[Cite as *Pierson v. Gorrell*, 2012-Ohio-3878.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

RANDE PIERSON,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-11-216
	:	O P I N I O N
- vs -		8/27/2012
	:	
BETH L. GORRELL,	:	
Defendant-Appellant.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR02010012

Jeffrey W. Bowling, 315 South Monument Avenue, Hamilton, Ohio 45011, for plaintiff-appellee

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PIPER, J.

{¶ 1} Defendant-appellant, Beth Gorrell (Mother), appeals a decision of the Butler County Court of Common Pleas, Division of Domestic Relations, granting legal custody of her child to plaintiff-appellee, Rande Pierson (Father).

{¶ 2} Mother and Father were married, and had one son born issue of the marriage. The parties divorced, and entered into a shared parenting plan in 2002. In 2003, Mother filed

a motion to terminate the shared parenting plan, and requested sole custody. The parties filed an agreed entry terminating the plan and designating Mother the legal and residential custodian of the child. Mother relocated in 2006 to Worthington, Ohio and Father filed a motion for custody, which was denied because there had not been a change of circumstances. However, the parties entered into another agreed entry in 2006, which dealt with several visitation issues. In 2010, Mother filed a notice of intent to relocate, this time to Dublin, Ohio. Father filed several contempt motions with the court, alleging that Mother failed to abide by visitation provisions of their agreed entries. The parties reached another agreement in August 2010 that resolved the contempt motions and other visitation and exchange issues.

{¶ 3} In January 2011, Mother filed a notice of intent to relocate to North Carolina. However, the notice was incomplete, and lacked the date of the intended move. Father then filed an objection to Mother's intent to relocate and moved for custody of the child. The magistrate held an emergency hearing in February 2011, and also interviewed the child in camera. The magistrate granted Father temporary custody of the child. In June 2011, Father filed a notice of intent to relocate to Florida. By this time, the child was 11 years old. Also in June 2011, the magistrate held a hearing on Father's January 2011 custody motion, and again interviewed the child in camera. The magistrate granted custody to Father after finding that a change of circumstances had occurred. Mother objected to the magistrate's decision, and the trial court overruled her objections.

{¶ 4} Mother appealed the trial court's decision, but this court dismissed her appeal for lack of a final appealable order because the court's child support order had not been re-calculated. The trial court later set child support and parenting time, thus making the decision a final appealable order. Mother now appeals the trial court's decision, raising the following assignments of error. For ease of discussion, we will discuss Mother's assignments

of error together.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED TO THE PREJUDICE OF MOTHER/APPELLANT AND ABUSED ITS DISCRETION WHEN IT FOUND A CHANGE OF CIRCUMSTANCES HAD OCCURRED.

{¶ 7} Assignment of Error No. 2:

{¶ 8} THE TRIAL COURT ERRED TO THE PREJUDICE OF MOTHER/APPELLANT AND ABUSED ITS DISCRETION WHEN IT FOUND IT WAS IN THE BEST INTEREST OF THE MINOR CHILD TO DESIGNATE FATHER/APPELLEE AS THE RESIDENTIAL PARENT AND LEGAL CUSTODIAN.

{¶ 9} Mother argues in her first assignment of error that the trial court erred in finding that a change of circumstances had occurred, and in her second assignment of error that the trial court erred in finding that it was in the best interests of the child to grant custody to Father.

{¶ 10} Trial courts are entitled to broad discretion in custody proceedings. *Davis v. Flickinger,* 77 Ohio St.3d 415 (1997), paragraph one of the syllabus. As "custody issues are some of the most difficult and agonizing decisions a trial judge must make," the judge must be given "wide latitude in considering all the evidence" and the decision must not be reversed absent an abuse of discretion. *Id.* at 418. 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." *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219 (1983).

{¶ 11} We presume that the trial court's findings are correct because the trial court is "best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland,* 10 Ohio St.3d 77, 80 (1984). Therefore, deferential review in a child

custody determination is especially crucial "where there may be much evident in the parties' demeanor and attitude that does *not* translate to the record well." *Flickinger,* 77 Ohio St.3d at 419. (Emphasis in original.)

{¶ 12} A trial court asked to re-designate parental rights and responsibilities is required to first find that a change in circumstances occurred to warrant a change in legal custodianship. *Fisher v. Hasenjager,* 116 Ohio St.3d 53, 2007-Ohio-5589. R.C. 3109.04(E)(1)(a), provides, in pertinent part,

> The 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, [or] his residential parent, * * * and that the modification is necessary to serve the best interest of the child.

{¶ 13} "Although R.C. 3109.04 does not provide a definition of the phrase 'change in circumstances,' Ohio courts have held that the phrase is intended to denote 'an event, occurrence, or situation which has a material and adverse effect upon a child.'" *Lewis v. Lewis,* 12th Dist. No. CA2001-09-209, 2002 WL 517991, *2 (April 8, 2002), citing *Rohrbaugh v. Rohrbaugh,* 136 Ohio App.3d 599, 604–05 (7th Dist.2000). In order to warrant the abrupt disruption of the child's home life, the change in circumstances must be one "of substance, not a slight or inconsequential change." *Flickinger,* 77 Ohio St.3d at 418.

{¶ 14} R.C. 3109.04(E)(1)(a) also requires that the court make specific findings and also consider the best interests 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:
>
> (i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

> (ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.
>
> (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.

Factors that must be considered when making a best interest determination are listed in R.C. 3109.04(F)(1)(a)-(j).

> (a) The wishes of the child's parents regarding the child's care;
>
> (b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;
>
> (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 honor and facilitate court-approved parenting time rights or visitation and companionship rights;
>
> (g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;
>
> (h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child * * *;
>
> (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;

> (j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶ 15} In the 2006 agreed entry, Mother and Father agreed that "an automatic change in circumstances for purposes of modifying the current parenting arrangement will occur should either Mother or Father move from their current addresses and not notify the other parent." The trial court relied on this clause of the 2006 entry when finding that a change in circumstances had automatically occurred when Mother filed her intent to relocate to North Carolina.

{¶ 16} The 2006 entry specifically states that the change in circumstances would occur if Mother or Father moved *without first notifying the other parent*. However, Mother gave notice to Father via her notice of intent to relocate filed with the court, as well as various emails regarding her planned move to North Carolina. While the trial court found that Mother's notice to relocate was incomplete because it did not contain a date of relocation, Mother's notice did relay to Father her intent to move, as did emails that she sent to Father as early as December 2010. The 2006 agreement does not specify how or by what means notice should be given by one party to the other. With no details, the agreement only requires that notice be given.

{¶ 17} The clause in the 2006 agreement did not create a per se change of circumstances absent notice. Regardless of the parties' various arguments regarding the 2006 agreement, and the nature of the notice actually given, we find that there was ample evidence in the record to establish a change of circumstances. Despite our disagreement with the trial court that the 2006 agreement is dispositive, we nonetheless find that the record supports a finding that circumstances in the child's life had changed since the last time the parties entered into an agreement in August 2010. Therefore, we cannot say that the trial court's decision was arbitrary, unreasonable, or unconscionable.

{¶ 18} Mother also correctly argues that the trial court was not permitted to consider circumstances that occurred prior to August 2010, the date of the agreed entry, when determining whether there had been a change of circumstances. The trial court adopted the agreement, which incorporated the unchanged clauses from the 2006 agreement, and became the new and controlling decree of parental rights and responsibilities. According to R.C. 3901.04(E)(1)(a), the court cannot modify a prior decree 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 * * *." (Emphasis added.)

{¶ 19} Prior to August 2010, Mother denied Father visitation on multiple occasions and also disobeyed prior court orders regarding the need to provide Father proper notice of Mother's exercise of vacation time. However, Father filed contempt motions and these motions were disposed of by way of the August 2010 agreement, and such refusal of visitation cannot now be considered, as that issue was disposed of in the August 2010 decree. Father's motion, therefore, must be considered as of the August 2010 date forward, not in context of what occurred prior to that date.

{¶ 20} However, we disagree with Mother's assertion that the trial court was not permitted to consider events and circumstances that occurred *after* Father filed his motion for custody in January 2011. Mother argues that the trial court improperly considered circumstances that continued to develop or arise after Father filed his motion alleging that a change of circumstances had occurred as of January 2011. These events included the fact that Father was given temporary custody; that the child was thriving under Father's care; that Father thoroughly abided by the terms of the temporary custody order; and that Father was relocating to Florida.

{¶ 21} We do not agree with Mother's attempt to limit the pertinent time frame from

August 2010 to January 2011. Instead, the trial court is not foreclosed from considering events and circumstances that occurred after Father filed his motion for custody in January 2011. The plain language of the statute states that a trial court's decision regarding change of circumstances begins with "facts that have arisen since the prior decree," but does not otherwise bookend the time frame by including reference to the filing date of the motion for relocation of parental rights and responsibilities. *See Jackson v. Herron*, 11th Dist. No. 2003-L-145, 2005-Ohio-4046, ¶ 25 (finding that R.C. 3109.04(E)(1)(a) dictates only that a trial court's decision regarding change of circumstances begins with the court's prior judgment entry).

{¶ 22} Recently, the Seventh District Court of Appeals overruled a parent's argument that the trial court erred by considering facts that occurred post-motion when determining whether there had been a change of circumstances. *Simkins v. Perez*, 7th Dist. No. 11 MA 80, 2012-Ohio-1150. In finding such, the court reasoned that,

> the statute governing the modification of custody decrees restricts the court from revisiting facts concerning circumstances that occurred prior to its existing custody determination where these facts were known to the court before issuing its ruling. R.C. 3109.04(E)(1)(a). However, nothing in the statute or case law restricts the court to the reasons provided in the motion itself in making this determination. In fact, the statute specifically charges the court to not only consider all information before it, but to also seek additional information before reaching its conclusions.

Id. at ¶ 24. We agree.

{¶ 23} R.C. 3109.04(E)(1)(a) is different, for example, from R.C. 2151.23(A)(1), which governs the adjudication of children as neglected, abused, or dependent. That statute specifically limits the pertinent time frame to "on or about the date specified in the complaint." R.C. 3109.04(E)(1)(a), however, does not specify that the trial court's consideration is limited to the time that a custody motion is filed. Such an interpretation would not only defy the

statute's plain language, but also the purpose and principles of the statute.

{¶ 24} "The purpose of requiring a finding of a change in circumstances is to prevent a constant relitigation of issues that have already been determined by the trial court. * * * Therefore, the modification must be based upon some fact that has arisen since the prior order or was unknown at the time of the prior order." *Brammer v. Brammer*, 194 Ohio App.3d 240, 2011-Ohio-2610, ¶ 17 (3rd Dist.), citing R.C. 3109.04(E)(1)(a). Moreover, and as stated by the Ohio Supreme Court, "a trial judge must have wide latitude in considering all the evidence" when making a determination of change of circumstances. *Flickinger,* 77 Ohio St.3d at 418. If a court could not consider events as they continued to unfold once a custody motion is filed, the trial court would be perpetually re-addressing new filings alleging a change in circumstances due to the inevitable passage of time between the filing of the original custody motion and the date of the hearing on the motion.

{¶ 25} We do not believe that the Legislature meant for such an inflexible application when the overriding purpose of the statute is to avoid re-litigation of issues and to secure a modicum of stability in a child's life based on custody determinations that are within that child's best interests. Allowing the trial court to consider the most up-to-date facts as they unfold comports with the statute's purpose to finalize a decision and not otherwise encourage more filings and litigation because of allegations that may have arisen after the custody motion was filed but before the final hearing. The statute mandates that consideration of a change in circumstances is based on "facts that have arisen since the prior decree." Therefore, we will discuss only those facts that have arisen since the trial court's August 2010 decree.

{¶ 26} The record is clear that the parties' relationship has become more hostile since the 2010 agreement. "Increased hostility between the parents and the frustration of visitation are factors which can support a finding of a change in circumstances." *In re R.A.S.*, 12th

Dist. No. CA2011-09-102, 2012-Ohio-2260, ¶ 26, quoting *In re Nentwick,* 7th Dist. No. 00 CO 50, 2002-Ohio-1560, ¶ 39, citing *Flickinger,* 77 Ohio St.3d at 416-417.

{¶ 27} Since August 2010, Mother has become increasingly hostile with Father, and has disobeyed certain provisions within the 2010 decree. The record contains several emails dated after August 2010 in which Mother is combative, including commentary directed at Father that had nothing to do with the child, such as "here we go again with your bullshit and games. Will you ever knock it off and act like an adult?" Mother also wrote to Father that, "fair is not a word that is in your vocabulary. * * * This just goes to show once again that everything is a game and a power trip with you. * * * Do you really think that the lies that you tell will go overlooked?"

{¶ 28} Mother's emails also made reference to Father being afraid of her husband, and that Father would have to deal with her husband dropping off the child despite court orders to the contrary. In one such email, Mother stated, "you are truly ridiculous and this will once again show in court. You don't care about [the child] at all. All you care about is playing this game and thinking you have power over everything." Mother then informed Father that her husband would drop the child off two houses down from Father's house so Father did not have "to hide," and that Father could file court papers if he so chose. Mother also threatened to litigate the issue. "you file…I file and we see what happens… or you can suck it up, be an adult and quit playing games." These are just a few examples of emails that demonstrate the hostility Mother felt toward Father and their inability to communicate effectively regarding the child.

{¶ 29} Mother also violated a provision in the parties' 2010 agreement that neither parties' new spouse would come while they exchanged the child for visitation. Mother's new husband would come with her to exchange the child, or the new husband would transport the child himself without Mother even accompanying him. Despite the fact that Father and

Mother's new husband do not get along, and have engaged in verbal altercations in the past in front of the child, Mother refused to obey the court order that her new husband not attend the exchange. The child being placed in the middle of this conflict between Mother and Father and Mother's new husband would certainly have a material and adverse effect upon the child.

{¶ 30} The record also indicates that since the August 2010 agreement, Mother intended to and did relocate from Ohio to North Carolina, and that Father intended to and did relocate to Florida. This court has held that relocation alone is not enough to trigger a change of circumstances, unless the move also brings with it an adverse or negative impact upon the child's welfare. *Zinnecker v. Zinnecker*, 133 Ohio App.3d 378 (12th Dist.1999). For example, a proposed move accompanied by a finding that the move will cause a disruption of ongoing relationships with extended family can constitute a change of circumstances. *Valentine v. Valentine*, 12th Dist. No. CA2010-12-320, 2012-Ohio-426, ¶ 13. "A court may consider any attendant circumstances surrounding a residential parents [sic] relocation that affect the child's welfare in determining whether a change in circumstances has occurred." *Brammer v. Brammer,* 194 Ohio App.3d 240, 2011-Ohio-2610, ¶ 20 (3rd Dist.).

{¶ 31} The record is clear that both parties planned on and did move away from Ohio, and away from the family, friends, and environment that represents the stability with which the child had become familiar. Given the 12-hour drive time between North Carolina and the Miami, Florida area, both parties' visitation with the child and their ability to see the child on a regular basis greatly changed. Due to the nature of the parties' prior agreements, and the fact that both parents lived in Ohio, the child had spent a considerable amount of time with both Mother and Father, and both parties could attend the child's sporting events, extracurricular activities, and school events. The parties' relocation, however, foreclosed those opportunities due to the increased travel time and long distance between North

Carolina and Florida.

{¶ 32} Based on these attendant circumstances, it is apparent that the shared-parenting plan in place as of 2010 was no longer feasible given both parties' relocation. According to the facts of this case, the move to either Florida or North Carolina would therefore have a disruptive impact on the child's ongoing relationships, and is a factor to consider when making the change of circumstances determination.

{¶ 33} Taking into consideration the various circumstances since the agreed entry in 2010, including Mother's refusal to obey court orders, the increased hostility between the parents, and the relocation of both parties, we find that a change of circumstances had occurred.

{¶ 34} The trial court found, and we agree, that pursuant to R.C. 3109.04(E)(1)(a)(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, and that Father having custody is in the child's best interests. A review of the best interest factors reveals the following.[1]

{¶ 35} Both parents wish to have custody of the child. The trial court took into consideration the child's wishes and concerns as expressed to the court during an in camera interview. While the trial court did not specify what was said during the interview, and the interview was neither transcribed nor included in the record, the trial court specifically stated that the child had "sufficient reasoning ability to express his wishes and concerns." Therefore, we presume that the child expressed his wishes to the trial court, and that the trial court took into consideration those wishes and concerns.

{¶ 36} The trial court also considered the child's interaction and interrelationship with

1. While a change in circumstances determination is contingent upon the facts from the last decree forward, R.C. 3109.04(F)(1) does not set forth any time frame that a trial court must limit its consideration of the best interest factors when making such a determination.

the child's parents, siblings, and any other persons who may significantly affect the child's best interest. The record indicates that the parties each have a positive relationship with the child, as do Father's new wife and his two children with her. The court heard testimony that Mother's new husband has temper/anger issues, but that the child has a positive relationship with the new husband's two children from a previous marriage.

{¶ 37} The record is clear that the child has adjusted well to living with Father and has improved his academics since being in Father's care. Father also took various steps to improve the child's health, and was very proactive in seeking medical attention for him. For example, Father took the child to the doctor because the child was suffering from an on-going stomach ailment. The doctor prescribed medication for the child, which Mother refused to give him during her visitation period because of her belief that the child did not need it. However, the child's condition worsened once he was off the medication, and he was placed back on the medication once he returned to Father's home. Neither Mother nor Father had any mental or physical conditions that would impact the best interest consideration.

{¶ 38} The record supports the trial court's finding that Mother continuously and willfully denied Father's right to parenting time in accordance with an order of the court and that Father is the parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights. When Mother had custody of the child, she often denied Father his visitation rights, disobeyed court orders by not giving adequate notice of her exercise of vacation, and disrupted Father's telephone communication with the child by scheduling other activities. Conversely, Father scrupulously abided by the court-ordered parenting time and openly communicated with Mother regarding the child. Father provided Mother with detailed information regarding the child's school progress, extra-curricular activities, feelings, concerns, achievements, setbacks, meeting new friends, and extensive details regarding the child's medical issues. These detailed reports are included in the

record, and formed the basis for Mother's question to Father, "do you really think that going drastically overboard with the weekly updates are [sic] going to make you a better parent?" Conversely, during the time that she held custody, Mother was ordered by the court to provide Father with details regarding the child's life, but failed to do so. Father testified that he never received any report cards from Mother, and that any information he wanted about the child had to be obtained from the school because Mother would not share it.

{¶ 39} The record does not indicate that either Father or Mother failed to make all child support payments, including all arrearages, which are required of that parent pursuant to a child support order under which that parent is an obligor or that either parent had been convicted of or pled guilty to domestic violence or child abuse.

{¶ 40} The trial court also considered how the move to either Florida or North Carolina would impact the child. The record indicates that the school district in Father's Florida home is "far superior" to the school district in North Carolina, and that the child would be more likely to continue his academic excellence in a better rated school district. The child would have his own bedroom with Father, and there are several extra-curricular activities near Father's home that the child enjoys, such as swimming, soccer, baseball, and fishing.

{¶ 41} After balancing the statutory factors, we cannot say that the trial court abused its discretion in finding that granting custody to Father was in the child's best interest and that the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child. As such, Mother's assignments of error are overruled.

{¶ 42} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur.