

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

JARED THOMPSON,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-03-052
- vs -	:	<u>OPINION</u>
	:	1/18/2011
TRACY THOMPSON,	:	
Defendant-Appellant.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR09-05-0526

James C. Smith, 4000 Roosevelt Blvd., Middletown, Ohio 45044-6619, for plaintiff-appellee

Fred S. Miller, Baden & Jones Bldg., 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

BRESSLER, J.

{¶1} Plaintiff-appellant, Tracy Thompson, appeals from a judgment of the Butler County Court of Common Pleas, Division of Domestic Relations, naming her former husband defendant-appellee, Jared Thompson, as the residential parent and legal custodian of their minor children following the parties' divorce. We affirm.

{¶2} The parties were married in 2003 and have two children, one born in 2003 and

the other in 2005. In 2008, the parties became involved in a domestic dispute, at which time Tracy picked up a knife from a butcher's block in their kitchen and swung it at Jared, missing him the first time but stabbing him in the chest the second time, puncturing his lung. After the parties looked at each other momentarily, Tracy pulled the knife out of Jared's chest and called 911.

{¶3} Jared spent four days in the hospital for treatment of a collapsed lung. Tracy was arrested and later indicted for felonious assault, a felony of the second degree. She eventually pled guilty to a reduced charge of aggravated assault in violation of R.C. 2903.12, a felony of the fourth degree, for which she was sentenced to five years of community control and fined \$1,000.

{¶4} In 2009, Jared filed for divorce and requested that he be named the children's residential parent and legal custodian. The trial court granted the parties a divorce and named Jared the residential parent and legal custodian of the parties' children.

{¶5} Tracy now appeals, assigning the following as error:

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT NAMED PLAINTIFF-APPELLEE TO BE THE RESIDENTIAL PARENT AND LEGAL CUSTODIAN OF THE PARTIES' CHILDREN."

{¶7} Tracy argues the trial court abused its discretion in naming Jared the residential parent and legal custodian of their minor children, because she only stabbed him after he seriously provoked her, and she had been the children's primary caregiver and was an excellent mother to them. We find this argument unpersuasive.

{¶8} In divorce proceedings, a domestic relations court must "allocate the parental rights and responsibilities for the care of the minor children of the marriage." R.C. 3109.04(A). If the parties fail to agree on a shared parenting plan or if neither party files a parenting plan that is consistent with the children's best interest, the domestic relations court,

in a manner consistent with the children's best interest, must allocate the parental rights and responsibilities for the children's care primarily to one of the parents and designate that parent as the children's residential parent and legal custodian. R.C. 3109.04(A)(1).

{¶9} In determining a child's best interest, the court must consider all relevant factors, including, but not limited to the enumerated factors in R.C. 3109.04(F)(1). The enumerated factors include "[t]he child's interaction and interrelationship with the child's parents," R.C. 3109.04(F)(1)(c); "[t]he child's adjustment to the child's home, school, and community[,]" R.C. 3109.04(F)(1)(d); "[t]he mental and physical health of all persons involved in the situation[,]" R.C. 3109.04(F)(1)(e); and "whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or neglected child[,]" R.C. 3109.04(F)(1)(h).

{¶10} A trial court has broad discretion in allocating parental rights and responsibilities, and its decision on these matters will not be reversed absent an abuse thereof. *Johnson v. Johnson*, Butler CA2009-06-177, 2010-Ohio-1283, ¶6. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Id.* An appellate court may not substitute its judgment for that of the trial court since the trial court is in a far better position to observe the parties and make a determination that is in the child's best interest. *Id.* The trial court's decision on custody determinations will be upheld so long as there is some competent, credible evidence in the record to support it. See *id.*, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶11} At the close of evidence, the trial court examined the enumerated "best interest" factors in R.C. 3109.04(F)(1) and found, among other things, that Tracy has "serious mental health issues" as she has been diagnosed with "paranoid personality disorder" by psychologist Dr. Bobbie Hopes; that despite Tracy's contention at trial to the contrary, the parties' children witnessed the stabbing and had to have been affected by that event; and that it was Tracy, not Jared, who had been convicted of stabbing the other parent in the children's presence. The trial court characterized Tracy's act of stabbing Jared in the presence of their children as "horrific," and awarded him custody primarily because of this event.

{¶12} Tracy argues that "while [she] undoubtedly did stab her husband in front of the children," the trial court failed to take into account that "the crime was brought about by serious provocation on the part of Jared, resulting in a sudden fit of rage in [her.]" Specifically, she asserts that, immediately prior to the stabbing, Jared had begun berating her over a trivial matter and then grabbed her, choked her, dragged her to the floor, and threatened to kill her. However, the trial court expressly rejected Tracy's claims of provocation, finding that Tracy had an opportunity to tell the officer who responded to her 911 call that she had been acting in self-defense or in response to a serious provocation from Jared when she stabbed him, but instead, simply told the officer, "I lost it, I stabbed him." The trial court was in the best position to determine the credibility of the witnesses who testified at trial, including the parties, see *Johnson*, 2010-Ohio-1283 at ¶6, and the record provides ample support for the trial court's factual determination on the issue of provocation.

{¶13} Tracy also argues the trial court placed too much emphasis on the fact that she stabbed Jared in front of the children, while placing too little emphasis on the fact that she had been the children's "primary caregiver" and had been an excellent mother to them. We find this argument unpersuasive.

{¶14} In determining which parent should be named a child's residential parent and legal custodian, a domestic relations court must give due consideration to which parent had been the child's "primary caregiver." *Holm v. Smilowitz* (1992), 83 Ohio App. 3d 757, 776. Although this factor is not specifically listed in R.C. 3109.04(F)(1) as one of the enumerated factors for a court to consider in determining a child's best interest, the role of the child's primary caretaker is a factor warranting consideration in evaluating the child's interactions and interrelationships with parents, as well as the child's adjustment to the child's home, school, and community. See *Glover v. Glover* (1990), 66 Ohio App. 3d 724, 730. However, the fact that one parent has been the child's primary caretaker does not create a *presumption* that the parent found to be the child's primary caretaker should be named the child's residential parent and legal custodian; rather, this fact must be considered in conjunction with the other statutory factors. *Holm*.

{¶15} In support of her argument that she should have been named as the children's residential parent and legal custodian because she had been their primary caregiver prior to the stabbing, Tracy relies on *Marshall v. Marshall* (1997), 117 Ohio App.3d 182, 186-188. However, that case is readily distinguishable from this one.

{¶16} In *Marshall*, the court of appeals found that the trial court had abused its discretion by awarding custody of the parties' minor children to the father. *Id.* at 186. Specifically, the court of appeals found that the trial court "placed undue emphasis on the fact that [the mother] left Ohio and failed to return[.]" and that "[t]he trial court's decision appears to be an attempt to hold [mother] in contempt for her failure to abide by the prior court order to return to Ohio." *Id.* The court of appeals then found that "a trial court does not have the authority to modify or change custody of the children based upon [a parent's] failure to encourage or implement regular visitation" and that "[o]ther penalties for contempt could have been imposed by the trial court in this case with the potential result of securing

compliance with the court order." *Id.* at 186. The court of appeals cited the primary caregiver doctrine as additional support for its finding that the trial court abused its discretion by granting custody of the children to the father rather than the mother. See *id.* at 188.

{¶17} The case sub judice is readily distinguishable from *Marshall*, because in this case, Tracy's act of stabbing Jared in front of their children was far more egregious than the misconduct of the mother in *Marshall*, particularly since Tracy's conduct involved an act of physical violence against one of the children's parents, committed in the children's presence. The trial court characterized Tracy's act as "horrific," and the record fully supports that characterization.

{¶18} The trial court acknowledged that prior to the stabbing, Tracy handled 90 percent of the parenting duties with respect to the parties' children. However, the trial court found that Jared's failure to spend more time with the children stemmed from the fact that he would sometimes have to work 60 to 80 hours a week at his landscaping job. The trial court criticized Jared for leaving the children with his parents for the entire six-month period between January 2009 until July 2009 by noting that, even though it probably was wise of him to leave the children with his parents for part of that time due to the injuries he received as a result of the stabbing, Jared's decision to leave the children with his parents for that entire period was probably more "convenient" than "necessary." The trial court reminded Jared that he no longer had Tracy to share the parenting responsibilities when the children were at his household, and therefore he would "need to answer that call." However, while the trial court clearly had doubts about whether Jared would be able to meet those added responsibilities, we cannot say that the trial court abused its discretion in naming Jared, rather than Tracy, the children's residential parent and legal custodian, since similar, if not significantly greater, doubts would have existed had the trial court chosen Tracy for that role.

{¶19} In light of the foregoing, Tracy's sole assignment of error is overruled.

{¶20} Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur

[Cite as *Thompson v. Thompson*, 2011-Ohio-158.]