[Cite as *Poshe v. Chisler*, 2011-Ohio-1165.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

MICHAEL R. POSHE,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-017**
- vs -	:	
KRISTEN E. CHISLER,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2004 PR 00788.

Judgment: Affirmed.

Mary Joseph Clair, 4132 Erie Street, Suite 202, Willoughby, OH 44094 (For Plaintiff-Appellee).

Russell S. Bensing, 1350 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Kristen E. Chisler, appeals from the judgment of the Lake County Court of Common Pleas, Juvenile Division, adopting the magistrate's decision granting custody to appellee, Michael R. Poshe. For the reasons discussed below, we affirm the judgment of the trial court.

{¶2} The parties, although never married, have one child together, J.M.P., d.o.b. December 30, 2002. In 2005, the parties entered into a shared parenting agreement, where they equally divided time in the parenting schedule, and worked

under such plan with no judicial modification. As required by the agreement, visitation with the maternal grandmother, Deanna Stockdale, was to be "supervised by [appellant]." Further, the agreement stated that appellant shall not arrange for Ms. Stockdale to be caretaker of J.M.P.

{¶3} In 2009, appellee filed a "motion for custody ex parte." Appellee moved to become the sole residential parent and legal custodian of the child, alleging that appellant had breached the shared parenting plan. Appellant did not seek modification or termination of the shared parenting plan.

{¶4} A two-day hearing was held before a magistrate. During that hearing, appellant proceeded pro se.

{¶5} The magistrate filed a decision dated October 19, 2009. The magistrate found that a change had occurred in the circumstances of the child and determined that modification of the allocation of parental rights was in the best interest of the child. Therefore, the magistrate terminated the shared parenting plan, and appellee was designated the sole legal custodian and residential parent of J.M.P.

{¶6} Appellant filed objections to the magistrate's decision and a hearing was held. At the conclusion of the hearing, the trial court overruled appellant's objections and affirmed the decision of the magistrate.

{¶7} Appellant filed a timely notice of appeal and asserts the following assigned error for our review:

{¶8} "The Trial Court erred in modifying the Joint Parenting Agreement so as to award custody of the minor child to the Father."

{¶9} Under her assigned error, appellant argues that the trial court abused its discretion by modifying the parties' shared parenting plan and designating appellee as

residential parent and legal custodian of the child when the record does not demonstrate that a change of circumstances had occurred and when the trial court failed to consider whether the harm likely to be caused by a change of environment was outweighed by the advantages of the change.

{¶10} A trial court has broad discretion in its determination of parental custody rights. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. A trial court's custody determination should not be disturbed unless it constitutes an abuse of discretion. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶61-62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶11} The Supreme Court of Ohio has stated the following with regard to a reviewing court's duty of deference to the trial court when making a custody determination:

{¶12} "The discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record. *** In this regard, the reviewing court in such proceedings should be guided by the presumption that the trial court's findings were indeed correct." *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. (Internal citation omitted.)

{¶13} Under R.C. 3109.04(E)(1)(a), a court may not modify a prior decree allocating parental rights and responsibilities "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."

{¶14} Additionally, a trial court is required to consider whether 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)(iii).

{¶15} R.C. 3109.04(E)(2)(c), on the other hand, governs the termination of a shared parenting plan. R.C. 3109.04(E)(2)(c) allows the termination of a shared parenting plan, upon the parties' own motion, or when the trial court "determines that [the] shared parenting [plan] is not in the best interest of the children."

{¶16} Additionally, R.C. 3109.04(E)(2)(d) provides:

{¶17} "Upon the termination of a prior final shared parenting decree under division (E)(2)(c) of this section, the court shall proceed and issue a modified decree for the allocation of parental rights and responsibilities for the care of the children under the standards applicable under divisions (A), (B), and (C) of this section as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made."

{¶18} In *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, the Supreme Court of Ohio upheld a decision of the Third Appellate District whereby the court held that a mere change in the designation of the residential parent and legal custodian did not constitute a termination of the shared parenting plan, but rather only a modification of the plan.

{¶19} In the instant case, there is debate between the parties as to whether R.C. 3109.04(E)(1)(a) or (E)(2) applies. In his appellate brief, appellee argues that he sought a termination of the shared parenting plan, and thus the trial court was required only to determine the best interest of the child. Appellant maintains that the trial court only modified the shared parenting order, and therefore the court was required to find that a change of circumstances had occurred warranting the reallocation of parental rights. Appellant argues the record does not reflect that a change of circumstances has occurred.

{¶20} The original shared parenting plan contained language that made both parties residential parents and legal custodians of their child. Through his motion, appellee sought termination of the shared parenting plan.

{¶21} In the October 19, 2009 decision, the magistrate found a change of circumstances had occurred and determined that "[m]odification of the allocation of parental rights [was] in the best interest of the child[.]" Thereafter, the magistrate terminated the shared parenting plan and designated appellee sole custodian and residential parent. Appellant was awarded standard visitation. The trial court, in a judgment entry dated January 19, 2010, overruled appellant's objections and ordered that the shared parenting plan be terminated. As the sole residential parent and legal custodian of the child, appellee has the right to make any decisions regarding the care, welfare, and education of J.M.P. Due to the clear and plain language of both the magistrate's finding and the trial court's entry, the shared parenting plan was terminated. As a result, the trial court was charged with finding that the termination of the shared parenting plan was in the best interest of the child. See, e.g., *Dyan v. Beismann*, 2d Dist. No. 22323, 2008-Ohio-984, at ¶9-13; *Rogers v. Rogers*, 6th Dist.

No. H-07-024, 2008-Ohio-1790, at ¶9-13. Nonetheless, even if we treated this as a modification of the shared parenting plan, the record reveals a variety of factors that are relevant to the change-in-circumstances requirement of R.C. 3109.04(E)(1)(a).

{¶22} At the hearing, numerous witnesses testified. The record is replete with instances where appellant violated the shared parenting agreement and made derogatory and profane statements in public and in front of J.M.P. Appellee maintained that according to their shared parenting agreement, J.M.P. was not to have unsupervised contact with appellant's mother, Ms. Stockdale, as she has an extensive criminal record, displays erratic behavior, has a drug problem, and has had numerous encounters with the Lake County Department of Job and Family Services. Appellee stated, however, that he has observed Ms. Stockdale with J.M.P. outside the presence of appellant. Further, James Davis, a police officer with the city of Willoughby, averred that, one morning in 2006 at approximately 1:00 a.m., he pulled over Ms. Stockdale for committing a traffic violation. Officer Davis noted that J.M.P. was sitting in the back of Ms. Stockdale's vehicle, and appellant was not present. In addition, Erik Royce, Ms. Stockdale's landlord, testified that on three different occasions he observed Ms. Stockdale babysitting J.M.P. Although appellant testified with respect to her mother's visitation with J.M.P., the magistrate found her testimony to be "totally evasive *** regarding the contact between the child and Ms. Stockdale."

{¶23} There was also testimony regarding appellant's use of profanity in front of J.M.P. In fact, Theresa Stillman, a bus driver, testified that appellant swore at her in front of J.M.P. and the children. Stillman testified that appellant used profanity on two different occasions yelling, "this f***ing bus driver does not know how in the f*** to park" loud enough for other children in the playground to hear. Appellant's use of profanity in

front of J.M.P. was corroborated by Royce. Appellee, as well as his parents, testified of the negative effect on J.M.P., as he has begun using inappropriate language. Again, the magistrate found that although appellant "denied the volume of [socially inappropriate, public, profanity-laden tirades in front of J.M.P.], there were multiple credible witnesses who verified many such incidents."

{¶24} The magistrate also heard testimony from several of the witnesses regarding frequent instances where the police came to appellant's residence. In fact, on one occasion, J.M.P. witnessed the police handcuff appellant and escort her into the police cruiser.

{¶25} The magistrate found, inter alia, that appellant's "inappropriate public displays negatively impact the child and have eroded communication rendering shared parenting unworkable"; that "the numerous transitions from household to household resultant from the current plan have been detrimental to the child," as the rules and lifestyles of the parties are incongruous; and that "unsupervised contact with [Ms. Stockdale] has placed the child in an unsafe environment."

{¶26} In addition to finding a change of circumstances, the magistrate found that the harm likely to be caused by the change of environment was outweighed by the advantages of the change of environment. Appellant argues that the trial court failed to make such a determination. The magistrate's decision states, however, that "[m]odification of the allocation of parental rights is in the best interest of the child and any harm caused by the change is outweighed by the advantages of a change of environment to the child." To support such a finding, the magistrate found that the "current schedule provides too many transitions for [J.M.P.]. There is neither

consistency of home rules, nor consistency of supervision in the homes. Differences in lifestyles create two different worlds for [J.M.P.]."

{¶27} There was evidence at the hearing that appellee has taken parenting classes, has been self-employed for over five years, is able to provide financial support for J.M.P., and has initiated counseling for J.M.P.

{¶28} While appellant has not challenged the best-interest analysis, we note that the magistrate's decision considered the factors enumerated in R.C. 3109.04 and determined that it would be in the best interest of J.M.P. to terminate the plan and allocate parental rights and responsibilities as set forth in his decision.

{¶29} Appellant's sole assignment of error is without merit. The trial court did not abuse its discretion in concluding that it was in the best interest of J.M.P. to terminate the shared parenting plan and grant appellee the sole residential parent and legal custodian. The judgment of the Lake County Court of Common Pleas, Juvenile Division, is hereby affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.