

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
ATHENS COUNTY

Michael K. Liming,	:	
	:	
Plaintiff-Appellant,	:	
	:	Case No. 08CA34
v.	:	
	:	<u>DECISION AND JUDGMENT ENTRY</u>
Denday Damos (fka Liming),	:	
	:	<b>Released 12/8/09</b>
Defendant-Appellee.	:	

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APPEARANCES:

Thomas R. McGuire, Guysville, Ohio, for Appellant.<sup>1</sup>

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Harsha, J.

{¶1} Michael Liming appeals the trial court’s judgment in this divorce action, contending that the trial court erred by refusing to enforce the parties’ in-court agreement for shared parenting of their two minor children and instead awarding legal custody to Denday Damos. He argues that because the evidence showed that Damos simply “changed her mind,” the trial court erred in concluding that the parties failed to have a meeting of the minds. However, the magistrate concluded that shared parenting was not in the children’s best interest, and after Liming failed to specifically object to the magistrate’s decision on that basis and failed to provide the court with a full transcript of the proceedings, the trial court agreed. Here, the trial court was statutorily required to determine whether shared parenting was in the best interest of the children prior to adopting any plan providing for it. Thus, even if the parties entered into a “binding”

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<sup>1</sup> Denday Damos did not file an appellate brief. However, she did file a pro se response to a magistrate’s order indicating that she would not be filing a brief and requesting that the matter be deemed submitted to the court without her further participation.

settlement agreement, the court was not “bound” to adopt it. Moreover, the issue of whether shared parenting is in the best interest of the children is not properly before us. Accordingly, Liming’s first assignment of error is meritless.

{¶2} Next, Liming contends that the trial court failed to conduct an independent review of the evidence concerning shared parenting because it did not address his argument that Damos “changed her mind.” However, the trial court’s decision expressly stated that it considered Damos’ testimony. And as we have stated, whether she changed her mind concerning the shared parenting agreement is irrelevant because the court found that shared parenting was not in the children’s best interest, a finding not properly before us in this appeal. Therefore, we reject Liming’s contention that the trial court erred in its review of the settlement agreement issue.

{¶3} Finally, Liming contends that the trial court erred in its division of the marital property and debt. He contends that the trial court failed to specify the dates it used in determining the meaning of “during the marriage” for purposes of valuing the marital property and failed to assign a monetary value to every asset and debt. He also argues that the “lopsided” division is inequitable. Our review of the record confirms that the trial court failed to clearly identify the dates it used in determining the duration of the marriage for purposes of property valuation. Because the trial court failed to do so, we are unable to determine whether the trial court properly valued the assets and made an equitable distribution of the property. Thus, we remand the case for the trial court to identify the dates used in its property valuation.

### I. The Procedural History and Facts

{¶4} Michael Liming and Denday Damos were married on August 8, 1993, and they have two children together. Liming filed for divorce in December 2001. After he filed a petition in the United States Bankruptcy Court for the Southern District of Ohio, an automatic stay of the proceedings occurred.

{¶5} The divorce proceedings ultimately came before a magistrate for a final hearing in April 2004, and after extensive negotiation, the parties informed the magistrate that they had reached an agreement. In the hearing room, while represented by counsel and under oath, the parties placed an agreement on the record. The parties agreed to a shared parenting arrangement, and the terms were outlined for the magistrate. They also made various stipulations concerning the distribution of marital property and debt. However, after further post-hearing negotiations, the parties were unable to submit a written joint shared parenting plan. Liming later filed a Motion to Enforce a Settlement Agreement and attached a Plan for Shared Parenting. He later filed an amended shared parenting plan with hand-written changes, changing the words “school residence parent” in Article (2), Paragraph (A)(2) to “primary residential parent.”

{¶6} A final hearing occurred in August 2004, at which time the magistrate also heard evidence concerning the enforceability of the purported settlement agreement. As part of these proceedings, the parties submitted Stipulations Regarding Divorce, Property, and Issues (“Stipulations”) with attached Exhibits A and B, which are documents Liming filed in the bankruptcy case.<sup>2</sup> Following the two-day hearing, the magistrate issued a

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<sup>2</sup> Paragraph 5 of the Stipulations states that the parties have marital interest in the property referenced in the exhibits. Exhibit A is the Order Confirming Chapter 13 Plan, dated March 14, 2003. The second page of Exhibit A is a schedule of real property; the third, fourth, and fifth pages are a schedule of personal property; pages six and seven are listings of property, both real and personal that Liming claims as exempt;

Proposed Decision with findings of fact and conclusions of law. The magistrate concluded that shared parenting was not in the best interest of the children and recommended that Damos be named their legal custodian and residential parent. The magistrate recommended that certain stipulations regarding the equitable division of the marital property be incorporated into the divorce decree. The magistrate also issued an Amended Proposed Decision, which recommended denying Liming's Motion to Enforce Settlement Agreement. The magistrate concluded that the parties failed to have a complete meeting of the minds concerning a shared parenting plan. Liming objected to the magistrate's decisions.

{¶7} The trial court adopted the magistrate's Proposed Decision, denied Liming's Motion to Enforce Settlement Agreement, and entered judgment accordingly. The January 19, 2005 divorce decree incorporated the parties' Stipulations, along with the attached exhibits. Liming appealed the court's judgment, but we dismissed the appeal for a lack of a final appealable order because the trial court had expressly reserved jurisdiction to distribute the marital property and to establish child support obligation until after the bankruptcy proceedings concluded.

{¶8} In June 2007, the bankruptcy court granted Damos relief from the automatic stay so that the trial court could proceed in making a determination regarding the division of the marital property. After conducting a hearing in October 2007, the magistrate issued

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page eight is a listing of creditors holding secured claims; page nine lists creditors holding unsecured priority claims; page ten lists executory contracts and unexpired leases; page eleven lists co-debtors; page twelve states Liming's current income; page thirteen lists income from real property; and page fourteen lists Liming's current expenditures. Exhibit B is a list of "Properties Owned by Michael Liming," which lists four pieces of real estate and references a double-wide mobile home. The four pieces of property consist of six parcels, each identified by parcel number. Exhibit B also lists two additional parcels with "no value," namely an oil lease and a gas lease. The documents set forth the "market value" of Liming's interest in certain pieces of real estate, as well as the value of his one-half interest in personal property and furnishing. They also give the "auditor's value" of each of the parcels of real estate.

a decision concerning the distribution of marital property and debt. Over Liming's objections, the trial court adopted the magistrate's decision. Liming now appeals.

## II. Assignments of Error

{¶9} Liming presents three assignments of error for our review:

Assignment of Error No. 1:

The trial court erred in determining that the parties did not enter into a binding settlement agreement with respect to the allocation of parental rights and responsibilities.

Assignment of Error No. 2:

The trial court erred in failing to make an independent review of the evidence in light of objections filed by Plaintiff-Appellant with respect to the allocation of parental rights and responsibilities.

Assignment of Error No. 3:

The trial court erred in its distribution of marital assets and debts.

## III. Settlement Agreement on Shared Parenting/Best Interest of the Children

{¶10} Generally, where the parties to an action enter into a voluntary settlement agreement in the presence of the court, the agreement is a binding contract and is enforceable. *Spercel v. Sterling Indus., Inc.* (1972), 31 Ohio St.2d 36, 285 N.E.2d 324. Where the agreement is reached by the parties in open court and preserved on the record or reduced to writing and filed, the court may, sua sponte, approve a journal entry that accurately reflects the terms of the agreement, adopting the agreement as its judgment. *Aristech Chem. Corp. v. Carboline Co.* (1993), 86 Ohio App.3d 251, 254-255, 620 N.E.2d 258. If the terms of a settlement agreement are in dispute, the issue of whether a trial judge should enforce the alleged settlement agreement is reviewed under an abuse of discretion standard. *Lucas v. Reese*, Athens App. No. 05CA2, 2005-

Ohio-3846, ¶8, citing *Moore v. Johnson* (Dec. 11, 1997), Franklin App. Nos. 96APE11-1579, 96APE12-1638, and 96APE12-1703, in turn citing *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 1997-Ohio-380, 683 N.E.2d 337. The term “abuse of discretion” connotes more than error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶11} However, when allocating parental rights and responsibilities for minor children under R.C. 3109.04, the trial court is obligated by R.C. 3109.052(B) to consider the best interest of the child. And under R.C. 3109.04(D)(1)(a)(i) through (iii), when either parent or both parents file a motion to adopt a shared parenting plan, the trial court has discretion to accept the shared parenting plan based upon the best interest of the children. Whether to adopt a shared parenting plan is within the sound discretion of the trial court. *Seng v. Seng*, Clermont App. No. CA2007-12-120, 2008-Ohio-6758, ¶10, citing *Haas v. Bauer*, 156 Ohio App.3d 26, 804 N.E.2d 80, 2004-Ohio-437, ¶20.

{¶12} In his first assignment of error, Liming contends that the trial court erred in determining that the parties did not enter into a binding settlement agreement and in not ordering a shared parenting plan. He argues the evidence does not support the magistrate’s factual findings that there was no meeting of the minds or that the oral agreement lacked specifics as to “critical” aspects. He points to Damos’ testimony at the August 2004 hearing and argues that she simply “changed her mind.”

{¶13} Even if we assume that the parties entered into a voluntary settlement agreement and agreed to a shared parenting arrangement, the court was statutorily obligated to determine whether a shared parenting plan was in the best interest of the

children. See R.C. 3109.052(B); R.C. 3109.04(D)(1)(a)(i) through (iii); see, e.g., *Seng v. Seng*, supra, citing *Haas v. Bauer*, supra. The magistrate found that shared parenting was not in the best interest of the children and based on its review of the limited record before it, the trial court agreed. On appeal, Liming disputes the magistrate's best interest findings because, he claims, she was well aware of the conflict between the parties at the time they stated their agreement on the record. However, the issue of whether a shared parenting plan is in the best interest of the children is not properly before us because Liming did not properly preserve this issue for appellate review under Civ.R. 53(D)(3).

{¶14} A party waives the right to challenge the trial court's adoption of a magistrate's decision unless that party objects to the magistrate's decision in accordance with Civ.R. 53(D)(3). See Civ.R. 53(D)(3)(b)(iv). Under Civ.R. 53(D)(3), a party must file objections to a magistrate's decision within fourteen days of the decision. See *id.* at (b)(i). Moreover, "[a]n objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." *Id.* at (b)(ii). Additionally, a party must support the objections with "a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." *Id.* at (b)(iii). "In essence, the rule is based on the principle that a trial court should have a chance to correct or avoid a mistake before its decision is subject to scrutiny by a reviewing court." *Barnett v. Barnett*, Highland App. No. 04CA13, 2008-Ohio-3415, ¶16, citing *Cunningham v. Cunningham*, Scioto 01CA2810, 2002-Ohio-4094, at ¶8. If a party fails to comply with any of the provisions in Civ.R. 53(D)(3)(b), then "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal

conclusion, whether or not specifically designated as a finding of fact or conclusion of law.”

{¶15} Here, the magistrate made numerous factual findings and conclusions of law and concluded that shared parenting was not in the best interest of the children. Specifically, the magistrate found:

Applying the law to the facts, the Magistrate believes the first issue to be addressed is Plaintiff’s request for shared parenting. The first factor a Court must consider in determining whether or not shared parenting is in the best interest of the children involved is the ability of the parents to cooperate and make decisions jointly, with respect to the children. It is clear from the time that this matter has been in Court that these parties are unable to communicate amicably. Plaintiff has taken every opportunity of contact with Defendant to harass her in one form or another. Much of this behavior has taken place in the presence of the children. Their attempts to arrive at a joint shared parenting plan, with the assistance of two attorneys, failed. Thus, to place them in a joint decision-making position is to place the boys at the center of a conflict every time a decision regarding their welfare must be made. This is clearly not in their best interests.

The second factor to be considered by the Court is the ability of each parent to encourage the sharing of love, affection, and contact between the children and the other parent. While Defendant can present a positive attitude toward Plaintiff’s role as a parent despite the harassment and financial difficulties she has faced during these proceedings, Plaintiff is unable to recognize any but the most superficial of Defendant’s parenting skills. He has attempted to portray her to the Court as an immoral person; to Dr. Apple as a child abuser; to his chosen evaluating psychologist and to a public children services agency as a sexual abuser. The Magistrate holds out little hope that he has the ability to encourage the sharing of love, affection, and contact between the children and Defendant.

Another factor to be considered by the Court is the recommendation of the Guardian ad Litem. Although the Guardian initially recommended initially recommended [sic] sole custody to Plaintiff and then shared parenting, by the time of the August 19<sup>th</sup> hearing, the Guardian was tempering this recommendation with a condition that Plaintiff first attend counseling. While he has seen a certified family therapist associated with his employer on several occasions, he has not had the kind of counseling that would address the problems associated with his difficulty interacting with others, including Defendant.

Given the foregoing, the Magistrate recommends that the Court deny Plaintiff's request for shared parenting.

{¶16} In his objections to the magistrate's decisions, Liming asserted that the decisions "fail to recommend that the settlement agreement be enforced and matters related and consequence thereto." Liming did not specifically object to the magistrate's factual findings and legal conclusion concerning why shared parenting was not in the best interest of the children. Thus, because he failed to object to these factual findings and legal conclusions, absent plain error, he has waived the right to assign them as error on appeal.

{¶17} Moreover, Liming failed to support his objections to the magistrate's decisions with a transcript of all of the evidence submitted to the magistrate or with a Civ.R. 53(D)(3)(b)(iii) affidavit of evidence. See Civ.R. 53(D)(3)(b)(iv). When a party fails to file a transcript of evidence or a Civ.R. 53(D)(3)(b)(iii) affidavit, our review is limited to determining whether the trial court abused its discretion when applying the law to the facts. *Barnett* at ¶19, citing *State ex rel. Duncan v. Chippewa Twp.* (1995), 73 Ohio St.3d 728, 730, 654 N.E.2d 1254.

{¶18} The trial court expressly stated in its decision that Liming had failed to provide it with a full transcript of the magistrate's hearing; Liming only filed a transcript of the testimonies of Damos, Tommy Adkins, and Shanah Hammock. The trial court went on to state that it had reviewed the magistrate's proposed decision, the limited transcripts, Liming's objections, and Damos' response and that it agreed with the magistrate's conclusion that shared parenting was not in the best interest of the children. The court stated that due to Liming's treatment of Damos, a joint decision-making plan will not work and that it was in the children's best interest to name Damos their sole legal custodian.

And finally, Liming did not specifically assign as error the trial court's decision on the children's best interest. See App. R. 12 (A)(1)(b) and App. R. 16(A)(3). Based upon limited record before us, we are unable to find an abuse of discretion.

{¶19} Accordingly, we overrule Liming's first assignment of error.

#### IV. Independent Review

{¶20} In his second assignment of error, Liming contends that the trial court failed to conduct an independent review of the evidence concerning shared parenting. Liming argues that the trial court failed to consider Damos' testimony at the final hearing and failed to address his argument that Damos simply "changed her mind" concerning the settlement agreement. He claims that the court's decision indicated that the court only considered the testimony of Tommy Adkins and Shanah Hammock.

{¶21} "In accordance with Civ. R. 53, which outlines the role of magistrates, the trial court is required to conduct an independent review of the case, having the 'ultimate authority and responsibility over the [magistrate's] findings and rulings,' *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 5, 615 N.E.2d 617, and must decide 'whether the [magistrate] has properly determined the factual issues and appropriately applied the law, and where the [magistrate] has failed to do so, the trial court must substitute its judgment for that of the [magistrate].'" *Lewis v. Hendrickson*, Gallia App. No. 02CA18, 2003-Ohio-3756, ¶16, citing *Inman v. Inman* (1995), 101 Ohio App.3d 115, 118, 655 N.E.2d 199.

{¶22} Contrary to Liming's assertions, however, the court expressly stated in its decision that it considered the transcript of Damos' testimony. And as we concluded above, the issue of whether the parties reached a settlement agreement concerning shared parenting is irrelevant because the magistrate found, and the court agreed, that

shared parenting was not in the best interest of the children. Again, because Liming did not specifically object to the magistrate's decisions on this basis or assign it as error here, we do not consider the issue on appeal. Accordingly, we reject Liming's contention that the trial court erred in failing to conduct an independent review of the issue concerning the alleged settlement agreement.

{¶23} Therefore, we overrule Liming's second assignment of error.

#### V. Equitable Division of the Property

{¶24} In his third assignment of error, Liming contends that the trial court erred in its distribution of marital property. First, he argues that the court failed to comply with R.C. 3105.171(G) and specify the date it used in determining the meaning of "during the marriage" for purposes of valuing the marital property and debt. He contends that the trial court primarily relied on the value of certain property as set forth in the bankruptcy documents, i.e. the exhibits to the Stipulations, despite the fact that the parties did not stipulate as to the value of that property and that the documents did not specifically identify a date of valuation. He also contends that the trial court used different dates in its valuation, without proper explanation. Second, he contends that the trial court failed to assign a value to certain marital property and debt and argues that this Court has no basis upon which to review the equitable division. Finally, he argues that the "lopsided" division was inequitable.

{¶25} Several rules govern our analysis of Liming's contentions relating to property distribution, including the familiar maxim that a trial court in any domestic relations action has broad discretion in fashioning an equitable division of marital property. *Blakemore*, supra, at 218; see, also, *Bisker v. Bisker* (1994), 69 Ohio St.3d 608,

609, 635 N.E.2d 308. Although the court has broad discretion, it is not unlimited. Thus, in making any division of marital property the court must comply with statutory mandates concerning the procedure and analysis it uses in making its distribution. A failure to do so amounts to per se abuse of discretion.

{¶26} The duration of the marriage is critical in distinguishing marital, separate, and post-separation assets and liabilities, and determining appropriate dates for valuation. *Eddy v. Eddy*, Washington App. No. 01CA20, 2002-Ohio-4345, at ¶23, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318, 432 N.E.2d 183. Under R.C. 3105.171(A)(2), “during the marriage” means whichever of the following is applicable:

(a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation;

(b) If the court determines that the use of either or both of the dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, ‘during the marriage’ means the period of time between those dates selected and specified by the court.

{¶27} Thus, the court may presume the date of the final hearing for divorce is the appropriate termination date of the marriage unless the court determines that the application of such a date would be inequitable. See *Deacon v. Deacon*, Cuyahoga App. No. 91609, 2009-Ohio-2491, ¶19, citing *O’Brien v. O’Brien*, Cuyahoga App. No. 89615, 2008-Ohio-1098, ¶40, in turn citing *Berish* at 321. In *Berish*, the Supreme Court of Ohio acknowledged that equity may occasionally require the trial court to choose a de facto termination of marriage date. “The choice of a date as of which assets available for equitable distribution should be identified and valued must be dictated largely by pragmatic considerations. \* \* \* [T]he precise date upon which any marriage irretrievably

breaks down is extremely difficult to determine, and this court will avoid promulgating any unworkable rules with regard to this determination. It is the equitableness of the result reached that must stand the test of fairness on review.” *Berish* at 319-320.

**{¶28}** However, R.C. 3105.171(G) provides:

In any order for the division or disbursement of property or a distributive award made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property had been equitably divided and *shall specify the dates it used in determining the meaning of ‘during the marriage’*. [emphasis added].

**{¶29}** A court must specify the dates it uses in determining the beginning and ending of the marriage in order to appropriately value each asset and to determine whether it is marital or separate in nature. See Sowald & Morganstern, Domestic Relations Law, Baldwins Ohio Practice (4 Ed.), Section 12:6. Failing to specify the precise dates that are used in valuing assets constitutes error on the part of the trial court. See *Budd v. Budd*, Summit App. No. 2485, 2009-Ohio-2674, ¶12, citing *Weller v. Weller*, Geauga App. Nos. 2006-G-2723, 2006-G-2724, 2007-Ohio-4964, at ¶29. “Given the broad discretion a trial court has in determining the duration of the marriage, the trial court must clearly identify the date upon which the marriage was terminated for the purpose of valuing marital assets.” *Budd* at ¶12. Moreover, “[a]n appellate court cannot undertake a review of whether marital assets have been accurately valued and divided until the specific valuation dates used by the trial court have been clearly identified.” *Id.*

**{¶30}** Furthermore, “the provisions of R.C. 3105.171 require that a monetary value be placed on every contested asset of the parties in a divorce proceeding.” *Knight v. Knight* (Apr. 12, 2000), Washington App. No. 99CA27, 2000 WL 426167, at \*4, citing, e.g., *Pawlowski v. Pawlowski* (1992), 83 Ohio App.3d 794, 799, 615 N.E.2d 1071; *Goode*

*v. Goode* (1991), 70 Ohio App.3d 125, 132, 590 N.E.2d 439. Thus, “the trial court is under a mandatory duty to value and classify the contested property as either marital or separate before distributing it.” *Id.* Finally, the trial court must make findings under R.C. 3105.171(G) “in sufficient detail to allow for meaningful appellate review of its decision.” *Knight* at \*4.

{¶31} Here, the magistrate’s decision failed to specify the dates used in determining the duration of the marriage, and Liming objected to the trial court on that basis. In overruling his objections, the trial court found that the magistrate properly relied upon the valuations that Liming had submitted to the bankruptcy court. Specifically, the court found that the magistrate properly identified the March 14, 2003, Bankruptcy Order Confirming Chapter 13 Plan, which was attached to the parties’ August 20, 2005, Stipulations, as “the best evidence of Plaintiff’s evaluation of marital assets at the time the divorce was pending.” However, the trial court’s decision did not address the dates used in determining the duration of the marriage and did not specifically identify the date upon which the marriage was terminated for purposes of valuing the marital property.

{¶32} And because the trial court failed to identify specific dates, we are unable to determine whether the trial court accurately characterized property as marital or separate and whether it made an equitable distribution of the property. Accordingly, we remand the case for the trial court to identify the dates it used in determining the term of the marriage for purposes of its property valuation.

{¶33} Thus, we overrule Liming's first and second assignments of error, sustain his third assignment of error in part, and remand the case to the trial court for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART  
AND REVERSED IN PART AND  
CAUSE REMANDED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**