

[Cite as *Rapp v. Pride*, 2010-Ohio-3138.]

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

NANCY J. RAPP fka Pride,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-12-311
- vs -	:	<u>OPINION</u>
	:	7/6/2010
ROBERT A. PRIDE,	:	
Defendant-Appellee.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
DOMESTIC RELATIONS DIVISION  
Case No. DR02-07-0885

Richard A. Hyde, 311 Key Bank Building, Hamilton, Ohio 45011, for plaintiff-appellant

M. Lynn Lampe, 1248 Nilles Road, Suite 7, Fairfield, Ohio 45014, for defendant-appellee

**YOUNG, P.J.**

{¶1} Plaintiff-appellant, Nancy Rapp, appeals the decision of the Butler County Court of Common Pleas, Domestic Relations Division, finding her in contempt, ordering parental make-up time, and awarding attorney fees. We affirm the decision of the trial court in part, reverse in part, and remand for further proceedings.

{¶2} Nancy and defendant-appellee, Robert Pride, were married and had two children born issue of the marriage. After the couple's divorce in 2003, the two entered into a shared parenting agreement whereby they shared custody of their minor daughters, who were 14 and 11 at the time of the hearing. Because relations between Nancy and Robert were very strained, the two communicated exclusively via email and exchanged the children at local stores and restaurants. Otherwise, Robert would come to Nancy's home, ring the doorbell, and wait in his car until the children came out.

{¶3} The animosity between the parties also caused them to set forth a strict visitation schedule and exchange policy within the shared parenting plan. During the school year, Robert had parenting time every Wednesday after school until Saturday at 6:00 p.m. During the children's summer vacation, Robert had visitation from Sunday at 6:00 p.m. until Tuesday at 5:30 p.m., from Wednesday at 7:00 a.m. to Thursday at 5:30 p.m., and on Friday from 7:00 a.m. until 5:30 p.m. Each parent was also afforded two weeks of summer vacation to be taken once a 30-day notice was given to the other parent.

{¶4} In 2008, and during Robert's parenting time, the oldest daughter went to the movies with her friend, but did not call Robert before she left as he had instructed her to. Robert went to the movie theatre and "terminated her evening as a consequence" of her disobeying his instruction to call him before going anywhere with the friend. As a result, the oldest daughter stopped visiting Robert and the two have not had visitation since November 2008.

{¶5} Robert continued to visit with his youngest daughter, and in the summer of 2009, gave Nancy a 30-day notice that he intended to exercise his vacation

visitation from 6:00 p.m. on July 5 to 6:00 p.m. July 12. Nancy replied via email, and reminded Robert that she had given notice that her vacation time would begin on July 12, and therefore asked Robert to clarify what time he planned on returning the child. In response, Robert sent an email stating that he would pick up his youngest daughter at 12:00 a.m. on July 5 and return her at 11:59 p.m. on July 11. Nancy did not reply to Robert's email or object in any way to the midnight pick-up time.

{¶6} At midnight on July 5, 2009, Robert parked in Nancy's driveway, rang the doorbell, and waited for his daughter to come out to begin her visitation. However, no one appeared, and Robert rang the door bell again and waited. After Robert rang the door bell a second time, the police came at Nancy's request and told Robert that he would not be picking up his daughter that night, and to work out the issue in court.

{¶7} Robert returned the next day at 6:00 p.m. to initiate his regular visitation according to the shared parenting plan. However, Nancy denied him visitation and called the police again. Robert sent Nancy several emails requesting parenting time in the weeks following the July 5 incident, but Nancy did not respond. On August 6, 2009, Nancy emailed Robert, suggesting that they meet at the West Chester Police Department to exchange their daughter. Believing that an exchange at a police station would create a negative impact on the child, Robert refused Nancy's suggestion. Robert tried to pick up his daughter at Nancy's home the day after the email, and was once again told to leave by the police. Robert did not have any visitation with the child the rest of the summer. However, once the school-year started, Robert began picking up his daughter at her bus stop after school, and Nancy did not deny any further visitation.

{¶18} Robert moved the court to find Nancy in contempt for failing to abide by the terms of the parenting plan, order counseling in an attempt to repair his relationship with his oldest daughter, order parental make up time for the visitation Nancy denied over the summer, and order attorney's fees and court costs.

{¶19} After a hearing, the magistrate denied Robert's motions for contempt and attorney's fees, and did not recommend that he be granted any parental make-up time. The magistrate did, however, grant Robert's motion regarding family counseling, and ordered him to pay the full expense of the therapy.

{¶10} Robert filed objections to the magistrate's decision, and the trial court sustained them in part. The trial court found Nancy in contempt for failing to abide by the terms of the shared parenting agreement, and ordered her to pay Robert \$1500 in attorney fees. The court also awarded Robert compensatory visitation to make up the week-long vacation and the regular parenting time Nancy denied him from July 5, 2009 until August 6, 2009. Nancy now appeals the decision of the trial court, which in effect overruled the magistrate's decision, raising the following assignment of error:

{¶11} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN OVERRULING THE DECISION OF THE MAGISTRATE AND FINDING PLAINTIFF-APPELLANT IN CONTEMPT AND ORDERING PLAINTIFF-APPELLANT TO PAY HER EX-HUSBAND'S ATTORNEY FEES AND COURT COSTS AND GRANTING DEFENDANT-APPELLEE "MAKE-UP" PARENTING TIME."

{¶12} In her assignment of error, Nancy asserts that the trial court erred in overruling the magistrate's decision to deny Robert's motions for attorney fees, contempt, and make-up parenting time. Finding part of her argument meritorious, we

sustain the part of Nancy's assignment of error regarding the trial court's grant of attorney fees.

{¶13} Because Nancy challenges the trial court's decision regarding domestic relations issues, we will employ an abuse of discretion standard so that the trial court's decision will only be reversed if it is unreasonable, arbitrary, or unconscionable. *Smith v. Smith*, Butler App. No. CA2005-04-091, 2006-Ohio-2136, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶14} Essentially, Nancy argues that the trial court should not have overruled the magistrate's decision because the magistrate who conducted the hearing was familiar with the parties and "their respective demeanor," and was in the best position to appreciate the contentious history between the parties. However, "the trial court, as the ultimate finder of fact, must make its own factual determinations through an independent analysis of the issues and should not adopt the findings of the [magistrate] unless the trial court fully agrees with them." *Hampton v. Hampton*, Clermont App. No. CA2007-03-033, 2008-Ohio-868, ¶14, citing *Inman v. Inman* (1995), 101 Ohio App.3d 115, 118.

#### **A. Contempt**

{¶15} Nancy asserts that the trial court erred by finding her in contempt after the magistrate denied Robert's motion to show cause why she should not be held in contempt.

{¶16} The Ohio Supreme Court has defined contempt as "disobedience of an order of a court. It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d

55, paragraph one of the syllabus. See also R.C. 2705.02. "The failure to abide by a shared parenting plan is a basis for civil contempt." *Hamed v. Delmatto*, Franklin App. No. 09AP-1020, 2010-Ohio-2478, ¶9.

{¶17} Courts must make civil contempt findings based on clear and convincing evidence, but because decisions in contempt proceedings lie within the discretion of the trial court, we will not reverse absent an abuse of discretion. *Caldwell v. Caldwell*, Gallia App. No. 02CA17, 2003-Ohio-1752.

{¶18} According to the record, Robert and Nancy filed a very detailed agreed parenting plan because they could not otherwise agree or communicate effectively regarding their children. The parenting plan specifically sets forth the visitation schedule, and expressly states that each parent is entitled to two weeks of vacation upon 30-days notice to the other parent. The vacation provision also states that email is considered an acceptable form of written notice.

{¶19} At the hearing, Nancy testified that she received Robert's vacation request, and that the email specifically stated that he would pick up the child at 12:00 a.m. on July 5. However unreasonable Nancy or the magistrate found the midnight pick-up time to be, Robert made his vacation request according to the shared parenting plan, and Nancy failed to communicate her disapproval of Robert's stated pick-up time or suggest an alternate exchange time. When Robert tried to initiate his vacation time according to the agreed entry and his 30-day notice, Nancy denied his vacation, thereby disobeying the shared parenting plan.

{¶20} Nancy also failed to abide by the terms of the shared parenting plan regarding Robert's regular summer visitation schedule. Even if Nancy refused to exchange the child at midnight, Robert's regular parenting time was scheduled to

start at 6:00 p.m. the following day, and Nancy's refusal to exchange the child was a direct violation of the terms of the shared parenting plan. Over the next month, Nancy continued to deny Robert's regular visitation until her August 6 email suggesting an exchange at the West Chester Police Department.

{¶21} These facts constitute clear and convincing evidence that Nancy disobeyed a lawful court order by failing to abide by the terms of the shared parenting agreement regarding vacation and regular summer visitation. The trial court's finding that Nancy disobeyed a lawful court order is sufficient to support the finding of contempt, and its decision was not an abuse of discretion.

#### **B. Parental Make-Up Time**

{¶22} Nancy also argues that the trial court abused its discretion by granting Robert make-up time for the week-long summer vacation and regular visitation he was denied until August 6, 2009.

{¶23} If a party's visitation rights are interfered with contemptuously, a court may award compensatory visitation to the party. R.C. 3109.051(K). "The court's decision whether to grant compensatory visitation will not be disturbed absent an abuse of discretion." *Huff v. Huff* (1995), Montgomery App. No. 14823, 1995 WL 600012 \*3.

{¶24} Essentially, Nancy asserts that the trial court ordered make-up time because it placed "100% of the blame" on her for the July 5 incident. Nancy further argues that Robert deserves the majority of blame for his "unreasonable and ridiculous actions" on the night he tried to pick up the child at midnight.

{¶25} Contrary to Nancy's argument, the trial court's decision does not parcel out blame to either party, and instead focuses on the terms of the shared parenting

agreement. As discussed above, specific to Nancy's contempt argument, she knew the terms of the agreement and was given notice of Robert's vacation request. By denying Robert his week of vacation, as well as his regular parenting time until August 6, 2009, Nancy failed to abide by the terms of the shared parenting agreement. In the process, Nancy denied Robert time with his daughter, and also denied the child visitation with her father.

{¶26} As the Second District Court of Appeals stated, "the need of a child for visitation with a separated parent is a natural right of the child, and is as worthy of protection as is the parent's right of visitation with the child; thus, the failure, without just cause, of a divorced or separated parent having custody of a child to accord visitation rights to the other parent is not only an infringement of the other parent's right to visitation but is also an infringement of the child's right to receive the love, affection, training and companionship of the parent." *Huff* at \*3.

{¶27} Given Nancy's denial of Robert's rightful parenting time and vacation, the trial court's decision to order make-up time was not arbitrary, unreasonable, or unconscionable, and did not constitute an abuse of discretion.

{¶28} We also note that during oral arguments before this court, Nancy requested that we fashion an outcome that would allocate blame more fairly than the trial court's complete reversal of the magistrate's decision regarding both the contempt and make-up parenting time. Nancy argues that the magistrate's decision takes into account Robert's "ultra strict and rigid" personality and "outrageous conduct," whereas the trial court's decision completely disregards what Nancy is forced "to deal with and the total lack of meaningful communication between the parties." However, it is well-settled in Ohio law that an appellate court's proper role in

domestic relations issues is to review the trial court's decision for an abuse of discretion. Furthermore, we may not substitute our judgment for that of the trial court. *In re Jane Doe 1* (1990), 57 Ohio St.3d 135. We are confined on review to "refrain from the temptation of substituting [our] judgment for that of the trier-of-fact, unless the lower court's decision amounts to an abuse of discretion." *Martin v. Martin* (1985), 18 Ohio St.3d 292, 295.

{¶29} Having found no abuse of discretion, we deny Nancy's request to fashion what she considers a more equitable outcome, and instead, analyze her final challenge to the trial court's decision.

### **C. Attorney Fees**

{¶30} Nancy argues that the trial court abused its discretion when it awarded Robert \$1,500 in attorney fees. We find this argument meritorious and remand the cause to the trial court to determine the appropriate amount of attorney fees.

{¶31} According to R.C. 3109.051 (K), "if any person is found in contempt of court for failing to comply with or interfering with any order or decree granting parenting time rights, \* \* \* the court that makes the finding \* \* \* shall assess all court costs arising out of the contempt proceeding against the person and require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt."

{¶32} Based on the mandatory language of the statute, the trial court correctly ordered Nancy to pay attorney fees once it found her in contempt. However, we must still review the trial court's valuation of the attorney fees for an abuse of discretion. As stated in R.C. 3109.051(K), the trial court was mandated to award "reasonable" attorney's fees. "What is reasonable for purposes of calculating

attorney fees, is a question of fact and the trial court must have evidence before it probative of that issue in order to make the finding." *Hall v. Nazario*, Lorain App. No. 07CA009131, 2007-Ohio-6401, ¶17.

{¶33} At the hearing before the magistrate, Robert's attorney asked him how much he had paid in attorney fees as a consequence of filing the contempt action. Robert replied, "\$1,500," and then stated that he had also paid court costs. However, the magistrate neither found Nancy in contempt, nor awarded attorney fees, and therefore made no factual finding regarding the reasonableness of Robert's claim that he paid \$1,500. We also note that the record does not contain any stipulations or other evidence to establish that Robert incurred \$1,500 in attorney fees in bringing his contempt motion, or that such fees were reasonable under the circumstances. Because the magistrate did not make any findings and the record contains no other evidence regarding attorney fees, the trial court had no factual basis for deciding the issue and its decision to award \$1500 was an abuse of discretion.

{¶34} Having found that the trial court abused its discretion in awarding Robert attorney fees without first determining the reasonableness of those fees, we reverse the trial court's decision regarding attorney fees and remand the issue back to the trial court to determine the reasonable fees necessary to bring the contempt action.

{¶35} Judgment affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

BRESSLER, and HENDRICKSON, JJ., concur.

