[Cite as *Smith v. Smith*, 2010-Ohio-3051.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

TIMOTHY SMITH,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0064**
- vs -	:	
CHRISTINE SMITH,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 2006 DR 199.

Judgment: Affirmed.

Rhonda L. Granitto Santha, 6401 State Route 534, Farmington, OH 44491 (For Plaintiff-Appellee).

Christopher A. Maruca, Betras, Maruca, Kopp, Harshman & Bernard, L.L.C., 6630 Seville Drive, #1, P.O. Box 129, Canfield, OH 44406 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Christine Smith, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, in which the trial court granted plaintiff-appellee, Timothy Smith's, Motion for Change of Custody. For the following reasons, we affirm the decision of the trial court.

{¶2} The parties were married on October 24, 2001, and one child, K.S., d.o.b. 03/01/05, was born as issue of the marriage.

{¶3} On May 5, 2006, Timothy filed a Complaint for Divorce. A divorce decree was subsequently granted in 2007, designating Christine as the residential parent, subject to "the reasonable rights of companionship being enjoyed by [Timothy]." The parties were to follow a Standard Order of Companionship for all companionship issues. Both parties agreed that "they [would] provide an address where the child will be when the child is in the possession of the other parent."

{¶4} On September 5, 2007, a hearing before a magistrate was held. The magistrate found that Christine had moved to Pennsylvania and Timothy "has had no companionship since August 16, 2007." Further, the magistrate noted that Timothy filed post-decree motions including a Motion for Change of Custody. The magistrate held that "[w]hile the change in custody is pending [Timothy is] to have [K.S.] every other weekend Thursday 6pm to Monday 9am commencing September 6, 2007." The magistrate noted that "[a]ny violation of this order **could lead to an immediate change in custody**." (Emphasis added).

{¶5} The trial court subsequently approved the magistrate's decision, also noting that a violation "**could lead to an immediate change of custody**." (Emphasis added).

{¶6} A hearing was held before a magistrate on October 30, 2008, on Timothy's Motion for Change of Custody. Both parties, along with their respective counsel, and K.S.'s Guardian ad litem (GAL) were present at the hearing. "After a review of the testimony provided, evidence submitted (including video tapes and CD)

and review of GAL's Report[,] the court determine[d] that a change of circumstances took place when [Christine] moved to P[ennsylvania] without filing a notice to relocate or notifying [Timothy]. The court also reviewed [R.C.] 3109.04(F)(1) A-J and determine[d] that the best interest of the child would be served placing custody of [K.S.] with [Timothy]. [Christine] to have companionship alt[ernate] weeks."

{¶7} The trial court reviewed the magistrate's decision and found that it "complie[d] with the requirements of the Rules and the Ohio Revised Code *** and that there are no errors on the face of the decision *** [and] therefore[,] approved" the magistrate's decision on May 22, 2009. Moreover, the trial court "reviewed 3109.04(F)(1) A-J and determine[d] that the best interest of the child would be served [by] placing custody of minor child [K.S.] *** with [Timothy]."

{¶8} Christine timely appeals and raises the following assignment of error: "The trial court erred to the prejudice of Appellant by changing custody and awarding same to Appellee, when no proper change of circumstances was alleged or established."

{¶9} R.C. 3109.04(E) sets forth the procedure for modifying a prior decree allocating parental rights and responsibilities for the care of children. R.C. 3109.04(E)(1)(a) states that "[t]he 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 ***, 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."

{¶10} Although, a reading of the trial court's findings of fact and conclusions of law does not reveal a specific listing or enumeration of each of the factors of R.C. 3109.04(F)(1), a trial court is required to consider the statutory factors; it is not necessary for the trial court to set forth its analysis as to each factor in its judgment entry so long as it is supported by some competent, credible evidence. See *Coe v. Schneider*, 4th Dist. No. 05CA26, 2006-Ohio-440, at ¶32; *Matis v. Matis,* 9th Dist. No. 04CA0025-M, 2005-Ohio-72, at ¶¶6-7; *In re Jacobberger*, 11th Dist. No. 2003-G-2538, 2004-Ohio-6937, at ¶26 and ¶31; *Makuch v. Bunce*, 11th Dist. No. 2007-L-016, 2007-Ohio-6242, at ¶41 ("While the magistrate did not formally list the statutory factors he considered in arriving at his conclusion that these modifications would be in the child's best interest, a practice we generally endorse, he carefully elucidated his reasoning. In doing so, we believe the magistrate met his statutory obligation.").

{¶11} A change in circumstances is a threshold requirement intended to provide some stability to the custodial status of the child. *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, at ¶15. However, appellate courts "must not make the threshold for change so high as to prevent a trial judge from modifying custody if the court finds it is necessary for the best interest of the child." *Davis v. Flickinger*, 77 Ohio St.3d 415, 1997-Ohio-260, at 420-421. "In determining whether a 'change' has occurred, we are mindful that custody issues are some of the most difficult and agonizing decisions a trial judge must make. Therefore, a trial judge must have **wide latitude** in considering all the evidence before him or her -- including many of the factors in this case -- and such a decision must not be reversed absent an abuse of discretion." Id. at 418 (citation omitted) (emphasis added).

{¶12} "[A] move may constitute a change of circumstances when coupled with evidence of other adverse effects, such as a disruption in ongoing relationships with extended family." *In re D.M.*, 8th Dist. No. 87723, 2006-Ohio-6191, at ¶36.

{¶13} "With respect to the form of objections, the rule *** requires that '[a]ny objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact.' Civ.R.53(E)(3)(c)." *Weisberg v. Sampson*, 11th Dist. No. 2005-P-0042, 2006-Ohio-3646, at ¶29. "This court has interpreted this rule to require a party challenging the magistrate's findings of fact to submit the requisite transcripts to the trial court." Id. (Emphasis omitted).

{¶14} Timothy contends that the record is devoid of a transcript as well as separate findings of fact and conclusions of law. Civil Rule 52 provides for separate findings of fact and conclusions of law upon timely request and applies to change of custody proceedings which involve questions of fact tried and determined by the court without a jury. See Civ.R. 52; *Werden v. Crawford* (1982), 70 Ohio St.2d 122, 123; *In re Fair*, 11th Dist. No. 2007-L-166, 2009-Ohio-683, at ¶48. If the appellant does "not request findings of fact and conclusions of law under Civ.R. 52[,] *** we must 'presume the regularity of the proceedings at the trial level.'" *Siefker v. Siefker*, 3rd Dist. No. 12-06-04, 2006-Ohio-5154, at ¶6, citing *Bunten v. Bunten* (1998), 126 Ohio App.3d 443, 447; *Fallang v. Fallang* (1996), 109 Ohio App.3d 543, 549 ("when a party does not request that the trial court make findings of fact and conclusions of law under Civ.R. 52, the reviewing court will presume that the trial court considered all the factors and all other relevant facts").

{¶15} "In the absence of a transcript from the magistrate's hearing, the scope of a trial court's review of the factual findings in a magistrate's decision 'is limited to determining whether those findings are sufficient to support *** the conclusions of law' reached by the magistrate. *** In other words, as an appellate court, we will only reverse if we find the trial court adopted the magistrate's decision when there was clear error of law or other defect on its face." *Weisberg*, 2006-Ohio-3646, at ¶30 (citations omitted); *Mauerman v. Mauerman*, 11th Dist. No. 2002-T-0049, 2003-Ohio-3876, at ¶15 ("[u]nfortunately, appellant's failure to provide the trial court with a transcript or affidavit precludes us from considering her sole assignment of error because this court must presume that the record supports the trial court's judgment unless appellant can demonstrate otherwise").

{¶16} In the instant case, due to the absence of separate findings of fact and/or a transcript of the magistrate's hearing, we must presume the regularity of the trial court proceedings. Thus, in the absence of evidence to the contrary, we presume that the trial court properly applied R.C. 3109.04 and that it did not abuse its discretion by finding that there was a change in circumstances based on Christine's relocation. Our review of the record before us reveals no evidence to suggest that the trial court's decision was improper. There is no clear error of law or other defect on the face of the decision.

{¶17} The record reflects that the magistrate reviewed testimony, evidence submitted, as well as the GAL report, and found that "a change in circumstances took place when the Defendant, Christine Smith, moved to Pennsylvania without filing a Notice to Relocate or notifying the Plaintiff, Timothy Smith."

{¶18} Accordingly, Christine's sole assignment of error is without merit.

{¶19} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, granting Timothy's Motion for Change of Custody, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶20} Under R.C. 3109.04, mere relocation of a residential parent is not sufficient to prove a "change in circumstances" justifying the modification of a prior decree allocating parental rights and responsibilities for the care of children. *In re Seitz*, 11th Dist. No. 2002-T-0097, 2003-Ohio-5218, at ¶38; cf. *Salisbury v. Salisbury*, 11th Dist. Nos. 2005-P-0010 and 2005-P-0084, 2006-Ohio-3543, at ¶92 (collecting cases). There is a rebuttable presumption that the custodial parent should retain custody unless a change in circumstances is such that it would have a material, adverse effect upon the child. *Salisbury* at ¶91. As the majority correctly notes, for relocation of a residential parent to justify a finding of change in circumstances sufficient to modify custody, there must be attendant circumstances to that relocation indicating that the child's welfare requires a change in custody. *Seitz* at ¶38.

{¶21} The majority's affirmation of the trial court's judgment is premised upon the limited review available to that court, and this one, when a party fails to move for findings of fact and conclusions of law in the trial court, and to file a transcript or affidavit of the evidence from the magistrate's hearings. I respectfully note, however, that the report and recommendation of the guardian ad litem is part of the record in this case. The GAL stated that appellant's relocation to Pennsylvania – the change in circumstances found by the trial court to justify the change in custody – was, evidently, temporary, and that she was in the process of moving back to this area. He recommended that appellant remain residential parent. For a change in custody to occur, a party must first show a change in circumstances. *In re Lamont*, 11th Dist. No. 2007-G-2786, 2008-Ohio-1893, at ¶32 (O'Toole, J., dissenting). If none is shown, the court should not advance to a best interest analysis. Id. Based on the GAL's recommendation, I do not think a change in circumstances was proven: the "relocation," if any, was in the past, and could not have any further effect on the child. Therefore, as a matter of law, the magistrate should not have advanced to a best interest analysis; and, this error was evident on the face of the magistrate's decision.

{¶22} I respectfully dissent.