. Therefore, we find appellant waived any error with regard to the trial court's reliance upon appellee's affidavit.

{¶17} Appellant also argues that appellee used up to five day-care providers, and it should not be his burden to determine which day-care provider of the five was caring for the child, which days each provider cared for the child, how many hours each provided care, and how much he owed to each provider. We disagree. The decree ordered appellant to pay one-half of the childcare expenses. He failed to do so. Although the decree does not specify how appellant was to obtain the proper amounts and proper payees, the decree is clear that he still must pay the due amounts. There was testimony presented at trial that appellee gave appellant day-care information and receipts, but appellant destroyed them. Appellant denies such events occurred. However, these allegations are of no real consequence to the contempt finding. The record is abundantly clear that appellant was aware the child was attending day-care and of the various day-care locations, as appellant would often pick-up the child from day-care, yet appellant failed to pay any of the child's day-care expenses. Compliance was not impossible. Appellant could have ascertained the amounts due through independent investigation or he could have requested the expense totals from appellee. However, there is no evidence in the record that appellant ever attempted to discover and pay the expenses as ordered in the decree. As such, the trial court was within its discretion to find appellant in contempt for failure to pay one-half of the day-care expenses.

{¶18} Appellant next argues under the umbrella of his third assignment of error that the trial court erred when it awarded appellee attorney fees based upon the contempt finding. R.C. 3109.05(C) provides that, if any person required to pay child support is found in contempt of court for failure to make support payments under the order, the trial court must assess all court costs arising out of the contempt proceeding against the person and

require the person to pay any reasonable attorney fees of the adverse party related to the contempt. Here, appellant contends R.C. 3109.05(C) applies only to contempt related to "child support," but the parties' decree specifically made the day-care expenses payable directly to the provider and not through the child support agency; thus, appellant urges, R.C. 3109.05(C) does not apply because the day-care expenses were not "child support."

{¶19} R.C. 3109.05(C) does not define "child support." However, in general, a parent is obliged to provide a child with "necessaries" during the child's minority. See R.C. 3103.03; *Basista v. Basista*, 8th Dist. No. 83532, 2004-Ohio-4078, ¶16. "Necessaries" generally include food, clothing, shelter, medical care, and education. Id. These are the types of current expenses that a child support order is intended to cover. Id. Payments for private school tuition and college education for the benefit of the child have also been considered to be in the nature of child support. See, e.g., *Mencini v. Mencini*, 8th Dist. No. 83638, 2004-Ohio-3125, citing *Kaiser v. Kaiser* (Dec. 6, 2001), 8th Dist. No. 78550 (private school tuition is a form of child support, as it is a form of financial child support designed to partially reimburse the custodial parent for an expense she incurred in rearing their child); *Rohrbacher v. Rohrbacher* (1992), 83 Ohio App.3d 569 (a provision in a dissolution decree for the college education of the parties' children is a form of child support and modifiable).

{¶20} In the present case, we find the day-care expenses were in the nature of child support and, thus, subject to the provisions of R.C. 3109.05(C). The day-care expenses were obviously a necessity for the care of the child while appellee worked. Telling as to how the original trial court intended the day-care expenses to be treated is the context of that term in the divorce decree. The court's order concerning the day-care

expenses is contained within provision four of the decree, which is the same provision that establishes appellant's child support obligation. Thus, we find the Muskingum County trial court intended the day-care expenses to be in the nature of child support. Accordingly, appellant's contempt for failure to pay one-half of the day-care expenses fell under the purview of R.C. 3109.05(C), and the trial court was required to order attorney fees related to the contempt. Furthermore, even if the trial court could not award attorney fees, pursuant to R.C. 3109.05(C), based upon appellant's contempt, the court had the discretion to do so under the broad powers to award attorney fees in post-decree proceedings granted by R.C. 3105.73(B), discussed infra. For these reasons, appellant's third assignment of error is overruled.

{¶21} We will address appellant's fourth assignment of error and appellee's cross-assignment of error together, as they are related. Appellant argues in his fourth assignment of error that the trial court erred and abused its discretion by awarding appellee attorney fees. In her sole cross-assignment of error, appellee argues the trial court abused its discretion when it failed to award her sufficient and adequate attorney fees to assist her in these matters. R.C. 3105.73(B) provides:

> In any post-decree motion or proceeding that arises out of an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that motion or proceeding, the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets.

{¶22} An award of attorney fees is generally within the sound discretion of the trial court and not to be overturned absent an abuse of discretion. *Babka v. Babka* (1992), 83

Ohio App.3d 428, 435. Abuse of discretion is more than mere error, but signifies that the trial court's decision is unreasonable, unconscionable or arbitrary. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The appellate court must not substitute its judgment for that of the trial court when reviewing under an abuse of discretion standard. Id.

{¶23} In the present case, the magistrate awarded appellee attorney fees in the amount of $4,828.68, plus the $1,500 in attorney fees related to her contempt motion. In addition to these attorney fees awarded by the magistrate to appellee, the trial court also awarded appellee $1,800 in additional attorney fees she incurred from September 1, 2007 through November 30, 2008. To support its awarding of these attorney fees to appellee, the magistrate and trial court cited as reasons that appellant earns $74,000 and appellee earns $36,525; appellant resides with his fiancée while appellee resides alone; appellant's motion to modify parental rights was unsuccessful; appellee's motion to modify child support was successful; and a significant increase in child support was appropriate. However, because the matter must be remanded for consideration of the GAL's report, upon remand appellant's motion to modify may be successful, appellee's motion to modify child support may not be successful, and child support may have to be modified. Thus, three of the bases for the magistrate's and trial court's rationale for awarding appellee attorney fees may no longer be supportive of an award after reconsideration upon remand. Therefore, we cannot address the issue of attorney fees at this juncture, as the trial court may have to revisit the issue depending upon its determinations on remand. Furthermore, insofar as appellee also requests attorney fees related to the costs for appellate counsel, the trial court may also address this request upon remand. See *Lee v.*

Lee (1983), 10 Ohio App.3d 113 (attorney fees are awardable for the prosecution or defense of an appeal from an alimony modification or child support proceeding under certain circumstances; however, the common pleas court is a more appropriate forum to evaluate such services, even though the courts of appeals have discretionary power to award these fees). See also *Rhoades v. Rhoades* (Feb. 28, 1991), 3d Dist. No. 16-90-15 (a trial court is equally able to evaluate the need and appropriateness of a party's legal appellate services; in fact, appellate courts have remanded the issue of appellate attorney fees to the trial court), citing *Lee* and *Evans v. Brown* (1985), 23 Ohio App.3d 97. For these reasons, appellant's fourth assignment of error and appellee's cross-assignment of error are moot at this juncture.

{¶24} Accordingly, appellant's first assignment of error is sustained, appellant's second and fourth assignments of error are moot, appellant's third assignment of error is overruled, and appellee's cross-assignment of error is moot. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch is affirmed in part and reversed in part, and this matter is remanded to that court to consider the GAL's report and reconsider attorney fees, if necessary.

Judgment affirmed in part and reversed in part; cause remanded.

BRYANT and McGRATH, JJ., concur.

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