[Cite as *Duning v. Streck*, 2002-Ohio-3167.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

DAVID MICHAEL DUNING,	:	
		CASE NOS. CA2001-06-061
Plaintiff-Appellant,	:	CA2001-06-062
	:	O P I N I O N
- vs -		6/24/2002
	:	
E. ASHLEY STRECK,	:	
Defendant-Appellee.	:	

APPEAL FROM COMMON PLEAS COURT, JUVENILE DIVISION

Ruppert, Bronson, Ruppert & D'Amico Co., L.P.A., Ronald W. Ruppert, 1063 E. Second Street, P.O. Box 369, Franklin, OH 45005, for plaintiff-appellant

John S. Mengle, 42 E. Silver Street, Lebanon, OH 45036, for defendant-appellee

POWELL, J.

{¶1} Plaintiff-appellant, David Duning, appeals a decision of the Warren County Court of Common Pleas, Juvenile Division, denying his motion to modify parental rights and responsibilities. We reverse the trial court's decision.

{¶2} Although never married, appellant and defendant-appellee, Ashley Streck, have one child together. Their son, James Tyler Streck Duning, was born on August 15, 1994. For a

period of years, the parties operated under an informal agreement in which appellee was James' residential parent and appellant was afforded parenting time, roughly equivalent to the Warren County guidelines. Paternity was formally established in August 2000. At that time, the parties reached a full agreement as to the allocation of parental rights and responsibilities. Pursuant to an agreed entry filed August 18, 2000, appellee was designated the child's residential parent while appellant was awarded parenting time pursuant to Warren County guidelines. Appellant was also ordered to pay child support. The parties agreed to continue to share the responsibility of providing transportation for the child.

{¶3} Unbeknownst to appellant, appellee had been planning a move to Seattle, Washington, where her former boyfriend, Bryan Roehl, was stationed with the U.S. Army. Although the two had separated for some time, they had apparently reconciled prior to August 2000. In July, appellee had applied for a job in Seattle with AT&T Wireless and interviewed for the position sometime prior to the submission of the agreed entry. She received an offer of employment on August 16, 2000, and signed the offer on August 18, 2000, the same day that the agreed entry was filed. Appellee concealed this information from both appellant and the court. Approximately one week later, she informed appellant of her intent to relocate to the state of Washington with the parties' minor child. Appellant responded by filing a contempt motion and a motion to modify parental rights and

responsibilities. The trial court temporarily restrained appellee from removing the child from Ohio.

{¶4} After a hearing on the matter, the trial court rendered a decision, retaining appellee as the residential parent of the minor child, permitting her to move to Washington with the minor child, and granting appellant parenting time during holidays and summers. Appellant now appeals, raising two assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING PLAINTIFF-APPELLANT'S MOTION TO MODIFY PARENTAL RIGHTS AND RESPONSIBILITIES."

{¶7} Under this assignment of error, appellant argues that the trial court abused its discretion in finding that a change of custody is not in the child's best interest. Appellant argues that, based on the evidence presented to the trial court, a change of custody is in the child's best interest. Appellant contends that appellee's relocation to Washington with her boyfriend would cause a "devastating disruption" in the child's life on account of the child's "deep-rooted and well-established ties" to family and friends in Ohio.

{¶8} The judgment of the trial court in its allocation of parental rights and responsibilities will not be reversed absent an abuse of discretion. See, e.g., Davis v. Flickinger, 77 Ohio St.3d 415, 418, 1997-Ohio-260. An abuse of discretion connotes more than an error of law or of judgment; rather, "it implies

that the court's attitude is unreasonable, arbitrary or unconscionable." Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219.

{¶9} R.C. 2151.23(F)(1) provides that the juvenile court shall exercise its jurisdiction in child custody matters in accordance with R.C. 3109.04, which authorizes domestic relations courts to allocate parental rights and responsibilities for the care of minor children. The modification of a prior decree allocating parental rights and responsibilities is governed by R.C. 3109.04(E)(1)(a), which states in part 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 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."

{¶10} A predicate to modifying a prior allocation of parental rights and responsibilities is a change of circumstances. R.C. 3109.04(E)(1). Although not explicitly stated in its decision, it is apparent that the trial court found that such a change of

circumstances had occurred, as evidenced by its discussion of factors relating to the child's best interest. We agree that a change of circumstances had occurred in that appellee proposed to move across country with the minor child, separating him from his father and extended family. See Clontz v. Clontz (Mar. 9, 1992), Butler App. No. CA91-02-027. Additionally, appellee's proposed move was unknown to the trial court at the time of the prior decree. See R.C. 3109.04(E)(1)(a).

{¶11} Although R.C. 3109.04(E)(1)(a) requires that the trial court find a change of circumstances before the court modifies the allocation of parental rights and responsibilities, such a finding in and of itself, does not demand a modification. Pryer v. Pryer (1984), 20 Ohio App.3d 170, 171. Rather, the modification must also be in the best interest of the child and may not be made unless one of the conditions enumerated in R.C. 3109.04(E)(1)(a)(i), (ii), and (iii) applies. See id.

{¶12} The primary concern in a child custody case is the child's best interest. Miller v. Miller (1988), 37 Ohio St.3d 71, 75. The child's best interest is to be determined by considering all relevant factors, including those enunciated in R.C. 3109.04(F). Birch v. Birch (1984), 11 Ohio St.3d 85.

{¶13} After a thorough review of the record, we find that the trial court abused its discretion in concluding that it was not in the child's best interest to modify the prior allocation of parental rights and responsibilities. This court has repeatedly upheld trial court decisions finding that a similar cross-country

move would not be in the best interest of the child. See, e.g., Kubin v. Kubin (2000), 140 Ohio App.3d 367; Hunter v. Hunter (Aug. 10, 1992), Madison App. Nos. CA91-10-031, CA91-11-034; Clontz v. Clontz (Mar. 9, 1992), Butler App. No. CA91-02-027. While these decisions do not mandate a holding that the trial court abused its discretion in this case, we find that the record and the factors set forth in R.C. 3109.04(F)(1) demand such a holding. In so holding, we are mindful of the significant discretion accorded trial courts in custody matters. However, we note that this discretion is not unlimited. Ross v. Ross (1980), 64 Ohio St.2d 203.

{¶14} The factors relevant to this case that the trial court must have considered in accordance with R.C. 3109.04(F)(1) are: "(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; (d) the child's adjustment to the child's home, school, and community; (e) the mental and physical health of all persons involved in the situation; (f) the parent more likely to facilitate court-approved parenting time rights or visitation in the future; *** (j) whether either parent has established a residence or is planning to establish a residence outside the state."

{¶15} Based on the record and all relevant factors, including the above factors in R.C. 3109.04(F)(1), we find that the trial court abused its discretion in determining that a change of custody was not in the child's best interest. The relevant

factors and the record indicate that a change of custody is in the child's best interest. Other than appellee, all of the child's relatives continue to reside in southwest Ohio. Many of these relatives have taken an active role in the child's life. Appellee's decision to relocate to Washington with her boyfriend would undoubtedly have an adverse effect on the child's relationships with appellant and these other Ohio family members. This adverse effect is relevant to R.C. 3109.04(F)(1)(c) and (e). Appellee's relocation would greatly reduce the child's interaction with appellant and many supportive relatives in Ohio, and would have a negative impact on the child's mental and emotional well-being.

{¶16} At the October 2000 hearing and the January 2001 hearing, the trial court heard much testimony regarding the child's relatives in southwest Ohio and their relationships with the child. Appellant, though he and appellee never married, has been involved in the child's life since the child's birth, as have the paternal and maternal grandparents. Appellant has never been separated from the child for more than a few weeks. Appellant currently lives with his wife in Lebanon, Ohio. All the parties involved concede that appellant is a good father to the child.

{¶17} The child's paternal grandparents also live in Lebanon and have had substantial and continuous contact with the child. For the first three years of the child's life, the child stayed with his paternal grandparents at least once per week. After

appellee moved to Columbus in 1997, the child usually stayed with his paternal grandparents for at least one night during appellant's visitation time.

{¶18} The child also has had significant contact with his maternal grandparents. The maternal grandfather resides in Lebanon, while the child's maternal grandmother lived in Springfield, Ohio before her recent death from cancer. The child also has a playmate in Lebanon with whom he has spent much time. Prior to appellee's relocation, the child knew no one in Washington other than appellee and appellee's boyfriend.

{¶19} The trial court largely based its decision on the fact that appellee has been the child's primary caregiver throughout the child's life. It is clear from the record that appellee has a strong bond with the child and, by appellant's own admission, appellee has done an admirable job parenting the child. Also, the fact that appellee has been the child's primary caregiver is a relevant factor to be considered. See Seibert v. Seibert (1990), 66 Ohio App.3d 342, 346. However, in this case, that factor alone cannot support a finding that the trial court acted within its discretion. Given appellant's demonstrated commitment to the child, the mother's commitment to move to Washington, the child's supportive environment in southwest Ohio, and the harm appellee's relocation would do to the child's relationships with appellant and his other relatives there, a change of custody is in the child's best interest.

{¶20} The trial court also based its decision on the

recommendation of a psychologist appointed by the court, Dr. Kuehnl-Walters. Though the report itself is not in the record, the trial court discussed the report's conclusions in its entry. Dr. Kuehnl-Walters appears to have based her best interest determination largely on appellee's strong bond with the child and the fact that appellee has been the child's primary caregiver.

{¶21} We find that this report was given undue weight by the trial court. Due to appellee's imminent relocation, the trial court had ordered a "very quick psychological evaluation" to aid it in determining which parent should be awarded temporary custody in October 2000. According to appellant, Dr. Kuehnl-Walters spent no more than 40 minutes with him, and only about 15 minutes observing appellant's interaction with the child. At the conclusion of the October 2000 hearing, the trial court awarded temporary custody to appellee in Washington. The record does not show that any further psychological evaluations were conducted prior to the January 2001 hearing.

{¶22} Additionally and importantly, we are deeply troubled by appellee's misleading conduct in hiding her intentions to move to Washington. Though she had taken steps to relocate prior to signing the August 18, 2000 agreed entry regarding visitation, she did not reveal to the trial court or appellant her intent to relocate until after she had signed the entry. She indicated in her deposition testimony that she did not decide to relocate until August 19 or August 20, while in fact she had accepted

AT&T's employment offer in Washington on August 18. She admitted at the October 2000 hearing that her deposition testimony was false. Given her fraudulent conduct, it seems evident that she will not be forthright and cooperative with the court and appellant regarding future visitation and custody matters. Such conduct implicates R.C. 3105.04(F)(1)(f).

{¶23} Unfortunately, this action does not come to us by way of a motion for relief from judgment under Civ.R. 60(B)(3) as a fraud by one party against another party and the court. Rather, it comes to us by way of a motion to modify a prior order on the basis of a change of circumstances since that order. In this case, there was a fraudulent concealment of circumstances. Regardless, Civ.R. 60(B)(3) is not before us.

{¶24} Based on the foregoing discussion, we find that the trial court abused its discretion in determining that a change of custody is not in the best interest of the child. The evidence in the record and the relevant factors indicate that a change of custody is in the child's best interest. Additionally, we find that the harm likely to be caused by the child's change in environment is outweighed by the advantages of the change in environment to the child. See R.C. 3109.04(E)(1)(a)(iii). Clearly, the child's relationship with appellee will be affected by a change of custody. However, the supportive environment provided by appellant, relatives, and friends in the Lebanon area outweighs any harm to this relationship.

{¶25} Thus, the trial court abused its discretion in denying

appellant's motion to modify the prior order regarding parental rights and responsibilities. Appellant's first assignment of error is sustained. Appellant's second assignment of error regarding the trial court's consideration of the psychological report is now moot. Even assuming the trial court's consideration of the report was proper, we reverse its decision. We hereby designate appellant as the child's residential parent. Appellee shall have the visitation afforded to appellant in the trial court's May 16, 2000 order.

Judgment reversed.

VALEN, J., concurs.

WALSH, P.J., dissents.

WALSH, P.J., dissenting.

{¶27} Because I disagree with the majority's reasoning and conclusion, I respectfully dissent.

{¶28} A trial court's decision involving the custody of children should be accorded significant deference upon appellate review. As stated by the Supreme Court of Ohio: "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 (citations omitted).

{¶29} Thus, the decision of the trial court with regard to the allocation of parental rights and responsibilities should not be reversed absent an abuse of discretion. See, e.g., Davis v. Flickinger, 77 Ohio St.3d 415, 418, 1997-Ohio-260. An abuse of discretion connotes more than an error of law or of judgment; rather, "it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219. This court should not "undertake to weigh the evidence and pass upon its sufficiency," but instead "ascertain from the record whether there is some competent evidence to sustain the findings of the trial court." Ross v. Ross (1980), 64 Ohio St.2d 203, 204. Even when an abuse of discretion is found, it is inappropriate for an appellate court to independently weigh the evidence and grant a motion to modify parental rights and responsibilities. Miller at 74.

{¶30} I initially note that the trial court failed to find the requisite change of circumstances necessary to modify a prior allocation of parental rights and responsibilities. See R.C. 3109.04(E)(1). While the majority accepts this finding as "implied" in the trial court's decision, such finding was not made by the trial court. While the parties and trial court may have agreed, or operated under an assumption that a change in

circumstances had occurred, this finding should have been expressly made by the trial court, or such a stipulation made by the parties, before the trial court considered the child's best interest.[1] If this case is to be reversed, I would remand the matter to the trial court to make the required change of circumstances finding. However, as the majority's decision rests on a determination of the child's best interest, my dissenting opinion will address this issue.

{¶31} When considering the child's best interest, the trial court must consider all relevant factors, including those enunciated in R.C. 3109.04(C). Birch v. Birch (1984), 11 Ohio St.3d 85, 87. This statute does not contain an exhaustive list of factors; rather, the trial court must consider all relevant factors which include the role of the child's primary caretaker and the child's age. Seibert v. Seibert (1990), 66 Ohio App.3d 342, 346.

{¶32} Upon review of the record, I cannot conclude that the trial court abused its discretion by denying the motion to modify the prior allocation of parental rights and responsibilities. There is no question that both parties are suitable, loving parents. Appellee has been the child's primary caretaker, while appellant has had consistent parenting time. The child is well-acquainted with appellee's new boyfriend, with whom he and appellee will be living in Washington. As found by the trial

1. In the present case, appellee's proposed cross-country move undoubtedly constitutes a change in circumstances. See Zinnecker v. Zinnecker (May 10, 1999), Clermont App. No. CA98-09-081.

court, the report prepared by the court-appointed psychologist indicates that the child is most strongly bonded with appellee, and that it would not be in the child's best interest to be separated from her.[2] All in all the parents appear to be on equal footing, save for appellee's role as the child's primary caretaker and her relocation to Washington.

{¶33} The majority, by reversing the trial court's decision, has substituted its own judgment for that of the trial court. The majority has acted as the fact-finder in this matter, a role wholly unsuited to appellate review in a custody matter. See Bechtol, 49 Ohio St.3d at 21; Miller, 37 Ohio St.3d at 71. While App.R. 12 grants an appellate court the power to reverse trial court judgments and enter those judgments that the court should have rendered, "it is inappropriate in most cases for a court of appeals to independently weigh evidence and grant a change of custody." Miller at 74.

{¶34} The majority finds that the relocation "would undoubtedly have an adverse impact on the child's relationships with appellant and [] other Ohio family members." While the move may arguably have such an impact, it was the trial court's role to determine the relative weight of this factor in relation to other factors which weighed against the change of custody. R.C.

2. The report prepared by the court appointed psychologist was not entered into evidence, and is thus not available for our review. Because neither party made the report available for our review, this court should accept the trial court's characterization of the report's conclusions. App.R. 9(B); See Columbus v. Hodge (1987), 37 Ohio App.3d 68, 69. The majority discredits this report, citing the speed with which it was prepared. However, as the report is not available for our review, I find it

3109.04(F)(1); Miller, at 74. And while the majority finds that appellee's failure to inform appellant of her intended move implies that she will fail to facilitate visitation in the future, such finding is not supported by the record. In the present case, there is not even an allegation that appellee failed to provide appellant with visitation or otherwise interfered with his parenting time.

{¶35} The majority concludes, finding that "the harm likely to be caused by the child's change in environment is outweighed by the advantages of the change in environment to the child." However, this finding is conclusory and factually unsupported. The trial court made no findings related to this issue, as it concluded that modification was not in the child's best interest. I again feel that the majority has inappropriately assumed the role of the fact-finder.

{¶36} The cases relied upon by the majority to support the conclusion that the trial court's decision constitutes an abuse of discretion are not dispositive of this matter. In each of the cases cited by the majority, this court found no abuse of discretion in the trial court's decision to modify custody upon one parent's relocation. However, these cases do not stand for the proposition that custody must be changed every time a parent proposes a cross-country move. Rather, in each case, this court upheld the trial court's decision upon concluding that the trial court considered all the appropriate statutory factors. See

inappropriate to discredit its contents.

Kubin v. Kubin (2000), 140 Ohio App.3d 367; Hunter v. Hunter (Aug. 10, 1992), Madison App. Nos. CA91-10-031, CA91-11-034; Clontz v. Clontz (Mar. 9, 1992), Butler App. No. CA91-02-027.

{¶37} Although it is true that "this court has repeatedly upheld trial court decisions finding that a similar cross-country move would not be in the best interest of the child," this court has also upheld decisions finding the converse to be true. See Hetterich v. Hetterich (Apr. 9, 2001), Butler App. No. CA2000-06-122. I thus find the majority's citations to these cases uncompelling. The majority opinion, through its reliance on these cases, suggests that trial courts are obliged to modify the allocation of parental rights and responsibilities whenever the residential parent proposes a significant move. This is certainly not the present state of the law.

{¶38} It is apparent that the main contention in this matter is appellee's concealment of her planned move. Like the trial court and the majority, I find her behavior vexing. Her decision to conceal the move was, in the best light, immature, and in the worst light, deceitful. However, it was the trial court's role to determine the allocation of parental rights and responsibilities that serves the child's best interest.

{¶39} The trial court made this determination, concluding that appellee's actions do not alter the fact that, for now, the child's best interests are served by residing primarily with her, even if it is in Washington. The trial court appropriately considered appellee's role as the child's primary caretaker, and

I find no abuse in the trial court's determination that in the present case, this factor was due significant weight. This court should not substitute its judgment for that of the trial court. See Miller, 37 Ohio St.3d at 71; Bechtol v. Bechtol (1990), 49 Ohio St.3d at 21; Baxter v. Baxter (1971), 27 Ohio St.2d 168, 172-173.

{¶40} While appellee's concealment of her move is relevant as it relates to her parenting abilities, custody of the child cannot be used as a tool to punish appellee for her fraudulent behavior. See Ellars v. Ellars (1990), 69 Ohio App.3d 712, 718-719. The trial court recognized the difficulty in separating these issues, but successfully managed to do so, stating: "The facts and scenario of this case were troublesome to the court. For the defendant to proceed as she did and not divulge her thoughts of moving to Seattle is not proper. She should not have misled the plaintiff and his family by signing the agreed order and appearing that everything would continue as it was. *** The court must admit there was a tendency, out of frustration as to the defendant's action to switch custody and deem it as parental alienation. However, this is not the case. The only person that would be penalized is the minor child. *** The court must not be vindictive but look for the best interests of the minor child. The best interest of the minor child is to remain in the custody of his mother[.]"

{¶41} Although I, too, find appellee's behavior troubling, the majority has overstepped the bounds of appellate review. The

trial court made factual findings which are supported by competent evidence in the record. Nothing indicates that the trial court's decision is unreasonable, arbitrary, or unconscionable. I believe that the allocation of parental rights and responsibilities was made within the province of the trial court's discretion, and consequently, would overrule appellant's assignments of error.