IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NATALIE M. SIEGEL,	:	APPEAL NO. C-140296 TRIAL NO. DR-1201717
Plaintiff-Appellant,	:	
vs.	:	*O P I N I O N.*
BRIAN A. SIEGEL,	:	
Defendant-Appellee.	:	

Appeal From: Hamilton County Court of Common Pleas, Domestic Relations Division

Judgment Appealed from is: Reversed in Part, Vacated in Part, and Cause Remanded

Date of Judgment Entry on Appeal: May 6, 2015

Cathy R. Cook, for Plaintiff-Appellant,

James R. Hartke, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

CUNNINGHAM, Presiding Judge.

{¶1} Plaintiff-appellant Natalie M. Siegel appeals from the judgment of the Hamilton County Court of Common Pleas, Domestic Relations Division, awarding sole custody of the parties' minor child to defendant-appellee Brian A. Siegal in a divorce action. Because the trial court abused its discretion when it failed to consider shared parenting for the reason that the shared-parenting plan was untimely filed, we must reverse the part of the trial court's judgment awarding sole custody to Brian, and vacate the remainder of the trial court's judgment allocating the parental rights and responsibilities of the parties. And we remand the cause for the trial court to consider shared parenting under the relevant provisions of R.C. 3109.04.

I. Background Facts and Procedure

{¶2} The parties married in November 2009, and had one child. Natalie filed for divorce in August 2012, and requested sole custody of the child. Thereafter, Brian requested shared parenting, and filed his proposed shared-parenting plan on December 20, 2013. The custody hearing began 26 days later, on January 15, 2014, and continued in progress on January 26, 2014, and April 12, 2014.

{¶3} At the custody hearing, the parties proceeded under the reasonable assumption that the trial court was considering Brian's request for shared parenting under the terms of his shared-parenting plan. Natalie presented relevant evidence in support of the court ordering shared parenting, including an exhibit containing her modifications to Brian's plan that she believed were in the best interest of the child. The trial court accepted that exhibit into evidence without any reservation. And the court refused to allow Brian to submit into evidence an exhibit containing

modifications to his proposed shared-parenting plan because it found that Natalie would be prejudiced.

{¶4} But in its decision awarding sole custody to Brian, the trial court refused to entertain Brian's proposed shared-parenting plan. The court explained in a footnote that R.C. 3109.04(G) states that the shared-parenting plan "shall be filed * * * at a time at least thirty days prior to the hearing on the issue of the parental rights and responsibilities for the care of the children." The court found that Brian had not filed the plan more than 30 days before the commencement of the custody hearing, nor had he requested leave to file the plan after that time and, thus, Brian had failed to comply with R.C. 3109.04(G). For this reason, the trial court refused to consider the request for shared parenting in determining the allocation of parental rights and responsibilities for the minor child. Natalie now appeals, raising two assignments of error.

II. Analysis

{¶5} In her first assignment of error, Natalie argues that the trial court erred by failing to consider shared parenting on the ground that Brian's plan was not filed within the time allotted by statute. We agree.

{¶6} R.C. 3109.04 governs the allocation of parental rights and responsibilities, including shared parenting, in divorce proceedings. The paramount concern of this statute is the best interest of the child, and it is the court's function to protect the child's best interest when making custody determinations. *See* R.C. 3109.04(B)(1); *Gardini v. Moyer*, 61 Ohio St.3d 479, 484, 575 N.E.2d 423 (1991); *Miller v. Miller*, 37 Ohio St.3d 71, 75, 523 N.E.2d 846 (1988); *Schaefer v. Schaefer*, 1st Dist. Hamilton Nos. C-020721, C-020722, C-020723, C-030255 and C-030385, 2004-Ohio-2032, ¶ 31.

{¶7} While the trial court has broad discretion in a custody proceeding, that discretion is not absolute; the court must follow the procedures described in R.C. 3109.04 when making custody decisions. *See Miller* at 74; *Erwin v. Erwin*, 3d Dist. Union No. 14-04-37, 2005-Ohio-1603, ¶ 7. An "abuse of discretion" indicates "more than an error of law or judgment and implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Miller* at 73-74, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶8} R.C. 3109.04(G) requires a party in a divorce action to file a shared-parenting plan at least 30 days before the hearing on the issue of parental rights and responsibilities. Other districts have held, and we concur, that this requirement is "directory, not mandatory." *Harris v. Harris*, 105 Ohio App.3d 671, 674, 664 N.E.2d 1304 (2d Dist.1995); *Clouse v. Clouse*, 3d Dist. Seneca No. 13-08-40, 2009-Ohio-1301, ¶ 35; *Swain v. Swain*, 4th Dist. Pike No. 04CA726, 2005-Ohio-65, ¶ 13; *In re Minnick*, 12th Dist. Madison No. CA2003-01-001, 2003-Ohio-4245, ¶ 12; *Onion v. Onion*, 11th Dist. Ashtabula No. 95-A-0002, 1996 Ohio App. LEXIS 2430, fn. 2 (June 14, 1996); *Hampton-Jones v. Jones*, 8th Dist. Cuyahoga Nos. 77279 and 77412, 2001 Ohio App. LEXIS 3489, *12 (Aug. 9, 2001).

{¶9} When the time limit is considered in the context of the other shared-parenting provisions, it is clear that the legislature intended for the trial court to retain "a reasonable degree of flexibility in considering shared parenting plans" that are filed outside the statutory deadline. *Harris* at 674. For example, the court can at any time ask the parents to submit appropriate changes to a plan. *See* R.C. 3109.04(D)(1)(a)(i)-(iii).

{¶10} Importantly, the 30-day requirement is provided to protect the due-process rights of the opposing party by ensuring that the party has adequate time to

prepare and present evidence contrary to the plan at trial. *See Harris* at 674. However, the trial court maintains discretion to grant leave to file an untimely plan as long as those due-process rights are protected. *See id.*; *Hampton-Jones* at *12.

{¶11} Although, in this case, Brian did not request leave of court to file his plan within the 30 days before trial, Natalie did not object to the technically late filing. And she acquiesced in the filing by submitting her own exhibit modifying the proposed shared-parenting plan, as well as offering her own testimony for the court's consideration on the issue of shared parenting. Thus, she had an adequate opportunity to respond and did so.

{¶12} Moreover, the trial court's actions prior to and during the hearing demonstrated that the court was considering shared parenting in making its parenting-allocation decision. Under these circumstances, the court's refusal to consider shared parenting for the sole reason that Brian's proposed shared-parenting plan was not timely filed was unreasonable and unconscionable, and thus, an abuse of discretion. *Miller*, 37 Ohio St.3d at 73-74, 523 N.E.2d 846.

{¶13} Accordingly, we sustain the first assignment of error. Because of this determination, we must reverse the trial court's award of sole custody to Brian and remand the cause for the trial court to consider shared parenting under the relevant provisions of R.C. 3109.04.

{¶14} In Natalie's second assignment of error, she challenges the trial court's award of sole custody to Brian. Because we have found that Natalie's first assignment of error has merit, we determine that the second assignment of error is moot, and we decline to address it. *See* App.R. 12(A)(1)(c).

III. Conclusion

{¶15} We reverse the part of the trial court's judgment awarding sole custody to Brian, we vacate the remainder of the trial court's judgment allocating parental rights and responsibilities, including child support and the conditions of mother's residual parental rights, and we remand the cause to the trial court for the consideration of shared parenting and for further proceedings consistent with the law and this opinion.

Judgment accordingly.

FISCHER and **MOCK**, **JJ.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.