[Cite as *Wholf v. Wholf*, 2004-Ohio-3931.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

WILLIAM T. WHOLF,	:	**O P I N I O N**
Plaintiff-Appellant/ Cross-Appellee,	:	
		CASE NO. 2003-G-2501
- vs -	:	
AMY D. WHOLF,	:	
Defendant-Appellee/ Cross-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 99 DC 581.

Judgment: Affirmed.

Kenneth J. Cahill, 1959 Mentor Avenue, Suite 2, Painesville, OH 44077 (For Plaintiff-Appellant/Cross-Appellee).

Jacob A. H. Kronenberg, 4403 St. Clair Avenue, N.E., Cleveland, OH 44103 (For Defendant-Appellee/Cross-Appellant).

WILLIAM M. O'NEILL, J.

{¶1} This appeal arises from the Geauga County Court of Common Pleas, Domestic Relations Division, wherein appellant/cross-appellee, William T. Wholf

(hereinafter referred to as appellant), appeals the judgment of the trial court, granting appellee/cross-appellant's motion to modify the shared parenting decree.

{¶2} William and appellee/cross-appellant, Amy D. Wholf (hereinafter referred to as appellee), were married on August 22, 1993. There was one child born of the marriage, William. On July 28, 1999, appellant filed a complaint for divorce. On September 20, 2000, the trial court granted the divorce and ordered into effect the shared parenting decree. The decree established an agreed-upon fifty/fifty shared placement schedule. Both parents were granted legal custody and residential parent status, and the child spent alternating weeks with each parent.

{¶3} On June 3, 2002, appellee filed a motion to modify the shared parenting decree, as the child was reaching school age and would begin attending preschool in August 2002, followed by kindergarten in August 2003. In her proposed modification to the shared parenting decree, appellee requested residential parent status for the child during the school week, with visitation for appellant on alternating weekends. Appellee believed the alternating week visitation arrangement would not properly accommodate the child's school schedule. Appellant filed a motion to modify the shared parenting decree on July 24, 2002. In his motion, appellant requested that he be granted residential parent status during the school week, with alternating weekend visitation for appellee.

{¶4} A hearing was held, at the conclusion of which the magistrate issued a decision. The magistrate recommended that appellee be designated the residential parent for school purposes with alternating weekend visitation for appellant. The magistrate's conclusions of law stated that, pursuant to R.C. 3109.04(E)(1)(a), there

had been a change of circumstances to-wit: the child had now reached school age. Moreover, the magistrate concluded that appellee was more likely to "honor and facilitate the flexibility that is contemplated in the parties Shared Parenting Plan."

{¶5} Appellant filed his objections to the magistrate's decision on February 11, 2003. On March 5, 2003, the trial court adopted the magistrate's decision with only limited modifications to the findings of fact. Appellant subsequently filed his timely notice of appeal.

{¶6} Appellee filed a response to appellant's objections and also filed objections to the magistrate's decision. Her objections were not timely filed, however, and were, therefore, overruled. Appellee subsequently filed a notice of appeal with this court. Counsel for appellee filed a motion to withdraw, which was granted. The appeal proceeded with appellant filing his brief and assignment of error. The time in which appellee was to file her answer brief and cross-assignments of error lapsed. Appellee subsequently retained new counsel and sought an extension of time within which to file her brief. With leave of this court, appellee subsequently filed her brief on September 15, 2003. However, appellee does not present any cross-assignments of error in her brief. Thus, we shall proceed with addressing appellant's single assignment of error presented on appeal:

{¶7} "Whether the trial court abused its discretion and erred as a matter of law when it granted appellee/mother's motion to modify shared parenting decree and denied appellant/father's motion to modify shared parenting decree."

{¶8} Appellant contends that the trial court abused its discretion when it failed to cite competent evidence that appellant was less likely to honor and facilitate the flexibility that is contemplated in the shared parenting decree.

{¶9} Pursuant to R.C. 3109.04(E)(1)(a):

{¶10} "The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on the 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:

{¶11} "***

{¶12} "(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."

{¶13} R.C. 3109.04(F)(1) enumerates factors to be considered when determining whether a modification of a shared parenting decree is in the best interest of the child, it reads, in pertinent part:

{¶14} "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:

{¶15} "(a) The wishes of the child's parents regarding the child's care;

{¶16} "(b) [not applicable];

{¶17} "(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;

{¶18} "(d) The child's adjustment to the child's home, school, and community;

{¶19} "(e) The mental and physical health of all persons involved in the situation;

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

{¶21} "(g) [not applicable];

{¶22} "(h) [not applicable];

{¶23} "(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;

{¶24} "(j) [not applicable]."[1]

{¶25} A trial court, as trier of fact, should be given wide latitude in determining whether a change of circumstances has occurred.[2] Moreover, such a decision by the trial court will not be overturned absent an abuse of discretion.[3] "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable."[4]

1. R.C. 3109.04(F)(1).
2. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, paragraph two of the syllabus.
3. Id., at paragraph one of the syllabus.
4. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶26} In the instant case, appellant contends that the trial court abused its discretion in determining that appellee was more likely to "honor and facilitate the flexibility that is contemplated in the parties' shared parenting plan."

{¶27} A review of the record and transcript of the modification hearing, as well as the magistrate's decision, reveals that the magistrate carefully weighed the factors enumerated in R.C. 3109.04(F)(1). Testimony was provided by both parties as to the environment in which the child participated at each parent's home. Both parties have remarried and have step-children living within their respective homes, either full-time or on a fixed visitation schedule. Both parties testified that the child has adjusted to his new step-parents and step-siblings well.

{¶28} Both parties agreed that there were no problems with visitation during the duration of the prior shared parenting decree. Appellee did testify at the hearing that appellant had requested additional visitation with the child in order to accommodate family events and other activities. She also testified that she kept appellant informed regarding upcoming events at school that would occur while the child was visiting with appellant so that he could attend them. She also testified that on a few occasions she requested additional visitation time with the child, in order to allow him to visit out-of-town relatives and to attend a friend's birthday party. Appellant did not allow for that extra visitation time. However, other than these instances, both parties abided by the fifty-fifty visitation terms of the prior decree.

{¶29} We agree with the findings by the magistrate, which were ultimately adopted by the trial court, concluding that, in light of the statutory factors and all evidence presented, appellee should be granted residential status for school purposes.

Although both parties presented evidence that the child was happy and thrived in both households, the existing fifty-fifty split of visitation is not conducive to a school-age child's schedule. Thus, the trial court properly concluded that a change in circumstances had occurred and that a modification of the shared parenting decree was necessary to serve the best interest of the child.[5]

{¶30} We agree with the trial court's determination that it was in the best interest of the child to modify the parenting decree and award appellee residential status for school purposes based on the evidence in the record. However, it is unclear from the record that a clear determination can be made that appellee is more likely to "honor and facilitate" the contemplated shared parenting agreement when the record demonstrates that both parties adhered to the prior visitation plan. We do not find, however, that it was an abuse of discretion to ultimately conclude that appellee should be granted residential status for school purposes. The record supports the conclusion that granting appellee such status was in the best interest of the child.

{¶31} Therefore, the trial court did not abuse its discretion and properly applied the statutory factors and concluded that there had been a change in circumstances and that the modification of the shared parenting decree was warranted. Moreover, the court properly found that appellee should be granted residential parent status for schooling purposes.

{¶32} Appellant's assignment of error is without merit. The judgment of the trial court is affirmed.

JUDITH A. CHRISTLEY, J., concurs with Concurring Opinion,

5. R.C. 3109.04(E)(1)(a).

DIANE V. GRENDELL, J., concurs in judgment only with Concurring Opinion.

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JUDITH A. CHRISTLEY, J., concurring.

{¶33} I respectfully concur with this thought. I agree that each parent in this matter provided the specific visitation and access called for by the shared parenting agreement. However, the evidence before the trial court did indeed indicate that the mother in this situation was much more willing to allow additional visitation for the father upon his request and that the reverse was not true. The opinion seems to be concerned that, because the actual visitation schedule was complied with, the trial court could not consider the fact that the one parent was much more flexible and willing to accommodate requests beyond the actual visitation schedule than the other. However, R.C. 3109.04(E)(2)(f) shows this to be an issue which the court may consider. Specifically, 3109.04(F)(2)(b) states "the ability of each parent to encourage the sharing of love, affection, and *contact* between the child and the other parent[,]" (Emphasis added.) With that concept in mind, I concur.

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DIANE V. GRENDELL, J., concurring in judgment only.

{¶34} Although I agree with the result ultimately reached by majority to affirm the decision of the court below, the majority's analysis of certain issues is incorrect. In

particular, the majority opinion's position regarding the "change of circumstances" precipitating the modification of the shared parenting agreement is not consistent with factual record and the relevant law.

{¶35} The majority writes that "the existing fifty-fifty split of visitation is not conducive to a school-age child's schedule" and, therefore, "the trial court properly concluded that a change in circumstances had occurred and that a modification of the shared parenting decree was necessary to serve the best interest of the child." The majority also writes that "[t]he magistrate's conclusions of law stated that, pursuant R.C. 3109.04(E)(1)(a), there had been change or circumstances to-wit: the child had now reached school age." The majority's opinion creates the false impression that merely because William has begun attending school, a "change in circumstances" has occurred warranting a modification of the shared parenting agreement.

{¶36} Contrary to the impression created by the majority opinion, the magistrate did not state that a change of circumstances had occurred because the child "had now reached school age." The magistrate found that a change of circumstances had occurred, but did not expressly identify the changed circumstances. In his findings of fact, the magistrate states that, since the shared parenting plan went into effect, both parties have moved to different school districts approximately thirty miles apart from each other and that, therefore, it is no longer practical for the parties to continue sharing custody of the child on alternating weeks. It is this fact that the parties now live at such a distance from each other that the child is no longer able to attend the same school consistently which constitutes a change in circumstances, not the fact that he has reached school age.

{¶37} This clarification is necessary because a child's attainment of school age, in and of itself, does not constitute a "change of circumstances" under Ohio law. R.C. 3109.04(E)(1)(a) provides that a "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 ***." (Emphasis added.) Obviously, the fact that the child would one day attend school was known to the court as well as to both parties at the time of the prior decree. Therefore, this fact, without more, cannot constitute a change of circumstances.

{¶38} The Twelfth Appellate District has recognized the baleful implications of allowing a modification of custody every time a child begins a new school: "We doubt the legislature intended for any school change to constitute a change of circumstances in the child warranting a change of custody. Were it so, any nonresidential parent would seek custody based solely upon a strong relationship and the fact that the child would be entering kindergarten, first grade, junior high school, or high school. Granting a change of custody solely upon those grounds would foster rather than prevent a constant relitigation of the issues already determined by the trial court in its prior custody order." *Allgood v. Allgood* (Oct. 25, 1999), 12th Dist. No. CA98-12-156, 1999 Ohio App. LEXIS 4965, at *14 (citation omitted).

{¶39} This court has held that the "change in circumstances need not be substantial but must be a change of substance." *In re Powell* (June 8, 2001), 11th Dist. No. 2000-L-044, 2001 Ohio App. LEXIS 2569 at *14. A child's aging alone is

insufficient. Id. (Citation omitted). Consistent with this principle, Ohio courts have held that a change of circumstances does not occur merely because a child comes of age for attending school. In the cases where the court has considered a child's commencement of school at all, there have always been additional circumstances supporting the finding of a change of circumstances. See, e.g., *Davis v. Flickinger*, 77 Ohio St.3d 415, 420, 1997-Ohio-260 (child's commencement of school may constitute a change of circumstances "when combined with hostility between the parents that adversely affects the visitation or custody arrangements"); *Davis v. Davis*, 7th Dist. No. 99-JE-65, 2000-Ohio-2584, 2000 Ohio App. LEXIS 5011, at *4-*5 (divorce decree expressly provided that custody issue should be reviewed prior to the child entering kindergarten); *Carter v. Carter*, 3rd Dist. No. 16-99-02, 1999-Ohio-904, 1999 Ohio App. LEXIS 4892, at *8-*9 (the fact that the children started their school education was one of several factors supporting a change in circumstances); *In re Edgington*, 3rd Dist. No. 3-99-07, 1999-Ohio-794, 1999 Ohio App. LEXIS 2579, at *6 (change of circumstances existed where, upon entering school, child was discovered to be developmentally challenged).

{¶40} The majority's analysis is also flawed because it fails to recognize that, under Ohio law, it is not necessary to find a change in circumstances in order for a court to modify a shared parenting agreement. R.C. 3109.04(E)(2)(b) states that a "court may modify the terms of the plan for shared parenting *** upon its own motion at any time if the court determines that the modifications are in the best interest of the children or upon the request of one or both parents under the decree." The obvious import of this provision authorizes a court to modify a shared parenting decree solely upon finding

that it would be in the best interest of the child to do so. As the Seventh District has stated, "[i]t is clear *** that a shared parenting agreement is treated differently than a custody decree arising out of adversarial litigation. *** [U]nder R.C. 3109.04(E)(2), the trial court was only required to find that terminating the shared parenting agreement was in the best interests of the child. And findings concerning a change in circumstances were superfluous ***." *Myers v. Myers*, 153 Ohio App.3d 243, 2003-Ohio-3552, at ¶40. Also, *Bauer v. Bauer*, 12 Dist. No. CA2002-10-083, 2003-Ohio-2552, at ¶13 ("a modification of the terms in a shared parenting agreement only requires a finding that it be in the best interest of the child under R.C. 3109.04(E)(2)(b)"); *In re Beekman*, 4th Dist. No. 03CA410, 2004-Ohio-1066, at ¶14 ("the plain language of the statute [R.C. 3109.04(E)(2)(b)] permits modification of a shared parenting plan upon a finding that the proposed modifications are in the best interest of the child, and does not require a finding that the child's circumstances have changed since the prior decree"); cf. *Porter v. Porter*, 9th Dist. No. 21040, 2002-Ohio-6038, at ¶8 (holding that modifying a plan by designating a residential parent for school purposes does not involve a reallocation of parental rights and may be effected through R.C. 3109.04(E)(2)(b)).

{¶41} In the present case, the lower court modified the shared parenting plan by designating appellee the "residential parent for school purposes." Appellant remains a residential custodial parent during non-school periods. Although the lower court made a finding of a change in circumstances, this finding was not necessary under R.C. 3109.04(E)(2)(b) and was, in effect, superfluous. It is equally unnecessary for this court to include a finding regarding the change of circumstances in its own analysis. It is

especially unnecessary for this court to do so in a way that confuses the law as to what constitutes a legitimate change of circumstances.