

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

VINCENT J. ALLGEIER, :
 :
 Plaintiff-Appellant, : CASE NO. CA2009-12-019
 :
 - vs - : OPINION
 : 11/1/2010
 :
 DAYLE A. ALLGEIER, :
 :
 Defendant-Appellee. :

APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DRA 20070146

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45177,
for plaintiff-appellant

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HENDRICKSON, J.

{¶1} Plaintiff-appellant, Vincent J. Allgeier, appeals a decision of the Clinton County Court of Common Pleas, Domestic Relations Division, regarding evidentiary and custody matters. For the reasons set forth below, we affirm the decision of the domestic relations court.

{¶2} Vincent and defendant-appellee, Dayle A. Allgeier, were married in May

2001. The marriage produced two children: Christopher, born May 21, 2002, and Jacob, born March 6, 2004. On March 5, 2007, Vincent filed a complaint for divorce. The court entered a temporary order designating Dayle as the legal custodian and residential parent of the children, with Vincent receiving parenting time pursuant to the parties' agreement.

{¶13} The allocation of parental rights and responsibilities was a significant point of contention between the parties during the pendency of the proceedings. The record indicates that Christopher is a special needs child, and Vincent and Dayle had differing views regarding how to address his developmental challenges. As a result, each party desired full custody of the children.

{¶14} The trial court appointed a guardian ad litem, and Dayle moved the court for an order requiring the parties to submit to psychological evaluations to assist in the court's custody determination. The magistrate appointed Dr. William Kennedy, a clinical psychologist, to examine the parties. Dr. Kennedy prepared a written report and testified at the final divorce hearing on September 22, 2008. Based upon his evaluation, he recommended that Dayle be designated residential parent and legal custodian of the children. The guardian ad litem had recommended that custody be awarded to Vincent.

{¶15} On October 31, 2008, Vincent filed a motion to strike Dr. Kennedy's testimony. Vincent argued that Kennedy's testimony was improper because it was based on data provided by the parties which was not admitted into evidence at the hearing. In its February 19, 2009 decision, the magistrate overruled Vincent's motion to strike and designated Dayle as the childrens' residential parent and legal custodian. Vincent was awarded parenting time with the children each week.

{¶16} Vincent filed an objection to the magistrate's decision, challenging the denial of his motion to strike. His objection was overruled by the trial court in its August

4, 2009 entry. A final decree of divorce was entered on November 18, 2009.

{¶7} Vincent appeals the trial court's decision overruling his objection, raising two assignments of error for our review.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO STRIKE THE PSYCHOLOGICAL CUSTODY EVALUATION AT TRIAL AND LATER RELIED ON THE REPORT IN DETERMINING THE RESIDENTIAL PARENT OF THE MINOR CHILDREN."

{¶10} In his first assignment of error, Vincent contends that the trial court erred in overruling his objection to the magistrate's denial of his motion to strike Dr. Kennedy's testimony. Vincent argues that Kennedy's testimony was inadmissible because his opinion relied on several sources provided by the parties which were not admitted into evidence. These sources included: 1) a Children's Hospital evaluation of Christopher; 2) individualized education programs from Christopher's school; 3) a letter written by Dayle's father; 4) photographs; 5) the guardian ad litem's report; 6) information regarding school performance; and 7) journal entries written by Dayle. Vincent claims that Dr. Kennedy's reliance on these sources violated the dictates of Evid.R. 703.

{¶11} A trial court's decision granting or denying a motion to strike is reviewed on appeal under an abuse of discretion standard. *Madison Cty. Bd. of Commrs. v. Bell*, Madison App. No. CA2005-09-036, 2007-Ohio-1373, ¶86. An abuse of discretion is more than error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219. The admission of evidence, including expert testimony, is likewise within the discretion of the trial court and will not be reversed on appeal absent a showing of an abuse of discretion. *Williams v. Parker Hannifin Corp.*, Preble App. No. CA2009-09-025,

2010-Ohio-1719, ¶20.

{¶12} Evid.R. 703 provides for the basis of opinion testimony by experts. According to the rule, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." The Ohio Supreme Court has determined that Evid.R. 703 is satisfied where "an expert bases his opinion, in whole or in major part, on facts or data perceived by him." *State v. Solomon* (1991), 59 Ohio St.3d 124, syllabus. It is the burden of the objecting party to demonstrate that the expert principally relied on facts not admitted into evidence and not perceived by the expert. *Havanec v. Havanec*, Franklin App. No. 08AP-465, 2008-Ohio-6966, ¶15, citing *Farkas v. Detar* (1998), 126 Ohio App.3d 795, 800.

{¶13} In this case, Dr. Kennedy testified that he relied on multiple sources of data in his custody evaluation, including the information provided to him by the parties. However, Kennedy testified that the "majority of the weight" relative to the formation of his recommendation was based on the information he had personally gathered. Kennedy testified that he interviewed Vincent and Dayle and observed their interactions with the children. He also administered several psychological tests to the parties. According to Kennedy, he did not consider the outside information until after he had the opportunity to meet with the parties and score their tests. Kennedy explained, "I want the impression that I gathered from the individual to be my impression, not to be biased in any way by the data or by someone else's experience with them. I need to incorporate that information into the actual evaluation, but I want my first impression to be my first impression, not somebody else's."

{¶14} In overruling Vincent's objection, the trial court adopted the magistrate's conclusion that Dr. Kennedy's testimony was admissible because it was based primarily

on facts and data he personally perceived. The magistrate noted that the majority of Kennedy's testimony related to the battery of testing he performed, together with his interviews and observations of the parties and children. The magistrate also noted that although Kennedy testified to reviewing some outside sources, he indicated that he did not give those sources significant weight in his custody evaluation.

{¶15} On appeal, Vincent argues generally that Kennedy's testimony was inadmissible based upon the Ohio Supreme Court's decisions in *State v. Chapin* (1981), 67 Ohio St.2d 437; and *State v. Jones* (1984), 9 Ohio St.3d 123. In both cases, the court determined that the experts' opinion testimony was inadmissible under Evid.R. 703 because their opinions were based on outside reports and sources that were not admitted into evidence. See *Chapin* at 442; *Jones* at 125.

{¶16} However, both *Chapin* and *Jones* are distinguishable from the instant case in light of *Solomon*, 59 Ohio St.3d at 126. In *Solomon*, the Ohio Supreme Court determined that because the expert witnesses had personally evaluated the defendant and based their opinions on their examinations, their testimony was admissible under Evid.R. 703 despite the fact that they relied, in part, on records and reports they had not prepared. *Id.* The court found *Chapin* inopposite, noting that there was no indication that the expert witnesses in that case had personally examined the defendants, and they appeared to rely almost entirely on reports and records prepared by others that were not admitted into evidence. *Id.* The court also found *Jones* unpersuasive, concluding that although the expert witnesses in that case had testified to interviewing the defendant, there was no discussion in the case regarding the admissibility of their testimony as a result of their reliance on those personal examinations. *Id.*

{¶17} Based on the supreme court's decision in *Solomon*, and upon a close review of Dr. Kennedy's testimony, we conclude that the trial court did not abuse its

discretion in overruling Vincent's objection to the magistrate's decision denying his motion to strike. Although, as the magistrate initially noted, Kennedy considered sources prepared by the parties in the context of his custody evaluation, the record reveals that the majority of his testimony was based on facts and data he perceived. As a result, Dr. Kennedy's testimony was properly admitted under Evid.R. 703. Accord *In re Lauren P.*, Lucas App. No. L-03-1252, 2004-Ohio-1656. Vincent's first assignment of error is therefore overruled.

{¶18} Assignment of Error No. 2:

{¶19} "THE TRIAL COURT ERRED BY DESIGNATING APPELLEE AS THE RESIDENTIAL PARENT AND LEGAL CUSTODIAN OF THE MINOR CHILDREN."

{¶20} In his second assignment of error, Vincent challenges the trial court's adoption of the magistrate's decision designating Dayle as the childrens' residential parent and legal custodian. Vincent argues that the magistrate failed to sufficiently state its findings regarding each element of R.C. 3109.04(F)(1) in a manner that "would give a rational observer a sense of why [Dayle] was deemed residential parent."

{¶21} R.C. 3109.04 governs the allocation of parental rights and responsibilities. In making this determination, the trial court's primary concern is the best interest of the child. *Bristow v. Bristow*, Butler App. No. CA2009-05-139, 2010-Ohio-3469, ¶8, citing *Gamble v. Gamble*, Butler App. No. CA2006-10-265, 2008-Ohio-1015, ¶25. The trial court must consider all relevant factors related to the child's best interest, including but not limited to those specified in R.C. 3109.04(F)(1). *Bristow* at id. A trial court's decision regarding child custody matters will not be reversed on appeal absent an abuse of discretion. *Id.* at ¶9.

{¶22} Although Vincent challenges the trial court's adoption of the magistrate's custody determination, he did not raise this issue, even generally, in the context of his

objection to the magistrate's decision. Civ. R. 53(D)(3)(b)(ii) governs the filing of objections to a magistrate's decision and provides that "[a]n objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." Except for a claim of plain error, a party is prohibited from assigning as error on appeal the trial court's adoption of any finding of fact or legal conclusion, unless that party has objected to that finding or conclusion. Civ.R. 53(D)(3)(b)(iv).

{¶23} This court has consistently determined that if a party fails to object to a conclusion of law or finding of fact issued by a magistrate pursuant to Civ.R. 53, the party is precluded from raising the issue on appeal absent a claim of plain error. *Chivukula v. Williams*, Butler App. No. CA2009-07-187, 2010-Ohio-1634, ¶9; *Cravens v. Cravens*, Warren App. No. CA2008-02-033, 2009-Ohio-1733, ¶30; *Koeller v. Koeller*, Preble App. No. CA2006-04-009, 2007-Ohio-2998, ¶15. In failing to raise the issue in his objection, or argue plain error in his merit brief, Vincent is prohibited from challenging the court's custody determination for the first time on appeal. *Cravens* at ¶31. His second assignment of error is therefore overruled.

{¶24} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

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