

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

GWEN JOHNSON, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-06-177
 :
 - vs - : OPINION
 : 3/29/2010
 :
 ADAM JOHNSON, :
 :
 Defendant-Appellant. :

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR08-11-1401

M. Lynn Lampe, 1248 Nilles Road, Suite 7, Fairfield, Ohio 45014, for plaintiff-appellee
Nicole M. Stephenson, 30 N. "D" Street, Hamilton, Ohio 45013, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Adam Johnson, appeals a decision of the Butler County Court of Common Pleas, Domestic Relations Division, denying shared parenting. We affirm the trial court's decision.

{¶2} Adam and plaintiff-appellee, Gwen Johnson, are the parents of three children. On November 19, 2008, Gwen filed for divorce, seeking, among other things, custody of the parties' children. In Adam's response, he stated his request for custody or shared parenting and subsequently filed a proposed shared parenting plan on

January 23, 2009, and an amended plan on April 28, 2009. On May 4, 2009, the trial court conducted a final hearing, where the main issues in dispute were related to the children. Gwen reiterated her desire to have full custody of the children while Adam expressed his desire to have shared parenting, but conceded that Gwen should be named residential parent for schooling purposes.

{¶13} After hearing testimony and weighing the statutory factors in R.C. 3109.04, the trial court denied Adam's request for shared parenting and named Gwen residential parent and legal custodian of the children. The trial court also awarded parenting time to Adam. This decision was incorporated into the June 8, 2009 decree of divorce. Adam filed an appeal raising a single assignment of error.

{¶14} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT REFUSED TO ORDER SHARED PARENTING FOR THE PARTIES."

{¶15} In his sole assignment of error, Adam argues the trial court should have ordered shared parenting because the parties were able to work and cooperate with one another; neither parent complained about the quality of time the other parent spent with the children; and because he expressed his desire to work with Gwen in making major decisions affecting the children. We do not agree.

{¶16} When designating parental rights and responsibilities, a trial court is vested with broad discretion and its decision should not be reversed absent an abuse of that discretion. *Donovan v. Donovan* (1996), 110 Ohio App.3d 615, 618, citing *Masters v. Masters*, 69 Ohio St.3d 83, 85, 1994-Ohio-483. An abuse of discretion is more than a mere error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Moreover, we may not substitute our judgment for that of the trial court as the trial court

is in a far better position to engage and observe the parties, and make a determination which is in the best interest of the child. *Trickey v. Trickey* (1952), 158 Ohio St. 9, 13-14. Therefore, the trial court's decision will stand as long as there is competent and credible evidence in the record in support of its custody or shared parenting determination. See *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶7} R.C. 3109.04(A) requires a trial court to allocate parental rights and responsibilities for the care of minor children. In allocating parental rights and responsibilities pursuant to R.C. 3109.04, the trial court may designate one parent as the legal custodian and residential parent of the child, or the court may delegate some or all of those responsibilities to both parents under a shared parenting plan. *Arthur v. Arthur* (1998), 130 Ohio App.3d 398, 406, citing R.C. 3109.04(A)(1) and (2). A trial court may not approve a shared parenting plan unless it is in the best interest of the children. R.C. 3109.04(D)(1)(b). Indeed, the paramount concern in allocating parental rights and responsibilities is that the trial court's decision is in the best interest of the children. *Glover v. Glover* (1990), 66 Ohio App.3d 724, 730, citing *Birch v. Birch* (1984), 11 Ohio St.3d 85, 87. See, also, R.C. 3109.04(B)(1).

{¶8} In order to determine a child's best interest, the trial court must consider all relevant factors, which include, but are not limited to those set forth in R.C. 3109.04(F)(1). *Sallee v. Sallee* (2001) 142 Ohio App.3d 366, 370. These factors include: the parent's wishes regarding the child's care; the wishes and concerns of the child, if interviewed; the child's interaction and relationship with family members and anyone else significantly affecting the child's life; the child's adjustment to home, school and community; the mental and physical health of all parties involved; the likelihood that a parent will honor and facilitate parenting time/visitation; whether child support arrearages exist; whether a parent or household member has been convicted or pled

guilty to a criminal act involving neglect or abuse of a child or family member; whether a residential parent had willfully denied parenting time to the other parent; and whether a parent has or plans to establish a residence outside the state. R.C. 3109.04(F)(1)(a) – (j).

{¶9} In deciding whether shared parenting is in the child's best interest, the trial court must consider all relevant factors, including but not limited to the factors in R.C. 3109.04(F)(1), the factors enumerated in R.C. 3119.23,¹ and five additional factors in R.C. 3109.04(F)(2). These five additional factors are:

{¶10} "(a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;

{¶11} "(b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;

{¶12} "(c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;

{¶13} "(d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

{¶14} "(e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem."

{¶15} In reaching its judgment to deny shared parenting and make Gwen the children's legal custodian and residential parent, the trial court directly addressed some

1. R.C. 3119.23 is entitled "[f]actors relevant to granting deviation" which is in the section relating to child support obligations. These factors are primarily financial in nature, and take into account a child's special and unusual needs; extraordinary obligations for children who are not the subject of the support order; other court-ordered payments; cost associated with extended parenting time; an obligor obtaining additional employment to support a second family; the child's financial resources and earning ability; income disparity; benefits received from remarriage or shared living expenses; income taxes; in-kind contributions from a parent; each parent's financial resources, assets, and needs; the parent's current and the child's previous standard of living; a child's physical and emotional condition and needs; the child's need and capacity for education and educational opportunities; a parent's reasonability to support others; and any other relevant factor.

of the shared parenting factors it utilized in making its decision. The trial court acknowledged that Adam and Gwen had "some ability to work together" especially with regards to parenting time and attending events together. However, the court also expressed concern regarding Adam and Gwen's ability to make joint decisions together, believing that disagreements between the parties would require further court intervention. The trial court recognized that neither party had disparaged the other, and even noted that both Adam and Gwen had agreed the other was a good parent. The trial court found that the parties lived close to one another, so geographic proximity was not at issue, and neither R.C. 3109.04(F)(2)(c) nor (e) were applicable to the proceedings.

{¶16} The trial court also discussed the parents' wishes as far as the children's residence, and decided that private school tuition was an expense Gwen must bear. In addition, the trial court addressed concerns about Adam's timeliness with regard to visitation, and the fact the children needed consistency and stability. Finally, the trial court expressed concerns with medical and mental health issues raised by Gwen, and Adam's unrealistic expectations with regard to forbidding the children from engaging in activities that interfere with his parenting time.²

{¶17} Although the trial court made Gwen legal custodian and residential parent of the children, the court addressed some of Adam's core concerns by admonishing Gwen not to choose extracurricular activities that "severely impact father's time." In addition, the trial court ordered Gwen to inform Adam about those activities, and furnish him with a schedule of the children's extracurricular activities. The trial court also ensured Adam had access to the children's medical and school records, but informed

2. Although not specifically mentioned in the trial court's decision, the court heard testimony regarding the fact that an arrearage existed in Adam's child support obligation. See R.C. 3109.04(F)(1)(g).

Adam that he, rather than Gwen, was responsible for acquiring the children's school schedules and information on parent-teacher conferences.

{¶18} Adam asserts that the reason he was seeking shared parenting was to preserve his ability to be able to make important decisions regarding his children's medical care, activities and school events. However, it should be noted that Adam does not contest the trial court's decision to make Gwen the residential parent. Essentially, Adam's argument is about the loss of legal custody of his children.³ Adam's concerns stemmed from "continually being kept uninformed by his wife regarding the[] [children's] activities" and because "he wanted to have an equal part in their upbringing."

{¶19} Adam acknowledges that the "key provision" in the shared parenting factors "is the ability of the parents to cooperate and make joint decisions regarding their child," and that "cooperation and communication [is] the hallmark of a shared parenting plan." Adam suggests that the testimony of both parties demonstrates the respect each parent has for the other, including respect for each other's parenting abilities. In support of his argument, Adam cites to the parties willingness to work with one another in adjusting the initial visitation schedule. However, despite this example of cooperation between the parties, Adam also states that Gwen did not keep him informed as to activities and appointments, which directly contradicts his assertions of harmony in the decision making process. We also observe that merely agreeing to adjust a visitation schedule is not the same as making important life decisions regarding a child's health and/or well-being. In addition, as we have stated in the past, "[s]uccessful shared parenting requires at least two things. One is a strong commitment to cooperate. The

3. R.C. 3109.51(D) states legal custody has the same meaning as that in "R.C. 2151.011(B)(19) [which] defines 'legal custody' as 'a legal status that vests in the custodian *the right to have physical care and control* of the child and to determine *where and with whom the child shall live*, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical

other is a capacity to engage in the cooperation required." *Kauza v. Kauza*, Clermont App. No. CA08-02-014, 2008-Ohio-5668, ¶27, quoting *Meyer v. Anderson*, Miami App. No. 01CA53, 2002-Ohio-2782, ¶25 (internal quotations omitted).

care, *all subject to any residual parental rights, privileges, and responsibilities.*" (Emphasis sic.) *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191, ¶15.

When there is a lack of cooperation, shared parenting may not necessarily be in a child's best interest. See *Seng v. Seng*, Clermont App. No. CA2007-12-120, 2008-Ohio-6758, ¶21.

{¶20} Finally, we understand and acknowledge that Adam is invested in his children's lives, which is evident by his active participation in their extracurricular activities such as sports and scouting; and by engaging them in various other activities such as attending movies and fireworks shows.⁴ However, this is simply not a sufficient reason for overturning a trial court's decision in this matter. The trial court weighed the factors with regard to determining whether shared parenting was in the children's best interest, and ultimately found that they did not weigh in favor of such an arrangement. We cannot say that the trial court's decision to make Gwen residential parent and legal custodian of the parties' three children was an abuse of discretion. Adams' sole assignment of error is overruled.

{¶21} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.

4. We also remind Adam that even though he lacks legal custody of his children, he still retains important residual parental rights, privileges and responsibilities. See R.C. 3109.51(D); R.C. 2151.011(B)(46).