[Cite as *Biers v. Biers*, 2013-Ohio-315.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Bradley Biers	Court of Appeals No. OT-11-039
Appellee	Trial Court No. 07DR109A
v.	
Enedelia Biers n.k.a. Enedelia Marez	**DECISION AND JUDGMENT**
Appellant	Decided: February 1, 2013

* * * * *

Christopher Marcinko, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas in a post-divorce action regarding the motions of defendant-appellant Enedelia Biers, n.k.a. Marez, to reallocate parental rights and requesting that plaintiff-appellee, Bradley Biers, have supervised visitation with the minor children of the parties.

{¶ 2} The facts of this case are as follows. On October 16, 2008, the lower court filed a judgment entry granting the parties a divorce and adopting an agreement reached by the parties that resolved all of the issues between them. Included in that judgment was the court's adoption of the parties' shared parenting plan, which set forth the parties' rights and responsibilities regarding their three minor children. That plan was subsequently modified by a consent entry dated April 13, 2010.

{¶ 3} On March 2, 2011, appellant filed a motion to reallocate parental rights and responsibilities. Appellant asserted that because appellee had not been complying with his responsibilities under the shared parenting plan, the plan had become obsolete and not in the best interests of the children. She therefore asked to be named the primary residential parent of the children and that appellee be granted standard court visitation. Thereafter, on April 20, 2011, appellant filed a motion for emergency custody. She based her motion on an incident that had occurred on March 21, 2011, in which appellee was involuntarily committed to the mental health unit of a local hospital. She further cited appellee's irrational fears of attack by an unknown assailant and his general unpredictable and haphazard behavior. The court granted the motion for emergency custody and set the matter for a hearing. Subsequently, and prior to the hearing, appellant also filed a motion to allow appellee to have supervised visits with the children. Appellant asserted that it would be in the best interest of the children to have visitation with their father but that it should be at a safe and secure environment.

{¶ 4} The case proceeded to a hearing on all of the pending motions before a court appointed magistrate on June 27, 2011. Appellant was represented by counsel but appellee chose to represent himself. At the hearing both appellant and appellee testified, as did several police officers from the Port Clinton Police Department and the chief of the Port Clinton Fire Department. That testimony revealed the following scenario of events.

{¶ 5} On March 21, 2011, appellee contacted the Port Clinton Police Department to report that his wife Shannon's boyfriend had been calling, harassing and stalking him and that he feared for his life. Officers Joel Barton and Richard Vance responded to the call. In addition, the officers contacted Kent Johnson, the chief of the Port Clinton fire department. Appellee is a volunteer fireman and the officers believed that Chief Johnson, as appellee's supervisor, would have more success talking to him. The officers learned that appellee was sitting in his home with a firearm because he was fearful of his wife's boyfriend. They convinced him to come out of his home so they could speak to him. When he exited the home he did not have his gun, but his appearance concerned the officers. Appellee was disheveled and distraught, was wearing a t-shirt that had food stains down the front, and looked as if he had not slept in days. In speaking to appellee, he could not give the officers rational or valid reasons for his fear of an attacker. Eventually, Chief Johnson convinced appellee to allow the officers to take him to Magruder Hospital. Initially, appellant was involuntarily committed for a psychiatric evaluation. However, upon his transfer to St. Charles Hospital, he voluntarily committed himself for mental health treatment. He remained in that hospital for seven days. At the

hearing below, appellee testified that he sees a counselor once a week, sees a psychiatrist once a month and takes an antidepressant. He further testified that he gave his hunting rifle to his father and that he has no other guns in his house, although he admitted that he does have a permit to carry a concealed weapon.

{¶ 6} Other testimony at the hearing addressed issues of the parties' failure to adhere to the shared parenting plan and appellant's request that appellee have supervised visitation. Appellant testified that in the winter and spring of 2011, appellee became depressed due to marital problems with his wife Shannon. During that time period, he only sporadically adhered to the parenting plan which called for the children to live with the parties on alternating weeks. Appellant also testified about an incident that had occurred during the summer of 2010. She stated that appellee called her and said he wanted to come see the children because he was going to die and wanted to tell them. When he arrived, he seemed distraught, although he did not say he was in bad health. Appellant would not let him talk to the children.

{¶ 7} Appellant testified that she no longer believed that shared parenting was in the children's best interest because she did not believe that appellee could care for the children the way they needed to be cared for. At the time of the hearing, the children were 10, 7 and 5 years old, and appellee lived in a one-bedroom apartment, although he testified that he was planning to move to a two-bedroom apartment. Appellant requested that she be named the custodial parent and that appellee be granted supervised visitation with the children at an organization called Joyful Connections. Appellant believed that

such visitation would be in the best interest of the children until she was satisfied that appellee was mentally healthy. She also stated that with visitation at Joyful Connections, she would not worry about the children's safety.

{¶ 8} On July 29, 2011, the magistrate filed a decision on the pending motions. After making numerous findings of fact regarding the events of March 21, 2011, and the parties' history with shared parenting, the court made the following findings:

> 35. This Magistrate specifically makes a finding that this court commends, and does not penalize Mr. Biers for initiating the phone call to the PCPD himself on 3/21/2011 for help, and by voluntarily committing himself to St. Charles Hospital to get the mental health treatment he needed at the time. The Magistrate further finds that neither party subpoenaed any witnesses and/or records from either The Giving Tree and/or Dr. Ih Foo Linn. This Magistrate finds that such records are critical in determining Plaintiff's mental health and ultimately, the outcome of this hearing. Therefore, after discussion with Judge Winters, this Magistrate has issued a subpoena for records only from the Giving Tree and Dr. Ih Foo Linn so as to make the necessary decisions in this case, including but not limited to, what is in the best interest of the children.
>
> 36. This Magistrate issued a Subpoena Duces Tecum for Documents Only in July 2011 to The Giving Tree and to Dr. Ih Foo Linn for Plaintiff's counseling and medical records; Plaintiff first signed a Release of

> Authorization for same. Pursuant to subpoena, this Magistrate received and read all of the documents on July 22, 2011. Upon review of said documents, this Magistrate is somewhat concerned that Plaintiff failed to show for several scheduled counseling appointments in the spring of 2011, but is overall satisfied with his progress in counseling to date, as well as compliance with his medications. Therefore, I find he currently presents no threat of harm to himself or his children so long as he remains in counseling and continues on his prescribed medications.

{¶ 9} Based on the findings of fact, the magistrate recommended that the court deny appellant's motion for supervised visitation, vacate the emergency temporary custody order and reinstate the amended/modified shared parenting plan. Appellant responded by filing objections to the magistrate's report. Appellant argued that the magistrate improperly relied upon her own investigation into exhibits that were not properly before the court, were not properly authenticated, were not made available to counsel, were not subject to cross-examination and were hearsay.

{¶ 10} On November 2, 2011, the lower court filed a judgment entry overruling appellant's objections and adopting the magistrate's decision. Regarding appellant's objections, the court determined that although the magistrate exceeded her authority by reviewing evidence outside of the record, there was sufficient, competent and credible evidence in the record to support the court's decision and that the error was therefore

harmless. Appellant now challenges that judgment through the following assignments of error.

Assignment of Error #1

The court in this matter erred in permitting the magistrate to conduct an independent investigation of facts in this matter after the record was complete and in finding that the magistrate's own external investigation of evidence outside of the record after the trial on this matter was concluded was harmless error.

Assignment of Error #2

The court erred in providing undue assistance to a pro se litigant by not only assisting him procedurally, but by obtaining, ex parte, a medical release from him and then subpoenaing and relying upon medical records on his behalf, after the close of evidence.

{¶ 11} Because they are related, we will address the assignments of error together. Appellant asserts that the lower court erred and abused its discretion in adopting the magistrate's decision where that decision was based on the magistrate's independent investigation of facts outside of the record.

{¶ 12} In reviewing a trial court's ruling on objections to a magistrate's decision, we review the ruling for an abuse of discretion with reference to the nature of the underlying matter. *King v. King*, 9th Dist. Nos. 11CA0006-M, 11CA0023-M, 11CA0069-M, 2012-Ohio-5219, ¶ 30. In determining the allocation of parental rights

and responsibilities for the care of minor children, the trial court is vested with broad discretion. *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). Absent an abuse of that discretion, a trial court's decision regarding these issues will be upheld. *Masters v. Masters*, 69 Ohio St.3d 83, 85, 630 N.E.2d 665 (1994). An abuse of discretion implies that the court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). In applying an abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. *See Davis v. Flickinger*, 77 Ohio St.3d 415, 416, 674 N.E.2d 1159 (1997). "This highly deferential standard of review rests on the premise that the trial judge is in the best position to determine the credibility of witnesses because he or she is able to observe their demeanor, gestures, and attitude. * * * This is especially true in a child custody case, since there may be much that is evident in the parties' demeanor and attitude that does not translate well to the record." *In re LS*, 152 Ohio App.3d 500, 788 N.E.2d 696, 2003-Ohio-2045, ¶ 12 (8th Dist.).

{¶ 13} R.C. 3019.04(E) sets forth the standard for modifying a child custody order and reads in relevant part:

> (1)(a) The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, * * * or either of the parents subject to a shared

parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain * * * the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

(i) * * * both parents under a shared parenting decree agree to a change in the designation of residential parent.

(ii) The child, with the consent * * * of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.

(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment of the child.

{¶ 14} R.C. 3109.04(F)(1) then provides, in relevant part, that in determining the best interest of the child, the court is to consider all relevant factors, including, but not limited to:

(a) The wishes of the child's parents regarding the child's care;

* * *

(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

* * *

(e) The mental and physical health of all persons involved in the situation;

* * *

(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court[.]

{¶ 15} While the trial court has broad discretion in matters regarding the custody of children, its exercise of that discretion "is not unlimited, but must always be rooted in the facts of the case." *Beekman v. Beekman*, 96 Ohio App.3d 783, 787, 645 N.E.2d 1332 (4th Dist.1994). As such, a court's decision to modify a prior shared parenting plan must be supported by sufficient factual evidence regarding the change in circumstances, the child's best interest, and one of the factors identified under R.C. 3109.04(E)(a).

{¶ 16} Upon a review of the magistrate's decision and appellant's objections thereto, the lower court agreed that the magistrate exceeded her authority by reviewing evidence outside of the record. The court, however, then pointed to the findings of fact that supported the conclusion that appellee was not a threat to himself or his children and that appellant had not met her burden of proof for a change of the shared parenting plan. Those facts, as summarized by the lower court are:

1. Plaintiff voluntarily went with Officer Barton for a mental health evaluation (Finding No. 3);

2. Officer Vance, who responded to Plaintiff's residence on March 21, 2011, had no concern for his safety after talking with Plaintiff (Finding No. 4);

3. Fire Chief Johnson did not think Plaintiff was a danger to anyone else at the time of the March 21, 2011 call (Finding No. 6);

4. Defendant points to no specific action of Plaintiff that would warrant him being separated from his children other than she is "unsure" of his mental status (Finding No. 24);

5. Plaintiff holds two jobs, is subject to random drug testing for his employment, meets with a Giving Tree caseworker one time per month[1], meets with his psychiatrist one time per month, takes an antidepressant and there are no weapons in his home (Findings No. 27, 28);

6. There is no evidence that Plaintiff has ever hurt or attempted to hurt his children in any way and that it is in the children's best interest to see and be with their father (Finding No. 32.).

{¶ 17} All of these findings were based on testimony at the hearing below. In addition, and as recognized by the lower court, appellant did not meet her burden of proof in regard to the requirements set forth in R.C. 3109.04(E) for a modification of the shared parenting plan. While the magistrate clearly erred in conducting her own independent

[1] Although the court found that appellee meets with the caseworker once a month, appellee clearly testified that he meets with the Giving Tree counselor once a week.

investigation and relying on evidence she learned through that investigation, *see Wallace v. Wallace*, 195 Ohio App.3d 314, 2011-Ohio-4487, 959 N.E.2d 1075, ¶ 17 (9th Dist.), the lower court corrected that error by reviewing the record and ignoring the evidence from outside the record. *See Jarvis v. Jarvis*, 7th Dist. No. 03-JE-26, 2004-Ohio-1386.

{¶ 18} Accordingly, appellant's assignments of error are not well-taken.

{¶ 19} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE