

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

HOLLY M. DRAGON,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NOS. 2011-A-0037
	:	and 2011-A-0039
PAUL A. DRAGON,	:	
Defendant-Appellant.	:	

Civil Appeals from the Court of Common Pleas, Case No. 2008 DR 162.

Judgment: Affirmed.

Robert E. Somogyi, Hans C. Kuenzi Co., L.P.A., Skylight Office Tower, Suite 410, 1660 West Second Street, Cleveland, OH 44113 (For Plaintiff-Appellee).

Paul A. Dragon, pro se, 1507 West 19th Street, Ashtabula, OH 44004 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Paul A. Dragon, appeals the judgment of the Ashtabula County Court of Common Pleas denying his motion to modify parental rights and awarding attorney fees in the amount of \$2,923.30 to appellee, Holly M. Dragon.¹ For the reasons stated herein, we affirm the judgment of the trial court.

{¶2} The parties to the instant appeal were married in 2001 and have two minor children. The parties divorced in January 2009. As part of the final divorce decree,

1. On June 28, 2011, this court sua sponte consolidated 11th Dist. Nos. 2011-A-0037 and 2011-A-0039 for purposes of briefing, oral argument, and disposition.

appellee was awarded both child support and spousal support. Appellant filed a motion to modify child support on March 31, 2009. A hearing on said motion was scheduled for July 2, 2009; however, prior to the commencement of the hearing, the parties purportedly reached a settlement agreement. Appellee's attorney filed an "Agreed Judgment Entry" in which the trial court stated that the "parties have resolved their differences by agreement, the terms of which are set forth herein[.]" Appellant subsequently refused to sign the agreement. As a result, a hearing was held on December 4, 2009, and at the conclusion of the hearing, the trial court signed the "Agreed Judgment Entry" and awarded attorney fees in the amount of \$3,500 to appellee. This court upheld the trial court's decision in *Dragon v. Dragon*, 11th Dist. Nos. 2009-A-0058 and 2010-A-0005, 2010-Ohio-4694.

{¶3} Upon being reinstated to the trial court, appellant filed numerous pro se motions, including a motion to modify parental rights and responsibilities. A hearing was held on said motion, and the trial court dismissed appellant's motion due to his failure to present evidence demonstrating a change of circumstances. After the hearing was concluded on appellant's motion, the trial court conducted a hearing on appellee's motion for attorney fees. The trial court granted judgment in favor of appellee in the amount of \$2,923.30.

{¶4} Appellant filed a timely notice of appeal. Appellant's first assignment of error states:

{¶5} "The trial court erred when it dismissed the defendant's motion to modify parental rights and responsibilities for lack of evidence under Revised Code 3109.04."

{¶6} Under his assigned error, appellant argues the trial court abused its discretion by not modifying the parties' parental rights and responsibilities based on a change of circumstances.

{¶7} A trial court has broad discretion in its determination of parental custody rights. *Booth v. Booth*, 44 Ohio St.3d 142, 144 (1989). A trial court's custody determination should not be disturbed unless it constitutes an abuse of discretion. *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 23 (1990). 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, ¶¶61-62, quoting *Black's Law Dictionary* 11 (8th Ed.2004).

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

{¶9} 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. (Internal citation omitted.) *Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988).

{¶10} 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.

{¶11} 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).

{¶12} "R.C. 3109.04 does not define 'changes in circumstances'; however, courts have generally held the phrase to note 'an event, occurrence, or situation which has a material and adverse effect upon a child.'" *Lindman v. Geissler*, 171 Ohio App.3d 650, 2007-Ohio-2003, ¶33 (5th Dist.), quoting *Rohrbaugh v. Rohrbaugh*, 136 Ohio App.3d 599, 604-605 (2000).

{¶13} Here, appellant argues a change has occurred in the circumstances of the children, as they are spending time with daycare providers and family members after school due to appellee's full-time employment. Appellant maintains this was not contemplated at the time of the divorce. To support this argument, appellant attempted to elicit testimony that the parties' two minor children were in the care of third parties after school. However, appellant presented no evidence to suggest this arrangement has had an adverse effect upon the children. Further, at the time of the parties' divorce,

it was anticipated that appellee would be employed: in the entry of divorce, the court found that appellee had graduated from Kent State University and that the “parties anticipate that she would be gainfully employed within three (3) months.” Given our standard of review, we cannot say the trial court abused its discretion in its determination that a change of circumstances was not present.

{¶14} Appellant’s first assignment of error is without merit.

{¶15} In his second assignment of error, appellant maintains:

{¶16} “The trial court erred when it found no merit in defendant’s motion to set aside the magistrate’s order.”

{¶17} Appellant’s argument revolves around the December 4, 2009 “alleged agreement” of the parties. In *Dragon v. Dragon*, 2010-Ohio-4694, ¶6-10, this court addressed appellant’s assertion that the trial court erred in adopting this “Agreed Judgment Entry” without holding a hearing on the terms of the agreement. We held that “[i]n the absence of demonstrating a factual dispute over the terms of the settlement agreement, the trial court did not err by adopting the proposed judgment entry.” *Id.* at ¶10.

{¶18} Both the magistrate and the trial court held this argument is barred by the doctrine of res judicata. In the May 20, 2011 judgment entry, the trial court stated:

{¶19} On March 2, 2011, the Defendant filed his Objection To The Magistrate’s Report of February 24, 2011. The Magistrate found that the Defendant based his Objection on arguments surrounding the Agreed Judgment Entry of December 4, 2009, which Defendant stated he never agreed to. The Magistrate found that the

Defendant's arguments were moot, as the Court of Appeals upheld the Agreed Judgment Entry filed on December 4, 2009, and found that the Defendant's argument was without merit based on *res judicata*.

{¶20} "It has long been the law of Ohio that 'an existing final judgment or decree between the parties to the litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit.'" (Emphasis sic.) *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St. 60, 62 (1990), quoting *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69 (1986). The Ohio Supreme Court has stated, "we expressly adhere to the modern application of the doctrine of *res judicata* * * * and hold that a valid, final judgment rendered upon the merits bars all subsequent action based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382 (1995).

{¶21} Finding that appellant's argument is barred by the doctrine of *res judicata*, appellant's second assignment of error is not well-taken.

{¶22} Appellant's third assignment of error alleges:

{¶23} "The trial court erred when it found it equitable that the defendant pay all post decree attorney fees and court cost[s]."

{¶24} Pursuant to R.C. 3105.73(B), a court may award all or part of reasonable attorney fees in "any post-decree motion or proceeding that arises out of an action for divorce[.]" "In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets." *Id.*

{¶25} This court has previously addressed a judgment of the trial court which awarded attorney fees to appellee. In *Dragon v. Dragon*, this court stated:

{¶26} The record reveals that appellant has been represented by six attorneys in this matter; appellee has been represented by one attorney. Appellee's counsel testified at the hearing that, after the meeting upon which the parties agreed to the terms of child support, appellant failed to execute the 'Agreed Judgment Entry.' Appellant further issued a number of subpoenas and filed additional motions with the court. Further, appellant also refused to sign the QDRO. *Dragon*, 2010-Ohio-4694, ¶10.

{¶27} Upon reinstatement to the trial court, appellant began to file numerous pro se motions pertaining to issues that have already been reviewed by this court or issues that the trial court found to be without merit. For example, appellant filed an objection to an administrative finding that he was in contempt for failure to pay spousal support, a motion to modify parental rights, and requested the trial court to revisit its previous award of attorney fees, which had been upheld by this court. At the hearing for attorney fees, the trial court noted that while appellant has the "right to file" motions, the motions should be "on the grounds permitted by the statute[.]" The trial court further acknowledged that based on the evidence presented, appellant's motion to modify parental rights was meritless. Therefore, based on the record before us, this court cannot say that the trial court abused its discretion in finding it appropriate to award appellee attorney fees.

{¶28} Appellant's third assignment of error is without merit.

{¶29} Based on the opinion of this court, the judgment of the Ashtabula County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.