

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

M.K.

Plaintiff-Appellee

-vs-

A.K. NKA A.H.

Defendant-Appellant

: JUDGES:

:

: Hon. Patricia A. Delaney, P.J.

: Hon. W. Scott Gwin, J.

: Hon. John W. Wise, J.

:

: Case No. 17-CA-00002

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O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Perry County Court of
Common Pleas, Case No. 10-DS-00062

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

November 2, 2017

APPEARANCES:

For Plaintiff-Appellee:

HOLLY P. REGOLI
124 W. Main Street, Suite 203
Lancaster, OH 43130

For Defendant-Appellant:

KYLE C. HENDERSON
170 South Spring St.
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Delaney, P.J.

{¶1} Defendant-Appellant A.K. nka A.H. appeals the March 10, 2017 judgment entry of the Perry County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} Plaintiff-Appellee M.K. (“Father”) and Defendant-Appellant A.K. nka A.H. (“Mother”) were granted a Decree of Dissolution of Marriage on March 23, 2010. Two children were born as issue of the marriage: N.K., born on October 1, 2004, and D.K., born on May 14, 2009.

{¶3} The Decree named Mother as the residential parent and legal custodian. Father had parenting time every other weekend and midweek.

{¶4} On December 11, 2015, Father filed a Motion for Reallocation of Parental Rights and Responsibilities. In the motion, Father alleged he was concerned about Mother’s care for the children. He stated the children appeared dirty and when Father picked up the children at Mother’s home, Father noticed the outside of the house was dirty and there was dog feces inside the home. Father also claimed Mother was not supervising the children’s schoolwork because D.K.’s reading log had not been signed by Mother for the month of November. Father finally alleged Mother had not taken care of the children’s medical needs. Father claimed Mother had never taken the children to the dentist.

{¶5} The trial court appointed a Guardian ad Litem on December 23, 2015. The GAL report was filed on June 16, 2016.

{¶6} Mother requested the trial court conduct an in camera interview of the children. The magistrate conducted the interview with the children on September 7, 2016.

{¶7} A hearing on the Motion for Reallocation of Parental Rights and Responsibilities was held before the magistrate on September 9, 2016. The following evidence was adduced at the hearing.

{¶8} Mother lives in Lancaster, Ohio with the two children, her husband, and three dogs. At the time of the hearing, one of the dogs had eight puppies. Mother's home was a two-story home and each child had his own bedroom.

{¶9} During the 2014-2015 school year, the children were late to school approximately 30 times. Mother was responsible for transporting the children to school and had difficulty establishing a morning routine. In the 2015-2016 school year, the children were not late to school because they took the bus. The children were average students at school. The school did not note any hygiene issues with the children. Father reported that Mother neglected to sign D.K.'s reading log for one month. Mother stated the reading log was not signed because D.K. lost his reading log twice and it was replaced. D.K. did lose recess time because he failed to keep up his reading log. Father was not involved in the children's school and rarely attended their school functions. The children were happy at their school in Lancaster.

{¶10} Mother was employed as a hair stylist. Her husband was a forklift driver. The children cared for and got along with Mother's husband.

{¶11} Father resided in McArthur, Ohio with his girlfriend of four years and her two children. His home was owned by his girlfriend's stepfather and was located on a cattle farm where Father was employed. There were four dogs in Father's home. Father did not exercise his mid-week visitation due to the distance between his home in Vinton County and Mother's home in Lancaster. When the children stayed with Father, the children

shared a bedroom. During the week, Father worked on the farm for most of the day. The children were able to play outside and Father was available to them.

{¶12} Mother and Father's girlfriend did not get along. There were text records showing an argument between Mother and Father's girlfriend. At the hearing, Father's girlfriend stated she no longer had issues with Mother and regretted her behavior towards Mother. After Father filed the motion for reallocation, Mother did not give Father extra visitation time with the children.

{¶13} Father brought the motion for reallocation of parental rights due to his concerns for Mother's care for the children. Father understood the children did not go to bed at Mother's until 1:00 a.m. He observed that when he picked up the children for visitation, the children's clothes were often dirty, torn, and/or improperly fitting. The youngest child often had soiled underpants. Father stated the children went to school wearing those clothes. He also observed when he picked up the children, the outside of Mother's home and front porch were cluttered with rubbish. Father discovered that Mother had never taken the children to a dentist or a well-child physical. Father took the children to the dentist and the youngest child required two crowns. Father caught the children up on their vaccination schedule. Mother stated because the children did not have adult teeth, the children's pediatrician checked the children's teeth and did not observe any issues. Mother also took the children to the doctor as needed. The GAL recommended to Mother that she take the children to see a dentist.

{¶14} The GAL conducted home visits with Father and Mother. Father's home was located on a farm in a rural area. During the GAL's announced visit, Father's home appeared neat and tidy. The children of Father's girlfriend shared a bedroom, while D.K.

and N.K. shared a bedroom. D.K. and N.K. were present with Father's girlfriend's children during the visit. Everyone appeared to be comfortable with one another during the GAL's visit.

{¶15} The GAL noted during her first announced home visit with Mother, the home seemed cluttered but appropriate for children. Mother stated she was in the process of remodeling the home. A sewer line in the home was being repaired, which caused an odor in the home. She also stated the home was cluttered because she was organizing items to be given away at a church function.

{¶16} During her first unannounced visit to Mother's residence, the GAL noticed a strong odor of dog, dog urine, and dog feces. The children took the GAL to their rooms and the GAL observed dog feces on the floor of the children's bedrooms. Mother stated it was the children's responsibility to take the dogs out and to clean up any messes left by the dogs inside the home.

{¶17} On the second unannounced home visit, the GAL observed numerous miscellaneous items on the lawn area and the front porch. The children let the GAL inside the home and told the GAL that Mother and her husband were home. The GAL never saw Mother or her husband while she was inside the home. The inside of the home smelled of dog feces and trash. The GAL saw what appeared to be dog feces and dog urine on the floor of one child's bedroom. Mother explained that she and her husband were getting ready upstairs to attend a wedding and because they were busy getting ready, they did not hear the GAL in the home. Mother also said it was not dog urine on the floor; the child spilled bubbles on the floor of his room.

{¶18} The GAL spoke with the children and the trial court conducted an in camera interview with the children. The children enjoyed being with Father but preferred the current parenting schedule. The children did not want to change schools.

{¶19} The GAL recommended that Father be named the residential parent and legal custodian.

{¶20} Friends of Mother, Mother's family members, and Father's family members testified on behalf of Mother. They stated Mother was a good parent. Father's family members and Father, however, were estranged from each other.

{¶21} The magistrate issued her decision on September 30, 2016. The magistrate granted Father's motion for reallocation of parental rights and named Father as the legal custodian and residential parent.

{¶22} On October 5, 2016, Mother filed objections to the magistrate's decision and requested the magistrate issue findings of fact and conclusions of law. The transcript was filed on November 30, 2016.

{¶23} The magistrate issued findings of fact and conclusions of law on January 5, 2017. Mother filed supplemental objections on January 19, 2017.

{¶24} On March 10, 2017, the trial court overruled Mother's objections and found a change of circumstances and it was in the children's best interests that Father be named the residential parent and legal guardian. The trial court, however, granted Mother more time with the children than the standard order parenting time.

{¶25} It is from this judgment Mother now appeals. It did not appear from the record the trial court stayed the matter pending appeal.

ASSIGNMENTS OF ERROR

{¶26} Mother raises five Assignments of Error:

{¶27} “I. THE TRIAL COURT’S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE UNSUPPORTED BY THE COMPETENT EVIDENCE ON THE RECORD.

{¶28} “II. THE TRIAL COURT FAILED TO GIVE PROPER SCRUTINY IN THE REVIEW OF SECOND PETITIONER-APPELLEE’S OBJECTIONS TO THE MAGISTRATE’S DECISION, SPECIFICALLY IN REGARD TO THE MAGISTRATE’S FINDINGS OF FACT, AS REQUIRED BY OHIO RULE OF CIVIL PROCEDURE 43(D)(4)(D).

{¶29} “III. THE TRIAL COURT’S JUDGMENT ENTRY OF MARCH 10, 2017 FAILED TO PROPERLY ANALYZE THE CHANGE OF CIRCUMSTANCES STANDARD PROMULGATED BY ORC 3109.04(E)(1)(A), AND AS SUCH WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶30} “IV. THE TRIAL COURT’S JUDGMENT ENTRY OF MARCH 10, 2017 FAILED TO PROPERLY ANALYZE THE BEST INTEREST STANDARD PROMULGATED BY ORC 3109.04(F)(1) USED TO DETERMINE THE CHILDREN’S BEST INTERESTS IN ALLOCATING PARENTAL RIGHTS AND RESPONSIBILITY, AND AS SUCH WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶31} “V. THE TRIAL COURT’S JUDGMENT ENTRY OF MARCH 10, 2017 FAILED TO PROPERLY ANALYZE ORC 3109.04(E)(1)(A)(III) IN DETERMINING WHETHER THE HARM LIKELY CAUSED BY A CHANGE OF ENVIRONMENT IS OUTWEIGHED BY THE ADVANTAGES OF THE CHANGE OF ENVIRONMENT TO THE

CHILDREN, AND AS SUCH WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.”

ANALYSIS

I., III., IV., and V.

{¶32} We consider Mother's first, third, fourth, and fifth Assignments of Error together because the Assignments are interrelated. The assigned errors require this Court to analyze the record and law to determine whether the trial court abused its discretion when it named Father as the legal custodian and residential parent.

{¶33} Our review of a trial court's decision allocating parental rights and responsibilities is under an abuse of discretion standard. *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). Custody issues are some of the most difficult and agonizing decisions a trial judge must make, especially in cases where both parents love and are bonded to the children. *Williamson v. Williamson*, 2017-Ohio-1082, -- N.E.3d --, ¶ 18 (7th Dist.) quoting *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). As the trier of fact, the trial judge must have wide latitude in considering all the evidence and issues. *Girdlestone v. Girdlestone*, 5th Dist. Stark No. 2016 CA 00019, 2016–Ohio–8073, ¶ 12, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997); *Heckel v. Heckel*, 12th Dist. Butler No. CA99–12–214, 2000 WL 1279171 (Sept. 11, 2000). Ultimately, parental rights and responsibilities are to be allocated based upon the paramount consideration of the best interest of the child. *Trent v. Trent*, 12th Dist. Preble No. CA 98–09–014, 1999 WL 298073 (May 10, 1999).

{¶34} Custody decisions are distressing to reviewing judges as well. *Williamson, supra* at ¶ 18 citing *Garrett-Long v. Garrett*, 7th Dist. No. 15 MA 0221, 2015-Ohio-7014, ¶ 50. Our review of the matter is constrained by the trial court's broad discretion.

{¶35} R.C. 3109.04(E)(1) states as follows:

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, the child's residential parent, 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 residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

- (i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.
- (ii) The child, with the consent of the residential parent or 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 to the child.

{¶36} Thus, before a court may modify a prior allocation of parental rights and responsibilities, it must consider: (1) whether a change in circumstances occurred, (2) whether modification is in the child's best interest, and (3) whether the benefits that result from the change outweigh any harm. *Clark v. Smith*, 130 Ohio App.3d 648, 653, 720 N.E.2d 973, 976 (3rd Dist.1998). The record must support each of these findings or the modification of child custody is contrary to law. *Davis v. Flickinger*, *supra* at 417.

{¶37} “Although R.C. 3109.04 does not provide a definition of the phrase ‘change in circumstances,’ Ohio courts have held that the phrase is intended to denote ‘an event, occurrence, or situation which has a material and adverse effect upon a child.’ “ *Martin v. Fuller*, 5th Dist. Licking Case No. 15-CA-88, 2016-Ohio-3158, ¶¶ 20-21 quoting *Torch v. Criss*, 5th Dist. Tuscarawas No.2015AP040020, 2015–Ohio–5328, ¶ 39 quoting *Lewis v. Lewis*, 12th Dist. Butler No. CA2001–09–209, 2002 WL 517991 (April 8, 2002), citing *Rohrbaugh v. Rohrbaugh*, 136 Ohio App.3d 599, 604–05, 737 N.E.2d 551 (7th Dist.2000). In order to warrant the abrupt disruption of the child's home life, the change in circumstances must be one “of substance, not a slight or inconsequential change.” *Flickinger*, *supra* at 418. The change, however, need not be “substantial.” *Id.* at 417-418. “The purpose of requiring a finding of a change in circumstances is to prevent a constant re-litigation of issues that have already been determined by the trial court. * * * Therefore, the modification must be based upon some fact that has arisen since the prior order or was unknown at the time of the prior order.” *Brammer v. Brammer*, 194 Ohio App.3d 240, 2011–Ohio–2610, 955 N.E.2d 453, ¶ 17 (3rd Dist.), citing R.C. 3109.04(E)(1)(a).

{¶38} Mother contends the magistrate failed to give specific reasons in her decision upon which to support the finding of a change of circumstances. In its judgment

entry overruling Mother's objections to the magistrate's decision, the trial court found there was a change of circumstances since the 2010 decree of divorce naming Mother as legal custodian and residential parent of the children. The trial court recited the evidence established at the hearing that while Mother had custody of the children, Mother's home was not kept in a sanitary manner, the children were dressed in torn, soiled, and improperly fitting clothing, and Mother did not take the children for regular dental or medical care.

{¶39} For there to be a change of circumstances, the change does not have to be quantitatively large, but must have a material effect on the child. *Brammer, supra*. D.K. required two crowns on his teeth after Father took him to the dentist. Father brought the children up to date on their immunizations. The children attended school wearing soiled, torn, and/or improperly fitting clothing. The GAL observed dog feces in the children's bedrooms during her visits. The change of circumstances as to Mother's care for the children from 2010 to the hearing date had a material effect on the children as to their basic health and clothing needs.

{¶40} Because the trial court determined there was a change of circumstances, the next issue we examine is whether a modification was in the children's best interests. "The statute further requires that the trial court find that the best interest of the child will be served by the change and that the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child." *Riegel v. Bowman*, 5th Dist. Delaware No. 17 CAF 01 0006, 2017-Ohio-7388, ¶ 36 citing *Brandle v. Brandle*, 2nd Dist. Clark No. 99 CA 62, 2000 WL 262631 (Mar. 10, 2000); R.C. 3109.04(E)(1)(a).

{¶41} The trial court examined the factors under R.C. 3109.04(F)(1). The GAL and magistrate interviewed the children who reported to be happy and content with the current parenting arrangement. The children enjoyed attending school in Lancaster. Both parents loved the children and were active in their children's lives. Father admittedly did not attend many of the children's school functions. The children got along with Mother's husband, Father's girlfriend, and his girlfriend's children. Under R.C. 3109.04(F)(1)(e), the trial court may consider the mental and physical health of all parties involved in the situation. In this case, the evidence shows Mother was not meeting the children's physical health needs by failing to schedule routine dental and physicals for the children. The trial court further found Mother's attention to the children's hygiene was not in the children's best interests. The record supports the trial court's findings.

{¶42} The final issue we examine is whether the trial court abused its discretion in finding the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the children. The trial court's concern was the children's environment in Mother's home. The evidence supports the trial court's concerns as to Mother's maintenance of the home and in relation to the children. The GAL observed the home was cluttered and smelled of trash. Mother explained the issues were due to remodeling, organization for a church sale, and a collapsed sewer drain. Mother reported the issues were resolved. Photographs were presented and the GAL corroborated that Mother's front porch and lawn were cluttered with rubbish. The GAL reported observing and smelling dog feces and urine in Mother's home during each visit. Mother contended it was the children's responsibility to let the dogs out and clean up after the dogs. At the time of the hearing, the children were six and eleven years of age. While

it is arguable children of those ages should be capable of helping to care for pets in the home, the GAL's observations showed the children needed adult assistance to care for the dogs.

{¶43} The GAL found Father's home to be clean and cared for. He also had dogs but the GAL did not report the same issues in the home as with Mother's home. The children spent time outdoors at Father's home. Father took the children to the dentist and to the doctor for well child visits. At the time of the issuance of this opinion, the children are enrolled in Father's school district.

{¶44} Custody cases are difficult -- an opinion the trial court expressed in the judgments issued in this case. The magistrate stated in the decision granting Father's motion for reallocation that had the parents presented a proposed shared parenting agreement, the court would have considered the plan so neither parent felt they were being restricted from the children's lives. Nevertheless, the trial court had to rule on the motion before it and based on the evidence presented, it found there was a change in circumstances, the best interests of the children would be served by the change, and the harm likely caused by the change of environment was outweighed by the change of environment. As a reviewing court, we cannot find the trial court abused its broad discretion in granting Father's motion for reallocation of parental rights based on the evidence.

{¶45} Mother's first, third, fourth, and fifth Assignments of Error are overruled.

II.

{¶46} Mother contends in her second Assignment of Error that based on the trial court's decision to overrule Mother's objections, the trial court failed to independently review the magistrate's decision pursuant to Civ.R. 53(D)(4)(d). We disagree.

{¶47} The trial court is obliged to independently review the issues upon objections to a magistrate's decision. Ohio Civ.R. 53(D)(4)(d) states in pertinent party:

* * * *. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

{¶48} The trial court does not sit in the position of a reviewing court when reviewing the magistrate's decision; rather, the trial court must conduct a *de novo* review of the facts and conclusions contained in the decision. *Phillips v. Phillips*, 2014-Ohio-5439, 25 N.E.3d 271, ¶ 26 (5th Dist.) citing *Inman v. Inman*, 101 Ohio App.3d 115, 118, 655 N.E.2d 199 (2nd Dist.1995), citing *DeSantis v. Soller*, 70 Ohio App.3d 226, 232, 590 N.E.2d 886 (10th Dist.1990); see also *Thompson Thrift Const. v. Lynn*, 2017-Ohio-1530, -- N.E.3d --, ¶ 56 (5th Dist.).

{¶49} "[W]hen independently reviewing the magistrate's decision, and in the absence of an affirmative demonstration the trial court applied an incorrect standard, given the presumption [of] regularity, we presume the trial court applied the correct

standard.” *Rudduck v. Rudduck*, 5th Dist. Licking No. 98CA85, unreported, 1999 WL 436818, at *4 (Jun. 16, 1999). That the trial court overruled Mother’s objections and adopted the magistrate’s decision does not provide a per se affirmative demonstration the trial court failed to conduct a de novo review. We note the trial court’s judgment entry states in pertinent part, “The undersigned conducted an independent review of this matter. The Court reviewed the entire file in this case, read the transcript and listened to the interview of the children.” (Judgment Entry, Mar. 10, 2017). The trial court then issued a six-page judgment entry reciting the pertinent facts and relevant law before stating its judgment. We presume the trial court applied the correct standard of review.

{¶50} Mother’s second Assignment of Error is overruled.

CONCLUSION

{¶51} The judgment of the Perry County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Gwin, J. and

Wise, John, J., concur.