[Cite as *Althammer v. Pottorf*, 2011-Ohio-3764.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

GREGORY ALTHAMMER, :

Plaintiff-Appellant, : CASE NO. CA2010-11-090

: O P I N I O N

- vs - 8/1/2011

:

ELIZABETH POTTORF, :

Defendant-Appellee. :

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008 JI 16044

Terrell B. Snyder, 204 North Street, Batavia, Ohio 45103, for plaintiff-appellant

Schuh & Goldberg, LLP, Brian T. Goldberg, 2662 Madison Road, Cincinnati, Ohio 45208, for defendant-appellee

RINGLAND, P.J.

{¶1} Plaintiff-appellant, Gregory Althammer (Father), appeals from the decision of the Clermont County Court of Common Pleas, Juvenile Division, designating defendant-appellee, Elizabeth Pottorf (Mother), residential parent and legal custodian of Riley Gene Pottorf (Daughter), the parties' minor child. Father also appeals from the trial court's decision to sua sponte modify their previously agreed upon parenting time schedule. For the reasons outlined below, we affirm in part, reverse in part, and remand for further proceedings.

{¶2} Daughter was born on April 19, 2007. At the time of Daughter's birth, Mother was living with her husband, Kevin Pottorf (Husband), and their two sons. Husband, who was present at the hospital for her birth, was listed as father on Daughter's birth certificate.

{¶3} In the summer of 2007, Father, who was involved in a romantic relationship with Mother during her marriage to Husband, obtained genetic test results indicating he was Daughter's biological father. That fall, after learning of the genetic test results, Mother and Daughter, along with her two sons, moved into a home with Father. Approximately six months later, in the spring of 2008, Father moved out of the home after his relationship with Mother turned sour. At all times, Mother was Daughter's primary caregiver.

{¶4} On August 18, 2008, Father filed a complaint to determine parentage. After paternity was established, the trial court filed a "Temporary Agreed Entry for Parenting Time" granting Father parenting time with Daughter on alternate weekends beginning on Friday evening at 6:00 p.m. through Sunday evening at 6:00 p.m.

{¶5} On May 27, 2009, Father filed a complaint for custody. The parties subsequently entered into mediation that resulted in, among other things, an agreed modification to the trial court's November 5, 2008 "Temporary Agreed Entry for Parenting Time." Mediation, however, failed to produce a resolution to the matter and it was set for a final custody hearing on May 3, 2010.

{¶6} On June 17, 2010, following the hearing, a magistrate issued a decision designating Mother as residential parent and legal custodian of Daughter. The magistrate also sua sponte modified the parties' previously agreed upon parenting time schedule. Father objected to the magistrate's decision. The trial court, however, overruled Father's objections.

{¶7} Father now appeals from the trial court's decision, raising three assignments of error for review. For ease of discussion, Father's first and second assignments of error will

be addressed together.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR CUSTODY, MODIFICATION OF THE TEMPORARY AGREED ENTRY FOR PARENTING AND OTHER RELIEF."

{¶10} Assignment of Error No. 2:

{¶11} "THE TRIAL COURT ERRED BY FAILING EVEN TO ADDRESS THE FACT THAT DEFENDANT-APPELLEE CONTINUALLY LEFT THE CHILD WITH NON-PARENTS IN PREFERENCE OF OFFERING PLAINTIFF-APPELLANT THE FIRST OPTION TO SPEND PARENTING TIME WITH THE CHILD."

{¶12} In his first two assignments of error, Father argues that the trial court erred by designating Mother as Daughter's residential parent and legal custodian. We disagree.

{¶13} An appellate court reviews a trial court's custody determination for an abuse of discretion. *In re L.E.N.*, Clinton App. No. CA2010-11-019, 2011-Ohio-1722, ¶10, citing *In re Brown* (2001), 142 Ohio App.3d 193, 198. An abuse of discretion constitutes more than an error of law or judgment; it requires a finding that the trial court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 219.

{¶14} R.C. 3109.04 governs the allocation of parental rights and responsibilities. *Allgeier v. Allgeier*, Clinton App. No. CA2009-12-019, 2010-Ohio-5313, ¶21. 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. In determining the best interest of the child, R.C. 3109.04(F)(1) requires the trial court consider all relevant factors, including, but not limited to: the wishes of the parents; the child's interactions and interrelationships with parents, siblings, and other persons who may significantly affect the child's best interest; the

child's adjustment to home, school and community; and the mental and physical health of all persons involved in the situation. *In re A.B.*, Butler App. No. CA2009-10-255, 2010-Ohio-2964, ¶12. In addition, although not specifically listed in R.C. 3109.04(F)(1), the trial court "must give due consideration to which parent had been the child's 'primary caregiver.'" *Thompson v. Thompson*, Butler App. No. CA2010-03-052, 2010-Ohio-158, ¶14, citing *Holm v. Smilowitz* (1992), 83 Ohio App.3d 757, 776.

{¶15} As an initial matter, Father argues that the trial court "ignored" the "undisputed evidence, which established that Mother's living arrangements have been unstable since the child's birth," as well as evidence indicating Mother left Daughter in the care of Ron and Sue Pottorf, Husband's parents, when she was at work or out-of-town instead of offering him "the 'first option' or 'right of first acceptance,' thus preventing him from spending time with his child." The record, however, is devoid of any evidence to support Father's claims that the trial court "ignored" such evidence. In fact, in its June 17, 2010 decision, the trial court specifically stated that "Mother's living arrangements have been somewhat unstable since [Daughter's] birth," and that "[i]t was uncontroverted that Mother does not offer Father time with [Daughter] * * * either when she was at work, or on the nights when [Daughter] stays overnight with the Pottorfs."

{¶16} That being said, after a thorough review of the record, it is clear that the trial court considered all relevant factors in R.C. 3109.04(F)(1) in making its decision designating Mother residential parent and legal custodian. As the evidence indicates, Daughter, who was just three years old at the time, has a strong and stable relationship with Mother, her primary caregiver, and has bonded with her two-half brothers, ages seven and eight, who also reside with Mother. The evidence also indicates that since Daughter's birth, the Pottorfs, Husband's parents, have cared for her and her two-half-brothers when Mother is either at work or out-of-town. As Ron Pottorf testified, "[w]e've tried desperately to keep this as a family unit * * *." In

addition, just as the trial court found, and for which we agree, the evidence "clearly demonstrates the active role [Mother] has taken in caring for [Daughter] since her birth and continues to engage in the age appropriate interactions, life lessons, and she understands the development requirements of a three year old child."

{¶17} Although there was some evidence presented highlighting Mother's somewhat unstable living arrangements, because the trial court is better equipped to examine and weigh the evidence, determine the credibility of the witnesses, and make decisions concerning custody, we find no abuse of discretion in the trial court's decision designating Mother as Daughter's residential parent and legal custodian.[1] As this court has consistently stated, "[t]he discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned." *In re J.M.,* Warren App. No. CA2008-12-148, 2009-Ohio-4824, ¶17, quoting *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Therefore, Father's first and second assignments of error are overruled.

{¶18} Assignment of Error No. 3:

{¶19} "THE TRIAL COURT ERR IN THE AMOUNT OF PARENTING TIME ORDERED TO PLAINTIFF-APPELLANT IN THAT IT AWARDED HIM LESS TIME THAN ALREADY PROVIDED FOR UNDER THE TEMPORARY AGREEMENT AND LESS TIME THAN HE ALREADY ENJOYED."

{¶20} In his third assignment of error, Father argues that the trial court erred by sua sponte modifying the parties' previously agreed upon parenting time schedule. We agree.

{¶21} The trial court has broad discretion in deciding matters regarding the visitation

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1. The evidence indicates Mother has moved four times since Daughter's birth. However, except for a brief two-week period in the fall of 2009, Mother has lived in the same home with Daughter and her two sons since late 2008.

rights of nonresidential parents. *Shafor v. Shafor*, Warren App. No. CA2008-01-015, 2009-Ohio-191, ¶7, citing *Appleby v. Appleby* (1986), 24 Ohio St.3d 39, 41. The trial court's decision, therefore, is subject to reversal only where there is an abuse of discretion. *King v. King* (1992), 78 Ohio App.3d 599, 602, 605. As noted above, an abuse of discretion constitutes more than an error of law or judgment; it requires a finding that the trial court acted unreasonably, arbitrarily or unconscionably. *Blakemore*, 5 Ohio St.3d at 219.

{¶22} In its June 17, 2010 decision, the trial court stated the following:

{¶23} "Mother and Father have expanded Father's parenting time initially ordered in the Temporary Order of November 5, 200[8], by adding one overnight during Father's off week. * * * Both parties testified that the current schedule has since been as follows: On Father's off week, [Daughter] stays with him from Wednesday at 6:30 p.m. until Thursday morning. On alternate weekends, [Daughter] is with Father from Friday at 6:30 p.m. until Sunday at 6:00 p.m.

{¶24} "Both parties testified that this schedule works well for [Daughter] * * *."

{¶25} However, after a thorough review of the record, and although we agree with the trial court's decision finding both parties testified their current schedule worked well for Daughter, neither party testified that that was Father's current agreed upon parenting time. Instead, contrary to the trial court's findings, the parties testified that Daughter stayed with Father on his off week on Wednesday evening beginning at 6:00 p.m. until Thursday morning at 7:30 a.m. and on alternate weekends from Friday morning at 9:30 a.m. until Sunday evening at 6:00 p.m. Nothing in the record would support the trial court's sua sponte modification of the parties' previously agreed upon parenting time schedule. Therefore, while the trial court's decision may simply be a result of a clerical error, we nevertheless find the trial court erred by sua sponte modifying the parties' agreed upon parenting time schedule as such. Accordingly, we sustain Father's second assignment of error, reverse the trial court's

decision as it relates to Father's parenting time only, and remand the matter for further proceedings.

{¶26} Judgment affirmed in part, reversed in part, and remanded.

HUTZEL and HENDRICKSON, JJ., concur.

Hendrickson, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.