

[Cite as *Curry v. Curry*, 2010-Ohio-6536.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Anthony C. Curry,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-437 (C.P.C. No. 06DR07-2777)
Tishola L. Curry (nka Bivens),	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 30, 2010

Tishola L. Curry (nka Bivens) pro se.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations

KLATT, J.

{¶1} Defendant-appellant, Tishola L. Curry, now known as Tishola L. Bivens, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, that terminated a shared parenting decree and reallocated the parental rights and responsibilities between Bivens and plaintiff-appellee, Anthony C. Curry. For the following reasons, we affirm.

{¶2} The parties are the parents of three children. After the birth of their first child, the parties married and had two more children. On November 13, 2007, the parties divorced. Upon granting the divorce, the trial court issued a shared parenting decree,

which adopted the agreed shared parenting plan that the parties had submitted to the court. Pursuant to the terms of the shared parenting plan, the parties alternated custody of the children on a weekly basis, with the children living with Bivens one week and Curry the next week.

{¶3} On April 24, 2009, Curry moved to terminate the shared parenting decree. In support of his motion, Curry alleged that the children had resided with him exclusively since September 2008. He also stated that Bivens had moved numerous times since the divorce and that, before he had assumed total physical custody of the children, the children were excessively tardy and absent from school during Bivens' parenting time.

{¶4} A magistrate conducted an evidentiary hearing on Curry's motion. In his subsequent decision, the magistrate recommended that the trial court grant Curry's motion, designate Curry the residential parent and legal custodian, and grant Bivens parenting time consistent with Loc.R. 27 of the Franklin County Court of Common Pleas, Division of Domestic Relations. The magistrate reached this conclusion because he found that the parties had significant and ongoing difficulties communicating about the needs and concerns of their children. Also, according to the magistrate, Bivens' "substance abuse issues" exacerbated the strain on the parties' relationship, as well as each party's relationship with the children. (June 2, 2009 magistrate's decision, at 2.) The magistrate further found that Bivens had neither her own home nor a job, while Curry had remarried, established a stable and appropriate home, and enjoyed long-term, ongoing employment. To cease the constant acrimony over the children, the magistrate concluded that it was in the children's best interests for the shared parenting plan to end and for Curry to assume primary care, custody, and control of the children.

{¶5} Bivens objected to the magistrate's decision. She contended that the magistrate erred when he found that she had abused drugs and that Curry had remarried. At a hearing before the trial court, Curry agreed that both factual findings were erroneous. Consequently, the trial court sustained Bivens' objection, reversed the magistrate's decision, and remanded the matter to the magistrate for a hearing. The trial court also ordered a home investigation of Bivens' current residence.

{¶6} After a second evidentiary hearing and the court-ordered home investigation, the magistrate issued a second decision. Correcting his earlier finding of fact, the magistrate determined that the record contained no evidence that Bivens had ever used illegal drugs. The magistrate also found that Curry had not been married at the time of the first hearing, but that he had subsequently married his current spouse. Except for those findings of fact that he corrected, the magistrate incorporated the findings of fact from his original decision into the second decision. Adding to the original and corrected findings of fact, the magistrate also found that Bivens had asked Curry to take continuous possession of the children because her sister had died, she had lost her job, and she had discovered that drugs were being sold out of the home in which she and the children lived. Additionally, the magistrate found that, after the first hearing, Bivens had established her own residence, which provided a better environment than her previous living arrangement.

{¶7} Based on these revised findings of fact, the magistrate again concluded that the parties' inability to cooperate or effectively communicate necessitated the termination of the shared parenting decree. Because Curry offered more environmental and emotional stability than Bivens, the magistrate concluded that it was in the children's best

interests for Curry to be the sole residential parent and legal custodian. The magistrate again recommended that Bivens receive parenting time pursuant to the terms and conditions of Loc.R. 27.

{¶8} Bivens objected to the magistrate's decision, arguing that she had proved that she had never abused drugs and that she had a stable residence. Essentially, Bivens contended that she was a good mother who had encountered difficulties, and that Curry was unfairly exploiting those difficulties to obtain full custody of the children.

{¶9} In considering Bivens' objection, the trial court first noted that the record did not contain a transcript from the first evidentiary hearing before the magistrate. Therefore, the trial court accepted as true the findings of fact that arose from evidence adduced during the first evidentiary hearing. After reviewing the evidence from the second evidentiary hearing, the trial court concluded that Bivens had proven that she did not have a history of drug use and that she had established an appropriate home. Nevertheless, given the parties' trouble cooperating and communicating, the trial court concluded that termination of the shared parenting decree was in the children's best interests. The trial court also ruled that Curry would be the more stable residential parent and legal custodian, and thus, an award of parenting time to Bivens was in the children's best interest. Accordingly, the trial court overruled Bivens' objection, and it approved and adopted the magistrate's decision.

{¶10} Bivens now appeals to this court from that judgment. As an initial matter, we must address Bivens' failure to include any assignments of error in her brief. App.R. 16(A)(3) states that an "appellant shall include in its brief * * * [a] statement of the assignments of error presented for review, with reference to the place in the record where

each error is reflected." This requirement has great significance because appellate courts "[d]etermine [an] appeal on its merits on the assignments of error set forth in the briefs under App.R. 16 * * *." App.R. 12(A)(1)(b). Without assignments of error, an appellate court has nothing upon which to rule. *Chambers v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 06AP-1043, 2007-Ohio-1493, ¶5.

{¶11} Despite Bivens' noncompliance with App.R. 16(A)(3), she did follow App.R. 16(A)(4), which requires appellants to include in their briefs a statement of the issues presented for review. Because the issue Bivens set forth adequately asserts the alleged error upon which she seeks review, we will construe it as an assignment of error. See, e.g., *Hagberg v. Cincinnati Ins. Co.*, 10th Dist. No. 06AP-618, 2007-Ohio-2731, ¶7; *Leslie v. Ohio Dept. of Dev.*, 171 Ohio App.3d 55, 2007-Ohio-1170, ¶40. Thus, Bivens assigns the following error:

[T]he [trial] court err[ed] by allowing false allegations made by the Plaintiff to stand in its decision to terminate the Shared Parenting Decree And a Shared Parenting Plan for the Curry Children filed 11/13/07 and award full custody to Plaintiff[.]

{¶12} By her assignment of error, Bivens argues that the trial court erred in accepting Curry's "false allegations" as true and in resting its decision on those "false allegations." We disagree.

{¶13} A trial court may terminate a shared parenting decree that include an agreed shared parenting plan "upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children." R.C. 3109.04(E)(2)(c). In determining whether shared parenting is in a child's best interest, a trial court must consider all of the R.C. 1309.04(F)(1) and (2) factors, which includes "[t]he ability of the parents to cooperate and make decisions jointly, with respect

to the children." R.C. 1309.04(F)(2)(a). The parents' inability to effectively cooperate or communicate constitutes grounds for terminating a shared parenting decree. *Duricy v. Duricy*, 11th Dist. No. 2009-T-0078, 2010-Ohio-3556, ¶43. See also *Beismann v. Beismann*, 2d Dist. No. 22323, 2008-Ohio-984, ¶44-45 (holding that continuation of shared parenting is not in a child's best interest when a parent refuses to cooperate in sharing the care of the child); *A.S. v. D.G.*, 12th Dist. No. 2006-05-017, 2007-Ohio-1556, ¶52-54 (affirming the trial court's decision to terminate a shared parenting decree because the parents could no longer cooperate and communicate with each other regarding the child); *Massengill v. Massengill* (Mar. 23, 2001), 2d Dist. No. 18610 (same); *Milner v. Milner* (Dec. 14, 1999), 10th Dist. No. 99AP-13 (concluding that the trial court did not abuse its discretion in terminating the shared parenting decree because "shared parenting is not appropriate where the parents cannot communicate, cooperate and make joint decisions").

{¶14} An appellate court reviews a trial court's decision to terminate a shared parenting decree under the abuse of discretion standard. *Lopez v. Lopez*, 10th Dist. No. 04AP-508, 2005-Ohio-1155, ¶27. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶15} Here, the magistrate found that the parties had significant difficulties in communicating and cooperating. The trial court accepted this factual finding, and based upon it, concluded that termination of the shared parenting decree was in the children's best interests. Bivens does not challenge this factual finding or the trial court's reliance on it in her appeal. Accordingly, because the parties could neither effectively

communicate nor cooperate, we conclude that the trial court did not abuse its discretion in terminating the shared parenting decree.

{¶16} Once a trial court terminates a shared parenting decree, it must reapportion the parties' parental rights and responsibilities as if it had never issued a shared parenting decree and as if neither parent had ever requested shared parenting. R.C. 3109.04(E)(2)(d); *H.R. v. L.R.*, 181 Ohio App.3d 837, 2009-Ohio-1665, ¶11. When neither parent requests shared parenting, the trial court must proceed pursuant to R.C. 3109.04(A)(1). *Schmidli v. Schmidli*, 7th Dist. No. 02 BE 63, 2003-Ohio-3274, ¶25. In accordance with that subsection:

[T]he court, in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children, including, but not limited to, the responsibility to provide support for the children and the right of the parent who is not the residential parent to have continuing contact with the children.

In determining what allocation of parental rights and responsibilities is in a child's best interest, the trial court must consider all of the R.C. 3109.04(F)(1) factors. *Anderton v. Hatfield*, 10th Dist. No. 07AP-198, 2007-Ohio-7139, ¶39.

{¶17} Additionally, unless the trial court concludes that parenting time is not in a child's best interest, the trial court must "make a just and reasonable order or decree permitting each parent who is not the residential parent to have parenting time with the child at the time and under the conditions that the court directs." R.C. 3109.051(A). To determine whether to grant parenting time and to establish an appropriate parenting time schedule, the trial court must consider the R.C. 3109.051(D) factors. *Lumley v. Lumley*,

10th Dist. No. 09AP-556, 2009-Ohio-6992, ¶16; *Flynn v. Flynn*, 10th Dist. No. 03AP-612, 2004-Ohio-3881, ¶6.

{¶18} An appellate court must accord a trial court's allocation of parental rights and responsibilities the utmost respect. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Therefore, an appellant must demonstrate that the trial court abused its discretion before an appellate court will reverse a ruling that divides rights and responsibilities between the parents. *Id.*

{¶19} In the case at bar, based on its consideration of the R.C. 3109.04(F)(1) and 3109.051(D) factors, the trial court designated Curry the residential parent and legal custodian of the children and awarded Bivens parenting time pursuant to Loc.R. 27. Bivens contends that Curry's "false allegations" improperly influenced the trial court's decision. First, Bivens argues that the trial court ruled as it did because, contrary to the evidence, it believed that she abused drugs. A parent's illegal drug use might influence how a trial court weighs the evidence with regard to the R.C. 3109.04(F)(1) and 3109.051(D) factors. Here, however, the trial court explicitly found that Bivens did *not* abuse illegal drugs, and thus, the allegation that she was a drug user did not enter into the trial court's consideration when it reallocated the parties' rights and responsibilities.

{¶20} Bivens also argues that the trial court erroneously relied on Curry's false contention that she "abandoned" the children. We also find this argument unavailing. The trial court never found that Bivens "abandoned" her children. Rather, the trial court adopted the magistrate's factual finding that Bivens requested that Curry assume continual custody of the children because her sister had died, she had lost her job, and she had discovered that drugs were being sold out of the home in which she and the

children lived. This finding is consistent with the version of the facts Bivens presents in her appellate brief.

{¶21} Finally, Bivens contends that Curry made other untruthful statements during the course of the proceedings, including allegations that Bivens failed to ensure that their children attended school and that he had married. Because neither party testified to school attendance problems during the second evidentiary hearing, we must presume that Curry introduced evidence about this issue during the first evidentiary hearing. Bivens, however, failed to provide the trial court with a transcript or an affidavit of the evidence adduced during the first evidentiary hearing. Because it lacked a transcript or an affidavit of evidence, the trial court accepted the magistrate's findings of fact, and it only considered whether those findings of fact supported the magistrate's legal conclusions. See *Law Offices of James P. Connors v. Cohn*, 10th Dist. No. 08AP-1031, 2009-Ohio-3228, ¶23 (requiring a trial court to so limit its review of a magistrate's decision when an objecting party does not submit a transcript or affidavit of evidence). The magistrate did not make any factual findings regarding the children's school attendance. Consequently, the trial court did not consider the children's alleged attendance problems when reapportioning the parties' rights and responsibilities.

{¶22} With regard to Curry's remarriage, Curry testified at the second evidentiary hearing that he had only stated that he was engaged when he testified at the first evidentiary hearing. The evidence thus establishes that Curry did not misrepresent his marital status to the magistrate. Moreover, Curry did remarry, so the trial court could consider that fact when evaluating the evidence in light of the R.C. 3109.04(F)(1) and 3109.051(D) factors.

{¶23} In sum, we conclude that the trial court did not rely on "false allegations" when terminating the shared parenting decree and reallocating the parties' parental rights and responsibilities. Accordingly, we overrule Bivens' assignment of error, and we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

FRENCH and HARSHA, JJ., concur.

HARSHA, J., of the Fourth Appellate District, sitting by assignment in the Tenth Appellate District.
