[Cite as *Pellettiere v. Pellettiere*, 2009-Ohio-5407.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

JOSEPH PELLETTIERE	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23141
v.	:	T.C. NO. 2003 FSO 00003
LORIE ANN PELLETTIERE aka McDANIEL	:	(Civil appeal from Common Pleas Court, Domestic Relations)
Defendant-Appellee	:	
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O P I N I O N

Rendered on the 9th day of October, 2009.

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WOLFF, J. (by assignment)

{¶ 1} Plaintiff-appellant Joseph Pellettiere appeals from a judgment of the Montgomery County Court of Common Pleas, Domestic Relations Division, which adopted the decision of the magistrate which sustained Lorie Ann Pellettiere, aka Lorie Ann McDaniel's motion for reallocation of parental rights and responsibilities pursuant to R.C. § 3109.04(E)(1)(a), and awarding residential

custody of their minor daughter to Lorie.[1] Since the court made the required findings pursuant to R.C. §§ 3109.04(E)(1)(a) and 3109.04(F)(1), and those findings are supported by sufficient evidence, there was no abuse of discretion and the trial court's decision is affirmed.

I

{¶ 2} Joseph and Lorie were married on June 22, 1992, in San Antonio, Texas. The parties had one child together, B.P., who was born on February 10, 1993. During the marriage, the parties moved to the state of Virginia in order for Joseph to attend graduate school. Joseph and Lorie were divorced on August 16, 1999, in Virginia. Prior to the divorce being finalized, Joseph relocated to Ohio with B.P. At the time of the divorce, Joseph was awarded custody of B.P., and Lorie was awarded visitation which amounted to eight weekends per year, as well as summer and holiday time. It was not until January 14, 2003, that the parties' divorce was registered in Montgomery County, Ohio.

{¶ 3} On September 21, 2006, Lorie filed a motion for reallocation of parental rights and responsibilities requesting that she be named residential parent and awarded sole custody of B.P. Attorney John F. Kolberg was appointed as guardian ad litem (GAL) for the minor child on October 19, 2006. In his first report and recommendation, the GAL stated that he interviewed both Joseph and B.P. on November 16, 2006. Lorie was not present for the first interview with the GAL because she was pregnant and was unable to travel from her residence in Virginia. In the first report, the GAL recommended that Joseph should retain sole custody of B.P., finding that he provided B.P. "a wonderful and stable life," and it would, therefore, not be in the child's best interests for Lorie to be awarded custody. The GAL specifically noted that Lorie's "lack of input has not been helpful to her position."

{¶ 4} The GAL, however, was able to interview Lorie on February 15, 2007. As a result of

[1]For purposes of clarity, the parties will be referred to by their first names.

the interview, the GAL filed a supplemental report in which he changed his initial position and recommended that Lorie be awarded custody of B.P. and that Joseph receive the standard order of visitation for an out-of-town parent. The GAL noted that Lorie and B.P. shared a "positive, significant bond," and that B.P. demonstrated a strong desire to live with her mother. The GAL also noted in his supplemental report that Joseph's employment required him to travel a great deal, thus leaving B.P. unattended by a parent for varying amounts of time.

{¶ 5} On February 22, 2007, Lorie subsequently filed a motion requesting that the trial court conduct an in-camera interview of B.P. in order to determine the minor child's wishes in regards to which of her parents were granted custody. A hearing was held before a magistrate on March 30, 2007, regarding Lorie's motion for reallocation of parental rights in which both parties testified and introduced evidence supporting their respective positions. On April 19, 2007, the magistrate conducted an in-camera interview of B.P. It is undisputed that during the in camera interview, B.P. informed the magistrate that she wished to live with her mother and have only minimal contact with her father.

{¶ 6} On August 20, 2007, the magistrate issued her decision sustaining the motion for reallocation of parental rights and awarding Lorie residential custody of B.P. Joseph filed objections to the magistrate's decision. In a decision filed on November 18, 2008, the trial court adopted in part and modified in part the magistrate's decision, thus affirming the magistrate's award of custody of B.P. to Lorie. Joseph filed a timely notice of appeal with this Court on December 12, 2008.

II

{¶ 7} Joseph's first assignment of error is as follows:

{¶ 8} "THE TRIAL COURT ERRED IN AWARDING CUSTODY OF THE MINOR CHILD TO MOTHER AS THERE WAS NO CHANGE IN CIRCUMSTANCES AND THE CHANGE WAS

NOT IN THE BEST INTEREST OF THE CHILD."

{¶ 9} In his first assignment, Joseph contends that the trial court erred when it affirmed the magistrate's award of sole custody of B.P. to Lorie. Joseph argues that the evidence adduced at the hearing failed to establish that a change in circumstances had occurred that was sufficient to warrant a reallocation of parental rights. Joseph also asserts that it was not in B.P.'s best interest to be removed from his custody and placed in the custody of Lorie.

{¶ 10} In reviewing a trial court's decision regarding reallocation of parenting rights, an appellate court applies an abuse of discretion standard of review. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 1997-Ohio-260. If the award of custody is supported by a substantial amount of credible and competent evidence, the award of custody will not be reversed by an appellate court as against the weight of evidence. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, syllabus. A trial judge is in the best position to observe the demeanor, attitude and credibility of each witness, and this is even more crucial in child custody cases. *Flickinger*, 77 Ohio St.3d 415, 419. Thus, a reviewing court may not reverse a custody determination unless the trial court has abused its discretion. *Pater v. Pater* (1992), 63 Ohio St.3d 393. The term abuse of discretion implies an unreasonable, arbitrary or unconscionable attitude. *Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359. An unreasonable decision is one that is not supported by a sound reasoning process. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157. An arbitrary attitude, on the other hand, is one "without adequate determining principle," "not governed by any fixed rules or standard." *Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359.

{¶ 11} This court recently held that the trial court's determination must be supported by sufficient evidence to meet the clear and convincing standard of proof. *Bell v. Bell* (November

30, 2007), Clark County App. No. 2007 CA 9, 2007-Ohio-6347. In *Bell*, this court stated that "[c]lear and convincing evidence is that level of proof which would cause the trier of fact to develop a firm belief or conviction as to the facts sought to be proven." *Id*. at 5, quoting *Miller v. Greene County Children's Services Board* (2005), 162 Ohio App.3d 416, 2005-Ohio-4035 (establishing that the standard of review in an action by an agency to take away custody from the natural parents is clear and convincing evidence). However, as the appellee correctly points out, this court ultimately did apply an abuse of discretion standard in *Bell*. *Id*. at 9 ("Having thoroughly reviewed the entire record, and there being no change of circumstances of substance, we conclude that the trial court's decision is supported by sufficient evidence and is not against the manifest weight of the evidence. There being no abuse of discretion, [appellant's] first, second and fifth assignments of error are overruled.")

{¶ 12} This court more recently applied the abuse of discretion standard as the appropriate standard of review in custody matters. *Beismann v. Beismann* (March 7, 2008), Montgomery App. No. 22323, 2008-Ohio-984. In doing so, we stated that "[t]he discretion which a trial court enjoys in custody matters should be afforded 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." *Id*. at 4, citing *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Accordingly, although there has been some confusion within this district, the appropriate standard of review is abuse of discretion. *Chelman v. Chelman*, Greene App. No. 2007 CA 79, 2008-Ohio-4634.

{¶ 13} R.C. 3109.04(E)(1)(a) creates a presumption that a child remains with the custodial parent unless there has been a change of circumstances of the child, the residential

parent, or either of the parents subject of a shared parenting decree since the prior decree or based on circumstances that were unknown to the court at the time of the prior decree. See *Sabins v. Sabins* (April 27, 2001), Montgomery App. No. 18616. The court must then determine that a modification is necessary to serve the best interest of the child. *Id*. Finally, the court must consider whether one of the circumstances set forth in R.C. 3109.04(E)(1)(a)(i)-(iii) applies. *Id*. In this case, the parties agree the appropriate consideration is whether the "harm likely to be caused by a change of environment is outweighed by the advantages of the change in environment to the child." R.C. 3109.04(E)(1)(a)(iii).

{¶ 14} The first and threshold finding a court is required to make is whether there has been a change of circumstances since the prior decree. The prior decree which the statute references is the prior decree that allocated parental rights. *Bell v. Bell* (Nov. 30, 2007), Clark Co. App. No. 2007 CA 9, 2007-Ohio-6347. In this case, the prior decree is the Final Decree of Divorce executed on August 16, 1999, which awarded residential custody to Joseph.

{¶ 15} The change must be of substance, not slight or inconsequential. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 1997-Ohio-260. The mere possibility of a change in circumstances in the future will not ordinarily suffice to support modification of a child custody decree. *Waggoner v. Waggoner* (1996), 111 Ohio App.3d 1, dismissed, appeal not allowed, 77 Ohio St.3d 1445.

{¶ 16} A child's maturing may constitute a change in circumstances, but age alone will not be sufficient. *Travis v. Travis* (August 3, 2007), Clark App. No. 2006 CA 39, 2007-Ohio-4077, citing *Basinger v. Basinger* (April 30, 1999), Trumbull App. No. 98-T-0080. Frustration of and interference with visitation are factors which support a finding of a change of

circumstances. *Beekman v. Beekman* (1994), 96 Ohio App.3d 783. "When a court makes a custodial decision, it makes a presumption that the circumstances are such that the residential parent will promote both maternal and paternal affection." *Id*. at 789.

{¶ 17} Joseph argues that no change in circumstance has occurred in regards to either himself or B.P. which would necessitate a reallocation of parental rights. In support of his assertion, Joseph testified that B.P. expressed a desire to live with Lorie since she was only four years old. As such, Joseph, who has been B.P.'s residential parent for approximately ten years, argues that B.P.'s desire to live with Lorie did not amount to a change in circumstance. Joseph also points out that a child's desire to live with a particular parent, without more, does not constitute a change in circumstances. *Markley v. Markley*, Wayne App. No. 06CA0043, 2007-Ohio-886.

{¶ 18} As we recently stated in *In re Custody of M.B.*, Champaign App. No. 2006-CA-6, 2006-Ohio-3756:

{¶ 19} "In determining whether a change in circumstances has occurred, 'a trial judge must have wide latitude in considering all the evidence before him or her[.]' *Id*. Although a child's advancing age alone does not qualify as a change in circumstances, the aging of a child combined with other related considerations 'may constitute a sufficient change of circumstances to warrant a change in custody.' *Id*. at 420; see also *Boone v. Kaser*, Tuscarawas App. No. 2001AP050050 ('[T]he passage of time during a significant developmental portion of a child's life, combined with other pertinent factors, such as the child's expressed desires to reside with mother, supports [a] trial court's finding of a change of circumstances, requiring further inquiry by a trial court'); *Butler v. Butler* (1995), 107 Ohio App.3d 633, 637 (reasoning that the passage of time during which a child progresses from

infant to school age qualifies as a change in circumstances when viewed in light of other factors); *Perz v. Perz* (1993), 85 Ohio App.3d 374, 376-377 n.1 (finding that a child's attainment of an age of 'sufficient reasoning ability' to express his or her wishes constitutes a change in circumstances 'such as would justify a further inquiry into the best interest of the child'); *Butland v. Butland*, Franklin (June 27, 1996), Franklin App. No. 95 APE09-1151 ('In essence, a trial court should evaluate a child's wishes and concerns regarding the allocation of parental rights and responsibilities from the standpoint of their depth, sincerity, and the extent they reflect changed circumstances within the parent-child relationship or relationship between the parties.')."

{¶ 20} With respect to the magistrate's finding that a change in circumstances occurred in the present case, the trial court stated:

{¶ 21} "*** From the testimony and evidence presented at trial and the in-camera interview with the child, the Court finds that the child is not adapting well to life with her father. While he clearly cares a great deal for her, she feels detached from him and that he's too hard on her. Moreover, she currently has problems relating to and communicating with her peers at school. Although [Joseph] has sought the help of professionals to bring the child out of her shell, it is clear that the child was not connecting with anyone while in [Joseph's] care. The Court finds that there has been a change in circumstance to address the motion for reallocation of parental rights and responsibilities."

{¶ 22} Although she may have expressed a desire to live with Lorie since she was four years old as Joseph notes, B.P. has matured over the past ten years in which she lived with her father. In that time, B.P.'s desire to live with her mother, as well as a feeling of detachment from her father, has only intensified. B.P.'s unequivocal preference to live with

Lorie as expressed to the magistrate during the in camera interview was not an impulsive decision made on a whim. Rather, the record demonstrates that B.P.'s decision to live with Lorie was made carefully and deliberately. B.P. resided with Joseph for approximately ten years after the parties divorced, and in that time, Joseph expended a great deal of effort in order to make B.P.'s life pleasant and comfortable. In that ten year span, however, B.P.grew from a small child to an adolescent who persistently expressed a strong desire to live with her mother. More importantly, B.P. was able to clearly articulate her reasons for wanting to live with Lorie, as well as her reasons for *not* wanting to live with Joseph. Based on the evidence presented, the trial court did not abuse its discretion in determining that a change of circumstances had occurred since the prior decree.

{¶ 23} Joseph also argues that the evidence did not establish that it was in B.P.'s best interests to be placed in the custody of her mother. Once the trial court has made the threshold finding that there has been a change in circumstances, the court must then make a finding as to the best interest of the children. In making this determination, R.C. 3109.04(F)(1) directs the court to consider all relevant factors, including those factors set forth in R.C. 3109.04(F)(1)(a)–(j). These factors relate primarily to the health and well being of both the child and the parents. *Meyer v. Anderson*, Miami App. No. 01 CA53, 2002-Ohio-2782. Further, while the court is required to consider these factors, it retains broad discretion in making a best interest determination. Id. R.C. § 3109.04(F)(1) provides that in determining the best interests of the child, the court shall consider all relevant factors, including, but not limited to:

"(a) the wishes of the child's parents;

(b) the wishes of the child if interviewed in chambers;

(c) the child interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interests;

(d) the child's adjustment to home, school, and community;

(e) the mental and physical health of all persons involved;

(f) the parent more likely to honor visitation;

(g) whether either parent has honored child support payments;

(h) whether either parent has been convicted of abusing a child;

(i)whether the residential parent *** has continuously and willfully denied the other parent's right to parenting time;

(j) whether either parent will live outside the state."

{¶ 24} After reviewing the factors listed in R.C. § 3109.04(F)(1), the trial court found that it was in the best interest of B.P. to move to Virginia and live with her mother. In particular, the court pointed out that B.P. expressed a strong desire to live with her mother during the in camera interview. Also during the interview, B.P. stated that her relationship with Joseph had deteriorated over the years, and she felt that he was demeaning and belittling towards her. It should also be noted that the GAL recommended that B.P. should be permitted to live with her mother after he interviewed B.P., Joseph, and Lorie. The GAL specifically noted that B.P. and Lorie shared a strong and significant bond, and that B.P. had a good relationship with Lorie's boyfriend and his children as well.

{¶ 25} Dr. Marcia J. Gunn, a psychiatrist who treated B.P. at Joseph's request, testified that B.P. stated that she missed her mother and wanted to live with her. Dr. Gunn also testified that B.P., who had been her patient from October, 2002, through September 2003, and then for one session in May, 2005, suffered from depression and refused to talk at times.

Dr. Gunn opined that if B.P. were to move to a new city and attend a new school, she would be able to adapt to her new surroundings.

{¶ 26} The trial court also noted that the record was replete with instances where both Joseph and Lorie failed to comply with the terms of the divorce decree in regards to visitation with B.P. The court found that the parties' issues with each other have served to impede Lorie's parenting time with B.P.

{¶ 27} Based on the competent, credible evidence before it, the trial court made the necessary findings to support its decision for a change in custody in the instant case. Thus, we find that the trial court did not abuse its discretion when it held that the benefits of the change in custody outweigh the disadvantages, and it was in B.P.'s best interest to live with her mother in Virginia.

{¶ 28} Joseph's first assignment of error is overruled.

III

{¶ 29} Joseph's second assignment of error is as follows:

{¶ 30} "THE TRIAL COURT ERRED IN THE CALCULATION OF CHILD SUPPORT BY FAILING TO CONSIDER HEALTH CARE COSTS AND INCOME ABILITY."

{¶ 31} In his second assignment, Joseph argues that the trial court erred when it determined the amount of child support he was required to pay by failing to take into account his out-of-pocket cost for B.P.'s health insurance. Joseph also argues that the court miscalculated his child support obligation in light of Lorie's extensive educational background consisting of two bachelors' degrees and a master's degree. Joseph argues that Lorie is currently underemployed as a pre-kindergarten teacher earning approximately $20,000.00 annually, so additional income should be imputed to her for the purpose of calculation of child

support. Lastly Joseph argues that he should have been entitled to a travel credit to cover his costs of visitation with B.P. when he travels to Virginia.

{¶ 32} Initially, we find that the trial court correctly calculated Joseph's child support obligation at $884.00 per month plus the 2% SEA processing fee, based on his gross annual salary of $103,000.00. Moreover, the trial court correctly gave Joseph credit for his annual $2,400.00 insurance premiums when it calculated his child support obligation.[2]

{¶ 33} The record establishes that Lorie is employed full-time as a pre-kindergarten teacher earning $20,000.00 annually. Lorie also has two bachelors' degrees and a master's degree. Other than his own assertions, Joseph has provided no evidence that Lorie is underemployed as a pre-school teacher. Thus, we agree with the trial court that the fact that Lorie possesses multiple degrees is insufficient to impute additional income to her for the purpose of calculating Joseph's child support obligation.

{¶ 34} When the original divorce decree was executed, the court gave Lorie a credit for approximately $231.00 to cover visitation travel expenses. Joseph argues that he should be entitled to a similar credit since he will be required to travel to Virginia as a result of the new visitation order. The court found that, given the disparity in income between the two parties, Joseph was in the best position to bear the travel costs associated with the new visitation order. Although the new visitation order has placed additional burdens on Joseph, we agree with the trial court that he is in a more tenable financial position to cover the costs associated

[2]The magistrate originally set the amount of Joseph's child support obligation at $913.00. The magistrate came to this number, which was later corrected by the trial court, because Joseph failed to provide sufficient evidence at the hearing of the cost of his yearly health insurance premiums. Once the proper documentation was provided to the trial court, the correct amount of monthly child support was calculated to be $884.00.

with his travel to and from Virginia in order to see his daughter.

{¶ 35} Joseph's second assignment of error is overruled.

IV

{¶ 36} Joseph's third and final assignment of error is as follows:

{¶ 37} "THE TRIAL COURT ERRED IN LIMITING FATHER'S PARENTING TIME WITH [THE] MINOR CHILD."

{¶ 38} In his final assignment, Joseph contends that the trial court erred when it awarded him parenting time in accordance with the parties' consent decree filed in their divorce. Pursuant to the original consent decree, Joseph was awarded visitation which amounts to eight weekends per year, as well as summer and holiday time. Joseph requests that a standard visitation order be implemented that permits him to see B.P. every other weekend during the year, without the midweek visit. Just as the trial court found, the standard order of visitation contemplates that both parties live within the Montgomery County area. Joseph, however, resides in Ohio, while Lorie lives in Virginia. Clearly, any attempt to incorporate an alternating weekend standard visitation order given the travel distance between the parties would not be in the best interest of B.P.

{¶ 39} Joseph's third assignment of error is overruled.

V

{¶ 40} All of Joseph's assignments of error having been overruled, the judgment of the trial court is affirmed.

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GRADY, J. and FROELICH, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by

assignment of the Chief Justice of the Supreme Court of Ohio).

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