[Cite as *J.F. v. C.C.*, 2018-Ohio-5373.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JILLIAN F.

Plaintiff-Appellant

-vs-

CURTIS C.

Defendant-Appellee

JUDGES:
Hon. John W. Wise, P. J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 2018 AP 04 0016

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2008 TC 11 00520
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 28, 2018

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
RICHARD L. FOX 122 South Wooster Avenue Strasburg, Ohio 44680	MARVIN T. FETE 138 2nd Street NW New Philadelphia, Ohio 44663

Wise, P. J.

{¶1} Plaintiff-Appellant Jillian F. appeals from the decision of the Court of Common Pleas, Tuscarawas County, Domestic Relations Division, which granted custody of her son, L.C., to Defendant-Appellee Curtis C., the child's father, with alternating weeks of parenting time. The relevant procedural facts leading to this appeal are as follows.

{¶2} Appellant Jillian and Appellee Curtis were married in July 2007. One child, L.C., was born of the marriage in 2008.

{¶3} The parties were divorced in the Tuscarawas County Court of Common Pleas, Domestic Relations Division, on March 12, 2009. Pursuant to the terms of the decree, Appellant Jillian was named as the legal custodian and residential parent of L.C., with parenting time awarded to Appellee Curtis.

{¶4} Appellant subsequently married Cy F. and moved with him to South Carolina in July 2010 for purposes of his employment. Appellant and Cy had a child together, and he adopted another child appellant had given birth to during the marriage. However, appellant and Cy were divorced in November 2016. The South Carolina court awarded appellant custody of the aforesaid two children. Appellant returned to Ohio, moving in with her parents in Wooster.

{¶5} In the meantime, on July 11, 2016, in Tuscarawas County, Appellee Curtis filed a motion for an *ex parte* order of emergency temporary custody and for a reallocation/change of custody.

{¶6} Via a judgment entry issued July 12, 2016, the trial court ordered emergency legal custody/residential placement of L.C. to appellee. The matter was thereafter referred to a magistrate for final resolution.

{¶7} The case proceeded to evidentiary hearings before the magistrate over the course of five different days, with the first hearing taking place on November 30, 2016, and the final hearing on June 27, 2017. Both parents testified, as well as, among others, L.C.'s counselor, L.C.'s school principal, the parties' co-parenting counselor, and the psychologist who conducted an evaluation of appellant. The record also contains a CD recording of an in-camera interview with L.C.[1]

{¶8} On August 30, 2017, the magistrate filed a seven-page decision recommending that L.C. "should spend alternate weeks with each parent," with appellee named as the residential parent for school purposes. The magistrate also recommended that L.C. remain in the Tuscarawas County school system which he was attending at the time of the hearing. Magistrate's Decision at 5.

{¶9} Appellant thereafter filed objections to the magistrate's decision. Following a hearing, the trial court overruled appellant's objections and adopted the magistrate's decision. *See* Judgment Entry, March 22, 2018. The court thus granted appellee legal custody and residential placement of L.C., but with the child "resid[ing] with each parent for one (1) week (7 days) (Friday at 6:00 P.M. to Friday at 6:00 P.M.)." *Id.* at 4.[2] Appellant was granted companionship time and was given "exclusive authority" to make all health care decisions pertaining to L.C. *Id.* at 4.

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[1] It does not appear that the CD was memorialized in a sealed transcript.

[2] While this order has some of the earmarks of shared parenting, we cannot classify it as such, as neither party submitted a proposed plan as set forth in R.C. 3019.04(D)(1).

{¶10} On April 11, 2018, appellant filed a notice of appeal. She herein raises the following three Assignments of Error:

{¶11} "I. THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION IN FINDING THAT A CHANGE OF CIRCUMSTANCES OF SUBSTANCE OCCURRED AS ALLEGED IN THE MOTION OF DEFENDANT-APPELLEE [CURTIS C.] FILED JULY 11, 2016.

{¶12} "II. THE TRIAL COURT ERRED IN ITS CONCLUSION THAT MODIFICATION OF THE PRIOR DECREE OF CUSTODY WAS IN L.C.'S BEST INTERESTS AND THAT THE HARM TO L.C. LIKELY TO BE CAUSED BY THE CHANGE WAS OUTWEIGHED BY THE ADVANTAGES OF THE CHANGE.

{¶13} "III. IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO CHANGE THE CUSTODIAL STATUS OF L.C. AS A RESULT OF CIRCUMSTANCES WHICH OCCURRED AFTER THE FILING OF THE MOTION FOR CHANGE OF CUSTODY, AND WHICH WERE SOLELY THE RESULT OF ORDERS ISSUED BY THE TRIAL COURT, AND THE PASSAGE OF TIME BETWEEN THE EX PARTE EMERGENCY ORDER AND THE FINAL EVIDENTIARY HEARING IN THIS MATTER."

Pertinent Statutory Law

{¶14} R.C. 3109.04(E)(1)(a) 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.

{¶15} (Emphases added.)

I.

{¶16} In her First Assignment of Error, appellant argues the trial court committed reversible error in finding a change in circumstances under R.C. 3109.04(E) for purposes of modifying custody of L.C. We disagree.

{¶17} The "change in circumstances" requirement, *supra*, is intended in part to provide some stability to the custodial status of the children, even if the nonresidential parent shows that he or she can provide a better environment. *See Hobbs v. Hobbs,* 36 N.E.3d 665, 2015–Ohio–1963, ¶ 54 (4th Dist.). R.C. 3109.04 does not define "change in circumstances." However, 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." *See Rohrbaugh v. Rohrbaugh* (2000), 136 Ohio App.3d 599, 604–605, 737 N.E.2d 551, citing *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416, 445 N.E.2d 1153. Furthermore, "[a] trial court must carefully consider the nature, circumstances and effects of each purported change. Positive, laudable change, such as growth and improvement (expecting some measure of mistakes along the way) should be fostered rather than blindly chilled or penalized in the name of stability." *Hanley v. Hanley,* 4th Dist. Pickaway No. 97CA35, 1998 WL 372685 (with one judge concurring in judgment only and one judge dissenting).

{¶18} We review a trial court's determination concerning the existence of a change in circumstances under an abuse of discretion standard. *See Murphy v. Murphy*, 5th Dist. Tuscarawas No. 2014 AP 01 0002, 2014-Ohio-4020, ¶ 22. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Furthermore, as an appellate court, we are not the trier of fact. Our role is to determine whether there is relevant, competent, and credible evidence upon which the factfinder could base his or her judgment. *Tennant v. Martin–Auer,* 188 Ohio App.3d 768, 936 N.E.2d 1013, 2010–Ohio–3489, ¶ 16, citing *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA–5758, 1982 WL 2911.

{¶19} Remarriage alone is not normally sufficient to support a change in circumstances in child custody proceedings. *In re Dissolution of Marriage of Kelly*, 7th Dist. Carroll No. 09 CA 863, 2011-Ohio-2642, ¶ 55 (Waite, P.J., dissenting). However, remarriage can be a factor that contributes to a change in circumstances. *Turner v.*

Turner, 7th Dist. Jefferson No. 11-JE-5, 2012-Ohio-2050, ¶ 27. Appellant presently urges that by analogy, a subsequent divorce alone should not be considered a change in circumstances.

{¶20} Also, in *Stein v. Anderson,* 5th Dist. Tuscarawas No. 2009 AP 08 0042, 2010–Ohio–18, this Court clearly stated as follows regarding changes of residence by a parent: "[W]hether intrastate or out-of-state, we think the preferred general rule is that a relocation, by itself, is not sufficient to be considered a change of circumstances, but it is a factor in such a determination." *Id.* at ¶ 13, citing *Green v. Green*, 11th Dist. Lake No. 96–L–145, 1998 WL 258434.

{¶21} The record before us reveals, however, that L.C. was being impacted by much more than just appellant's basic relocation and remarriage. Following her marriage to Cy F., appellant engaged in extramarital affairs, as evinced by admissions she made for purposes of her psychological evaluation. Plaintiff's Exhibit 41. One of these affairs produced a child, which Cy F. thereafter adopted. However, appellant told one of her counselors, according to the GAL, that her relationship with Cy F. was "controlling and emotionally abusive." In addition, the GAL reviewed various records and discovered that appellant had reported bruising on L.C.'s body, possibly caused by Cy. *See* GAL Report, November 22, 2016, at 5, 7.

{¶22} Appellant also had an affair in South Carolina with Norris R., who began physically abusing her. In one incident in late 2015, which resulted in a written police report ultimately presented to the magistrate, appellant was allegedly assaulted by Norris at a shopping mall, resulting in her earring being ripped out and her being thrown to the ground, striking her head on concrete. Defendant's Exhibit A. The next day, appellant

texted Cy and stated she had felt “helpless” and “like I was going to be murdered.” Nonetheless, appellant thereafter allowed Norris to watch L.C. and her other children. Appellant, on cross-examination, admitted to having had the altercation with Norris. Tr. at 8.

{¶23} Furthermore, it is undisputed that by the time appellee began pursuing a change of custody regarding L.C., appellant’s house in South Carolina was in foreclosure (although she had made arrangements for herself and her children to live with her parents), she had allowed her car to be repossessed, she had quit her job to move back to Ohio, and that she was being divorced from Cy F.

{¶24} We also note that in the testimony of L.C.’s therapist, Crystal Carmany, she noted at the outset that the child “had a number of changes in his life and just wanted some help adjusting to some of those.” Tr. at 96.

{¶25} Appellant presently attempts to downplay the aforesaid evidence, urging that there was no allegation of domestic violence or arguing in the South Carolina residence, or that any incidents involving Norris involved the presence of her children. Appellant further claims that no testimony was presented that any of the allegations resulted in an adverse effect upon L.C.

{¶26} However, upon review, we find the reallocation of parental rights and responsibilities in favor of appellee in this matter, with “alternating weeks” parenting time, was not unreasonable, arbitrary, or unconscionable in regard to the “change in circumstances” requirements of R.C. 3109.04(E)(1)(a).

{¶27} Appellant's First Assignment of Error is overruled.

II.

{¶28} In her Second Assignment of Error, appellant argues the trial court erred in determining that a modification of custody was in L.C.'s best interest and that the harm to the child likely to be caused by the change was outweighed by the advantages of the change. We disagree.

{¶29} Our review of a trial court's decision allocating parental rights and responsibilities is under an abuse of discretion standard. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846. Furthermore, because custody issues are some of the most difficult and agonizing decisions a trial judge must make, he or she must have wide latitude in considering all the evidence. *Girdlestone v. Girdlestone*, 5th Dist. Stark No. 2016 CA 00019, 2016–Ohio–8073, ¶ 12, citing *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159. Similarly, when making its determinations in custody or visitation cases, the trial court, as the trier of fact, must be given wide latitude to consider all issues. *Heckel v. Heckel*, 12th Dist. Butler No. CA99–12–214, 2000 WL 1279171. 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.

{¶30} In addition to change in circumstances, "[t]he 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." R.C. 3109.04(E)(1)(a); *Brandle v. Brandle*, 2nd Dist. Clark No. 99 CA 62, 2000 WL 262631 (emphasis added).

Best Interests

{¶31} R.C. 3109.04(F)(1) mandates as follows:

In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

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

(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

(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;

(d) The child's adjustment to the child's home, school, and community;

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

(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

(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;

(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶32} There is no requirement that a trial court separately address each best interest factor enumerated in R.C. 3109.04. *See In re Henthorn,* Belmont App. No. 00–BA–37, 2001–Ohio–3459. Absent evidence to the contrary, an appellate court will presume the trial court considered all of the relevant factors listed in R.C. 3109.04(F)(1). *Id.*, citing *Evans v. Evans* (1995), 106 Ohio App.3d 673, 677, 666 N.E.2d 1176.

{¶33} In the case *sub judice*, as we analyzed in regard to the "change in circumstances" issue, evidence was presented that appellant's life since her divorce from appellee has been marked by relationship issues and problematic choices. There are concerns that appellant has not fully addressed her domestic violence victimization issues. Notably, despite her negative history with Norris R., appellant continued to refer to her time with him as a "great relationship." *See* Exhibit 41. The GAL, despite ultimately being in favor of an "alternative weeks" arrangement, expressed concerns about appellant's ability to co-parent with appellee. In his April 5, 2017 report, the GAL noted: "I can think of only one parent other than [appellant] who has baffled and worried me more about her behavior." Evidence was also provided indicating appellant's refusal to treat appellee as an equal in parenting roles. In that same report, the GAL wrote it was "evident that [appellant] feels that [appellee] is an inferior parent and inferior person." *Id.* at 2. In addition, evidence was adduced that appellant, while in South Carolina, had not listed

appellee's name as the father on school records; instead, Cy F.'s name was put down. *See* Defendant's Exhibit E.

{¶34} In her challenge to the best interest determination, appellant additionally seems to blame appellee for L.C.'s present academic deficiencies in reading, writing, and language skills. However, this Court cannot ascertain from the present record whether this problem is traceable to L.C. being with appellee or to some other preexisting reason. But we acknowledge the record indicates incidents of confusion or inattention by appellee to some of L.C.'s medical needs, such as his eczema and allergies. As noted previously, the trial court dealt with this concern by granting appellant (who is employed as a nurse) full authority in health care decisions concerning the child. We also acknowledge that the magistrate, on the last day of hearings, expressed frustration at *both* parents for what she termed their "tit for tat" attitudes, stating on the record: "And as long as this continues, you are hurting your child. *** You're so hung up on your spite that you're both willing to throw your child under the bus and I'm not hearing either one of you saying that you're willing to make a change and what does that say to me then?" Tr. at 450. Nonetheless, the GAL ultimately opined that both parents could provide safe environments for L.C. Tr. at 467.

{¶35} We emphasize that in proceedings involving the custody and welfare of children, the power of the trial court to exercise discretion is peculiarly important. *See Thompson v. Thompson* (1987), 31 Ohio App.3d 254, 258, 511 N.E.2d 412, citing *Trickey v. Trickey* (1952), 158 Ohio St. 9, 13, 106 N.E.2d 772. To borrow terminology this Court has previously expressed in other custody matters, we are confident in this case that both appellant and appellee care greatly about the child's welfare and both believe they can

provide for his optimal care. *See In re D.B.E.*, 5th Dist. Holmes No. 08 CA 8, 2009-Ohio-1396, 2009 WL 795206, ¶ 23. Under the present circumstances, upon review, we find the magistrate and judge duly considered the statutory "best interest" factors, and we hold the court's arrangement of alternating weeks with each parent in the present dispute does not constitute an abuse of discretion or compel us to attempt to substitute our judgment.

Harm/Advantage Weighing

{¶36} We have emphasized that there may be "room for some overlap" between the consideration of the best factors of R.C. 3109.04(F)(1) and the harm/advantage analysis of R.C. 3109.04(E)(1)(a)(iii), even though they are separate questions. *Riegel v. Bowman*, 5th Dist. Delaware No. 17 CAF 01 0006, 2017-Ohio-7388, ¶ 36. In any case, we recognize that R.C. 3109.04(E)(1)(a)(iii) does not require a trial court "to cast the whole of its reflection on the case into words." *Meyer v. Anderson*, 2nd Dist. Miami No. 96CA32, 1997 WL 189383.

{¶37} In the case *sub judice*, the magistrate concluded in pertinent part, "Given the distance between the parties' homes [Sherrodsville, Ohio and Wooster, Ohio], the magistrate finds that 50/50 time will be difficult for the parties. Ideally the parties would live closer to each other to facilitate companionship for the child. However, each party has strengths to offer the child and the child needs significant time with each parent. Therefore, such a time sharing is likely to be in the best interest of the child and any harm that may come from the modification will be outweighed by the benefit to the child." Magistrate's Decision at 5.

{¶38} Here, the magistrate clearly recited her R.C. 3109.04(E)(1)(a)(iii) finding in her decision. Our review of the record reveals adequate evidentiary support for this

determination that the advantages to L.C. brought about by a change of his environment would outweigh the likely harm caused by such change, particularly where, practically speaking, the familial relocation from South Carolina has now permanently disrupted the life the child had established there.

{¶39} Appellant's Second Assignment of Error is overruled.

III.

{¶40} In her Third Assignment of Error, appellant argues it was an abuse of discretion for the trial court to modify parental rights and responsibilities as a result of events which occurred after the filing of said motion by appellee. We disagree.

{¶41} In essence, appellant maintains that certain evidence regarding L.C. stemmed from the passage of time between the *ex parte* emergency order and the final evidentiary hearing in this matter, particularly as to his school situation in Tuscarawas County, and that it was improper to use such evidence in determining change in circumstances and/or best interests. However, as discussed *supra*, there were multiple factors before the magistrate and trial court on these issues outside of the child's academic life. Even so, "*** [a] child's best interest is a fluid concept, as it involves the child's continually-changing need for appropriate care." *In re G.L.S.*, 9th Dist. Summit No. 28874, 2018-Ohio-1606, ¶ 16 (additional citation omitted). Furthermore, in determining the best interest of a child, "the court shall consider all relevant factors ***." R.C. 3109.04(F)(1). A judge is presumed to consider only the relevant, material, and competent evidence in arriving at a judgment, unless the contrary affirmatively appears from the record. *In re M.D.*, 5th Dist. Knox No. 2011-CA-9, 2012-Ohio-31, ¶ 33 (citations omitted). We are aware of no blanket rule barring a court addressing custody issues from

considering events that may unfold in a child's life during the time it takes for the dispute to wind through evidentiary hearings.

{¶42} Upon review, we are unpersuaded the trial court abused its discretion in this regard as urged by appellant.

{¶43} Appellant's Third Assignment of Error is overruled.

{¶44} For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Domestic Relations Division, Tuscarawas County, is hereby affirmed.

By: Wise, P. J.

Hoffman, J., and

Delaney, J., concur.

JWW/d 1205