

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

JEFFREY DAVID CAVAGNARO, :
 :
Plaintiff-Appellant, : CASE NO. CA2012-02-012
 :
- vs - : OPINION
 : 9/4/2012
 :
NALMA DAIER CAVAGNARO, :
 :
Defendant-Appellee. :

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 09DR33142

Timothy N. Tepe, 301 East Silver Street, P.O. Box 148, Lebanon, Ohio 45036, for plaintiff-appellant

Lauren L. Clouse, 20 South Main Street, Springboro, Ohio 45066, for defendant-appellee

RINGLAND, J.

{¶ 1} Plaintiff-appellant, Jeffrey David Cavagnaro (Father), appeals the decision of the Warren County Court of Common Pleas, Domestic Relations Division, granting defendant-appellee, Nalma Daier Cavagnaro (Mother), the right of first refusal for additional parenting time if Father is unavailable for any period of time that includes an overnight.¹

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

{¶ 2} The parties were married on February 12, 2005, and a daughter was born issue of the marriage. The parties were subsequently divorced by a decree filed February 11, 2011. Father was designated as the residential parent and legal custodian of the parties' daughter. Mother was granted "reasonable rights of companionship with the minor child, not less than the Basic II Parenting Schedule of the Warren County Common Pleas Court, Domestic Relations Division."

{¶ 3} On October 7, 2011, Mother filed four motions for contempt, one of which included a motion to modify parenting time. The magistrate's October 19, 2011 decision found that there was not a change in circumstances and recommended that the parties continue to implement the Basic II Parenting Schedule. However, the magistrate additionally recommended that "each party shall have the right of first refusal for additional parenting time if the other party is unavailable for any time period that includes an overnight."

{¶ 4} On November 2, 2011, Father filed an objection to the magistrate's decision, specifically objecting to the recommendation that Mother receive the right of first refusal as described above. The trial court overruled Father's objection in a decision dated January 12, 2012.

{¶ 5} Father appeals, raising the following assignment of error:

{¶ 6} THE TRIAL COURT ERRED TO THE PREJUDICE OF [FATHER] BY MODIFYING THE [MOTHER'S] COMPANIONSHIP SCHEDULE WITH THE MINOR CHILD.

{¶ 7} Within this assignment of error, Father argues that the trial court abused its discretion in modifying Mother's companionship schedule without considering the factors set forth in R.C. 3109.051.

{¶ 8} The trial court has broad discretion in deciding matters regarding the visitation rights of nonresidential parents. *Appleby v. Appleby*, 24 Ohio St.3d 39, 41 (1986). Therefore, the trial court's decision is subject to reversal only where there is an abuse of

discretion. *King v. King*, 78 Ohio App.3d 599, 602 (12th Dist.1992). This is premised on the idea that the trial court must have the discretion to do what is equitable based upon the particular facts and circumstances of each case. *Booth v. Booth*, 44 Ohio St.3d 142,144 (1989), citing *Cherry v. Cherry*, 66 Ohio St.2d 348, 355 (1981). A reviewing court may not merely substitute its judgment for that of the trial court absent a showing that the decision was unreasonable, arbitrary, or unconscionable. *Quint v. Lomakoski*, 167 Ohio App.3d 124, 2006-Ohio-3041, ¶ 12 (2nd Dist.); *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 9} While a change in circumstances is required where there is a change in custody arrangements, any changes to visitation, or parenting time, are not subject to the same requirement. *Braatz v. Braatz*, 85 Ohio St.3d 40, 44-45, 1999-Ohio-203; see also *In re: Nichols*, 12th Dist. No. CA97-11-102, 1998 WL 295937 at 3 (June 8, 1998) (finding no requirement to show a change in circumstances with regards to changes in visitation). Instead, R.C. 3109.051 governs matters of parenting time and visitation. See *Braatz* at 44. Therefore, when ordering a modification of parenting time or visitation the court must consider the enumerated factors in R.C. 3109.051(D) as well as any other factor in the child's best interest. R.C. 3109.051(D); *id.* at 45. While it is always preferable for the trial court to mention R.C. 3109.051 and its factors, the court need not specifically refer to the statute. *Kager v. Kager*, 5th Dist. No. 2005CA00208, 2006-Ohio-2427, ¶ 10. However, the trial court's findings and/or the record should indicate that the court considered the statute and its factors when it rendered its decision. See, e.g., *id.*; *Braden v. Braden*, 11th Dist. No.2006-P-0028, 2006-Ohio-6878, ¶ 37, 49; *Bernard v. Bernard*, 7th Dist. No. 00 CO 25, 2002-Ohio-552, ¶ 41.

{¶ 10} R.C. 3109.051(D) states, in part, as applicable here, that: "In determining whether to grant parenting time to a parent pursuant to this section or [other sections], * * * in establishing a specific parenting time or visitation schedule, the court shall consider all of the

following factors: prior interrelationships with parents and relatives; the geographical distance between parents; the available time of both the child and parent(s); age of the child; child's adjustment to home, school and community; wishes and concerns of the child; health and safety of the child; child's time with other siblings; mental and physical health of all parties; each parent's willingness to reschedule missed parenting time; whether the residential parent has denied the other parent's rights to parenting time; whether either parent is establishing a residence outside the state; and any other factor in the best interest of the child."

{¶ 11} In the present case, it appears the trial court implicitly considered a few of the factors listed in R.C. 3109.051(D) when rendering its decision. However, the court did not clearly enumerate the factors considered under R.C. 3109.051(D), including the best interests of the child under R.C. 3109.051(D)(16), nor did it give any indication as to its reasoning in connecting those factors implicitly considered to the decision to modify the right of first refusal for additional parenting time if Father is unavailable for any period of time that includes an overnight.

{¶ 12} In reviewing a trial court's opinion, we must be able to ascertain the information and reasoning the court utilized in determining parenting time matters. When that analysis and clear reasoning is absent from the trial court's written opinion, it is impossible to review the decision without substituting the trial court's judgment with our own. As doing so is not permitted in an abuse of discretion review, we are forced to ask the trial court to clearly enumerate its reasoning and to follow statutory precepts before we can review its decision to modify the parenting time schedule. *Preece v. Stern*, 12th Dist. Nos. CA2008-09-024, CA2008-12-029, 2009-Ohio-2519, ¶ 14, 32.

{¶ 13} Having directed the trial court to clarify its written opinion so that we may properly review the decision for an abuse of discretion, we sustain Father's assignment of error, reverse the trial court's decision, and remand for further proceedings consistent with

this opinion.

HENDRICKSON, P.J., and PIPER, J., concur.