

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY**

DANIEL MARSHALL

PLAINTIFF-APPELLEE

CASE NO. 1-99-81

v.

CANDRA MARSHALL

OPINION

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Civil appeal from Common Pleas Court

JUDGMENT: Judgment affirmed

DATE OF JUDGMENT ENTRY: February 16, 2000

ATTORNEYS:

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For Appellee

HADLEY, P.J. The petitioner-appellant, Candra E. Marshall, appeals the decision of the Allen County Court of Common Pleas, Domestic Relations Division, denying her motion for a modification of parental rights and responsibilities. For the reasons set forth below, we affirm the judgment of the trial court.

The procedural history and pertinent facts of this appeal are as follows. Candra and the respondent-appellee, Daniel H. Marshall ("the appellee"), are the biological parents of two young children, Kayli Eileen Marshall, born November 7, 1989, and Daniel Frederick Thomas Marshall, born March 30, 1992. The parties were divorced on October 30, 1995. The divorce decree awarded custody of the children to Daniel.

On June 1, 1998, Candra filed a motion for a modification of parental rights and responsibilities so as to place the children in her permanent custody.¹ A hearing was held on November 30, 1998. On February 4, 1999, the magistrate's report recommended that Candra's motion be denied. On May 18, 1999, Candra filed her objections to the magistrate's report. By judgment entry of September 10, 1999, the trial court overruled Candra's objections and adopted the findings and recommendations of the magistrate.

Candra now appeals, asserting the following two assignments of error.

¹ The record reveals that Candra had filed a previous motion for a modification of parental rights and responsibilities on August 16, 1996. By judgment entry of August 1, 1997, Candra's motion was denied.

ASSIGNMENT OF ERROR NO. I

The trial court abused its discretion and erred as a matter of law when it failed to find sufficient evidence to support a change of circumstances.

ASSIGNMENT OF ERROR NO. II

The trial court abused its discretion and erred as a matter of law when it failed to find that modification of custody was necessary to protect the best interests of the children.

Initially, we note that the discretion of a trial court in deciding child custody issues is quite broad and is to be given the utmost deference. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74 citing *Trickey v. Trickey* (1952), 158 Ohio St. 9, 13. Despite this expansive language, the discretion of the trial court is not absolute "and must be guided by the language set forth in R.C. 3109.04." See *Baxter v. Baxter* (1971), 27 Ohio St.2d 168; *Palladino v. Palladino* (1971), 27 Ohio St.2d 175.

When reviewing a trial court's determination to modify custody, its decision is subject to reversal only upon a showing that the trial court abused its discretion. *Masters v. Masters* (1994), 69 Ohio St.3d 83, 85. A finding of abuse of discretion requires evidence that the decision of the trial judge was unreasonable, arbitrary or unconscionable. *Leigh v. State Emp. Relations Bd.* (1996), 76 Ohio St.3d 143, 144; *State ex rel. Brenders v. Hall*, 71 Ohio St.3d 632, 637. 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*, 37 Ohio St.3d at 74. "Moreover, judgments in child custody cases which are supported by some competent, credible evidence going to the essential elements of the case will not be reversed by a reviewing court as being against the weight of the evidence." *Musson v. Musson* (June 10, 1998), Hardin App. No. 6-98-01, unreported, citing *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21.

The power of a trial court to modify an existing custody decree is provided in R.C. 3109.04(E)(1)(a), which states, in pertinent part, as follows:

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, his 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 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.

A trial court essentially applies a three-part test in determining whether a modification of child custody is appropriate. The test is as follows: (1) whether there has there been a change in circumstances; (2) whether a modification is in the best interest of the child; and (3) whether the harm resulting from the change will be outweighed by the benefits. *Thatcher v. Thatcher* (Oct. 6, 1997), Mercer App. No. 10-97-08, unreported, citing *In re Kennedy* (1994), 94 Ohio App.3d 414. Unless the record supports an affirmative answer to each of these questions, the modification is not appropriate under R.C. 3109.04(E) and is contrary to law. *Thatcher, supra*, citing *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 417. With respect to the first prong of the foregoing test, the Supreme Court of Ohio has stated that a change in circumstances must be a "change of substance, not a slight or inconsequential change." *Flickinger*, 77 Ohio St.3d at 418.

In her first assignment of error, Candra maintains that the trial court abused its discretion in finding that the evidence does not show a change in circumstances. In her brief, Candra alleges that the factual findings and recommendation of the court appointed guardian ad litem support her conclusion that a modification of custody is warranted. Specifically, the guardian ad litem found the following facts warrant a modification of custody: (1) Daniel has been

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unable to secure stable employment, (2) Daniel's live-in girlfriend provides a majority of the family's financial support, (3) Daniel abuses marijuana in the presence of the children, (4) Daniel's use of corporal punishment is inappropriate and unduly excessive, (5) the children desire to live with their mother, and (6) Daniel is an active member of a white supremacist motorcycle gang.²

At the hearing of November 30, 1998, various witnesses, including Daniel himself, testified as to the conflicting facts and circumstances surrounding the foregoing issues. Upon a thorough review of the record, we find competent, credible evidence of the following: (1) the inability of Daniel to secure stable employment has not adversely affected the well-being of the children³; (2) Daniel is actively seeking employment⁴, (2) Daniel does not abuse marijuana in the presence of the children, (3) Daniel's use of corporal punishment on or about May 7, 1998, although inexcusable in its severity and duration, was an isolated incident⁵, (5) the children are performing fairly well in school, have many friends, and are relatively content with their home environment, and (6) Daniel is not an active member of a white supremacist motorcycle gang.

² In her brief, Candra raises numerous other factual allegations in support of her position that a modification of custody is warranted. We find, however, no merit to these claims and decline to address them in any further detail.

³ We note that at the time of the hearing Daniel was employed at Roundy's Inc.

⁴ Daniel's live-in girlfriend has provided additional financial support for the family while Daniel seeks employment.

⁵ The incident of corporal punishment was investigated by the Lima Police Department wherein no further action was taken. The magistrate also found that Daniel had inflicted, as punishment, very few spankings upon the children and there was no evidence of child abuse in the home. The magistrate ordered both Daniel and Candra to refrain from utilizing corporal punishment in the future.

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For the foregoing reasons, we find that the trial court was within its discretion in finding that the evidence does not show a change in circumstances to justify a modification of custody. Because the first prong of the test set forth in *Thatcher, supra*, has not been met, we need not address Candra's second assignment of error.

Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court. Accordingly, Candra's first and second assignments of error are not well-taken and are overruled.

Judgment affirmed.

WALTERS and SHAW, JJ., concur.

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