[Cite as *In re J.C.*, 2019-Ohio-107.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 107292 and 107294

IN RE: J.C., ET AL.

Minor Children

[Appeal by S.Y.C., Mother]

JUDGMENT:
REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. CU-16-101850 and CU-16-101851

BEFORE: Blackmon, P.J., Laster Mays, J., and Jones, J.

RELEASED AND JOURNALIZED: January 10, 2019

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PATRICIA ANN BLACKMON, P.J.:

{¶1} S.Y.C. ("Mother") appeals pro se from the trial court's judgment denying her motion to modify the allocation of parental rights and responsibilities concerning her and J.V.C.'s ("Father") children, J.C., whose date of birth is January 18, 2006, and G.C., whose date of birth is December 11, 2008. Mother assigns the following errors for our review:

I. The trial court erred and abused its discretion unreasonably, arbitrarily, and unconscionably by failing to consider the significant and extensive facts presented to find a change in circumstances in the residential parent and the lives of the children against the manifest weight of the evidence and prevailing case law.

II. The trial court erred and abused its discretion unreasonably, arbitrarily, and unconscionably by failing to find that a reallocation of parental rights is in the children's best interest.

III. The trial court erred and abused its discretion unreasonably, arbitrarily, and unconscionably by ordering that the Appellee could move anywhere under the jurisdiction of the Trial Court, in clear violation of Ohio Revised Code 3109.051(G)(1).

IV. The trial court erred and abused its discretion unreasonably, arbitrarily, and unconscionably by failing to take and consider evidence dating back to the prior custody decree of December 22, 2009.

V. The trial court erred and abused its discretion unreasonably, arbitrarily, and unconscionably by refusing to allow Appellant to fully prosecute her case.

{¶2} Having reviewed the record and pertinent law, we reverse the trial court's judgment in part, and remand this case for a new hearing on Mother's motion, and to correct the journal entry to comply with R.C. 3109.051(G)(1). The apposite facts follow.

{¶3} Mother and Father have been feuding over custody and visitation issues since before G.C. was born. The children initially lived with Mother and her parents in Madison, Ohio, while Mother was commuting to medical school in Columbus. In 2009, when Mother began her residency, she moved with the children to Columbus, under a court order that she transport the children to visit Father, who is a physician in the Cleveland area, for 16 hours each week.

{¶4} In June 2009, Mother accused Father of abusing her and J.C.,[1] and Mother refused to allow Father his visitation time. Both parties filed various motions, and ultimately the court determined that shared parenting was not feasible in this case, given the geographical distance between the parents and the court's conclusion that Mother was not likely to honor court-ordered parenting time with Father.

{¶5} On December 22, 2009, the Lake County Court of Common Pleas, Juvenile Division, named Father the residential parent and legal custodian of the children. Additionally, the court granted Mother, who was still living in Columbus at the time, graduated visitation with the children. This custody determination was affirmed on appeal in [*J.V.C.*] *v.* [*S.Y.C.*], 11th Dist. Lake No. 2010-L-008, 2010-Ohio-5401.

{¶6} Mother and Father again filed numerous subsequent motions, and the court issued various orders regarding topics ranging from when the children were available for telephone conversations to whether the children would retain Mother's surname. These orders were affirmed on appeal. *See* [*J.V.C.*] *v.* [*S.Y.C.*], 11th Dist. Lake No. 2011-L-121, 2012-Ohio-2242; [*J.V.C.*] *v.* [*S.Y.C.*], 11th Dist. Lake No. 2012-L-103, 2013-Ohio-2042.

{¶7} On August 18, 2011, Mother filed a motion for allocation of parental rights and responsibilities and motion for shared parenting, which the trial court denied on August 22, 2012.

{¶8} On September 17, 2012, and October 18, 2012, Mother filed a motion to modify parenting time/visitation. The court granted this motion on September 6, 2013, resulting in the following equal parenting time schedule: "Commencing * * * Sunday at 7:00 p.m. * * *, Mother's parenting time shall be increased so that children are with Mother for one week, until

[1]According to the record, these abuse allegations were unsubstantiated.

the following Sunday at 7:00 p.m. and are then with Father for one week, until the following Sunday at 7:00 p.m., on a rotating basis."

{¶9} This equal parenting time order was affirmed on appeal in [*J.V.C.*] *v.* [*S.Y.C.*], 11th Dist. Lake No. 2013-L-092, 2014-Ohio-2454.

{¶10} On October 16, 2015, Mother filed a second motion for reallocation of parental rights and responsibilities seeking "legal custody and residential parent status" of the children, or in the alternative, shared parenting. On December 1, 2015, Father filed a motion to modify parenting time, requesting that Mother's visitation be reduced.

{¶11} On January 12, 2016, the Lake County Court of Common Pleas, Juvenile Division, transferred this case to the Cuyahoga County Court of Common Pleas, Juvenile Division, because, by this time, Mother and Father both lived in Cuyahoga County. The parties renewed their respective motions, and on December 1, 2016, and December 2, 2016, the court held hearings on these motions. On May 8, 2018, the court issued a journal entry stating, in part, as follows:

> The Court does not find that 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 in circumstances has occurred in the child[ren], the child[ren's] residential parent, or either of the parents subject to a parenting decree, and that the modification is necessary to serve the best interests of the child[ren].

{¶12} Specifically, the court found that

> [t]he parents have demonstrated an inability to make joint decisions regarding the child[ren]. The parties have had a contentious relationship dating back to 2008 replete with multiple case filings regarding the custody of the child[ren]. * * * Both parents have failed to demonstrate to this Court that there is a change in the

> circumstances of the child[ren] such as to warrant any change in the current order. While it would seem reasonable that since the parties have the child[ren] on a nearly equal possession schedule that the Mother would have custody, the parents lack the ability to make joint decisions regarding the child[ren]. Moreover, there has been nothing presented to indicate that Shared Parenting would be in the best interest of the child[ren] at this stage as the Father has been making decisions that have not adversely affected the child[ren]. Additionally, there has been nothing presented to the court which would indicate that the Mother should have less time with the child[ren] than is presently in place.

{¶13} The court then dismissed both Mother and Father's motions without prejudice. It is from this order that Mother appeals the denial of her motion to modify custody. We note that the court's denial of Father's motion to reduce Mother's visitation is not being appealed.

Motion to Modify Allocation of Parental Rights and Responsibilities and Request for a Shared Parenting Order

{¶14} Pursuant to R.C. 3109.04(E)(1),

> [t]he court shall not modify a prior decree allocating parental rights and responsibilities for the care of the children unless it finds, based on facts that have arisen since the prior decree * * *, that a change has occurred in the circumstances of the child [or] the child's residential parent[2] * * * 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 * * * unless a modification is in the best interest of the child and * * * (iii) [t]he harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

[2]Throughout this opinion, the language "either of the parents subject to shared parenting decree" has been intentionally omitted from the R.C. 3109.04 standard. There is no shared parenting decree in the instant case and this factor is not applicable.

{¶15} We review a trial court's decision in child custody matters for an abuse of discretion. "However, while a trial court's discretion in a custody proceeding is broad, it is not absolute, and must be guided by the language set forth in R.C. 3109.04." *In re M.S.*, 8th Dist. Cuyahoga No. 99563, 2013-Ohio-4043, ¶ 15.

Determining Whether a Change of Circumstances has Occurred Based on "Facts that have Arisen since the Prior Decree"

{¶16} During the December 1, 2016 and December 2, 2016 hearings, the parties disagreed on a cutoff date for admissible evidence to determine whether a change of circumstances occurred.

{¶17} A review of the hearing transcripts shows that the juvenile court prohibited the parties, and in particular Mother, from introducing evidence prior to August 22, 2012,[3] to determine whether a change of circumstances occurred. The court stated that it was "not going to relitigate things that have already been determined." Furthermore, it appears that the juvenile court chose August 22, 2012, because that is the date that the Lake County court denied Mother's first motion for allocation of parental rights and responsibilities and motion for shared parenting.

{¶18} Mother argues that not considering evidence prior to August 22, 2012 — or September 6, 2013, for that matter — was error, and that the court should have considered evidence to show a change of circumstances dating back to December 22, 2009, because that is "the only decree determining custody."

[3] At the motion hearings, the court used two different dates as cutoffs for the admissibility of evidence. In addition to August 22, 2012, the court stated that it was basing its decision regarding whether there has been a change in circumstances on evidence presented "[s]ince whatever order was issued in regard to [Mother] having this change in her parenting time." The record shows that the most recent court order regarding visitation or parenting time was September 6, 2013.

{¶19} Father argues that August 22, 2012, is the date of the "prior decree" referenced in R.C. 3109.04(E)(1), thus, this is the proper date from which to determine whether a change of circumstances occurred. According to Father, in the August 22, 2012 order, "the trial court specifically held that all prior orders not modified therein shall remain effective until further order * * *." Therefore, Father reasons, "[i]t cannot be said that [Mother's] motion at the time was wholly unsuccessful." Father's arguments lack support in both the law and common sense.

{¶20} Pursuant to R.C. 3109.04(E)(1), the change of circumstances necessary to modify a parental rights decree must be based on facts that have arisen since the prior decree was issued. "The statute's reference to the 'prior decree' means the prior decree that allocated parental rights." *Gaines v. Pelzl*, 2d Dist. Greene No. 2003-CA-60, 2004-Ohio-2043, ¶ 6. "Therefore, the relevant time frame for determining whether a change in circumstances exists is not the period between a non-custodian parent's prior unsuccessful motion for a change of custody and the filing of a new motion." *In re Custody of M.B.*, 2d Dist. Champaign No. 2006-CA-6, 2006-Ohio-3756, ¶ 10. "As a result, when a non-custodial parent files a second or successive motion for a change of custody after previously having failed on a similar motion, the starting point for determining whether a change in circumstances exists remains the date of the decree that actually allocated parental rights." *Id*. *See also Hartley v. Hartley*, 2d Dist. Montgomery No. 27646, 2017-Ohio-8494.

{¶21} Upon review, we find that December 22, 2009, is the operative date for analyzing whether a change in circumstances occurred in the case at hand. In Mother's motion to modify custody, she requests the following relief: "Defendant is seeking a change in parental rights and responsibilities awarding her legal custody and residential parent status for the children's best

interest." Furthermore, Mother "suggests the current equal visitation time is in the best interests of the children and should not be changed." Mother is requesting a modification of the December 22, 2009 decree which named Father as the residential parent and legal custodian of the children. There is no other decree or order in this case that affects custody of the children.

{¶22} Accordingly, we find that the court abused its discretion by not considering evidence dating back to December 22, 2009, to determine whether there has been a change of circumstances pursuant to R.C. 3109.04(E)(1).

Prejudicial Effect

{¶23} Generally, determinations regarding the admission, exclusion, and relevancy of evidence are within the discretion of the trial court. "A reviewing court will uphold an evidentiary decision absent an abuse of discretion that has affected the substantial rights of the adverse party or is inconsistent with substantial justice." *Di v. Cleveland Clinic Found.*, 2016-Ohio-686, 60 N.E.3d 582, ¶ 51 (8th Dist.). *See also Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). In other words, "an evidentiary determination should not be disturbed absent a showing of an abuse of discretion which amounts to prejudicial error." *State v. Graham*, 58 Ohio St.2d 350, 352, 390 N.E.2d 805 (1979).

{¶24} Pursuant to Evid.R. 103(A)(2), "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and * * * [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court

by offer or was apparent from the context within which questions were asked." Furthermore, "[o]nce the court rules definitely on the record, either before or at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." *See also* Civ.R. 61 ("No error in * * * the exclusion of evidence * * * is ground for * * * vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.").

{¶25} In the case at hand, Mother's attorney attempted to introduce testimony and exhibits concerning events that occurred prior to 2012 or 2013, but the court ruled this evidence inadmissible. For example, the court refused to consider evidence of how many times Father moved with the children since being awarded custody of them; emails between Mother and Father showing their inability to communicate effectively; transcripts from prior court proceedings in this case; Father's use of different last names for the children; G.C.'s medical records from 2010; and the former guardian ad litem's report, which recommended shared parenting. This evidence is both relevant and admissible under R.C. 3109.04(E).

{¶26} The court's May 8, 2018 journal entry denying Mother's motion for modification of custody summarily concludes that no change in circumstances occurred and makes no findings of fact regarding this standard. The factors that the court considered in its journal entry relate to the best-interest-of-the-child analysis found in R.C. 3109.04(F)(1). We find this analysis to be premature, because Mother was precluded from presenting evidence that was central to her claim that a change in circumstances occurred since the prior custody decree was issued.

{¶27} As the court held in *Perz v. Perz*, 85 Ohio App.3d 374, 376, 619 N.E.2d 1094 (6th Dist.1993),

> the legislature has seen fit in change-of-custody actions to erect a barrier that must be hurdled before inquiry can be made on those issues affecting the best interest of the child. That barrier is the initial requirement that there must be a change in the circumstances of the child. This obstacle can best be viewed as the domestic relations version of the doctrine of *res judicata*. That is, there cannot be a constant relitigation of the same issues. There must be some substantial change of a circumstance that is significant to the question of custody before reexamination of the issues is appropriate. The barrier to inquiry into the best interest of the child should be real, but not insurmountable.

(Emphasis sic.)

{¶28} In addition to the evidence that the court excluded, there is evidence in the record which the court apparently did not consider, but should have, in denying Mother's motion. For example, the *Perz* court concluded that "a significant passage of time" and the children's maturation "from infancy to early adolescence is a sufficient change of circumstance to warrant an inquiry into the question of whether the interest of the children would be best served by their remaining with appellee, or by a change in custody." *Id*. at 377. In the case at hand, approximately eight and one-half years passed between the original custody decree and the court's journal entry denying Mother's motion for a custody modification. The children were ages three and one when Father was granted custody, and they were ages 12 and nine when Mother's motion was denied.

{¶29} Furthermore, Mother and Father lived approximately two hours away from each other when the court granted Father custody in 2009. When the court denied Mother's motion in May 2018, both parents lived — and currently live — in the district where the children attend school, just minutes apart from each other. Additionally, when Father was awarded custody, his mother was the primary care giver for the children, and they all lived in his mother's house. Now, Father lives with his girlfriend, who is the primary care giver for the children. It is

interesting to note that Father signed a power of attorney purportedly authorizing his girlfriend to make the same decisions regarding the children that Mother is seeking to have a say in.

{¶30} In summary, the court committed prejudicial error by not considering facts that occurred since the prior custody decree when concluding that there was no change in circumstances. Mother's fourth and fifth assigned errors are sustained.

Notice of Residential Parent's Intent to Relocate

{¶31} Pursuant to R.C. 3109.051(G)(1), "[i]f the residential parent intends to move to a residence other than the residence specified in the parenting time order or decree of the court, the parent shall file a notice of intent to relocate with the court that issued the order or decree."

{¶32} In the case at hand, the court's May 8, 2018 journal entry reads, in part, as follows: "The legal custodian shall file a notice of intent to relocate with this court prior to moving from the jurisdiction of the court."

{¶33} Upon review, we find that the court's journal entry is inconsistent with R.C. 3109.051(G)(1). Mother's third assigned error is sustained.[4]

{¶34} Because we found that the court erred in excluding relevant and admissible evidence that prejudiced Mother, her first and second assigned errors are moot. *See* App.R. 12(A)(1)(c).

{¶35} Judgment reversed in part, and remanded to the lower court for further proceedings consistent with this opinion. The court's denial of Mother's motion for reallocation of parental

[4] Mother's third assigned error states that the court "erred * * * by ordering that [Father] could move anywhere under the jurisdiction of the trial court * * *." That is not what the court ordered. Rather, the court improperly narrowed the circumstances under which Father is required to notify the court of his intent to relocate. Nonetheless, Mother's third assigned error is sustained to the extent that the court's order is inconsistent with R.C. 3109.051(G)(1).

rights and responsibilities is reversed. The court's order regarding Father's notice of intent to relocate is reversed. The court's denial of Father's motion to modify parenting time is not part of this appeal. This case is remanded to the trial court for a new hearing on Mother's motion for reallocation of parental rights and responsibilities, and to issue a new order complying with R.C. 3109.051(G)(1).

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

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

PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
LARRY A. JONES, SR., J., CONCUR