[Cite as *Picciano v. Lowers*, 2009-Ohio-3780.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

IN THE MATTER OF:	:	
NICHOLAS G. PICCIANO,	:	
Petitioner-Appellee,	:	Case No. 08CA38
vs.	:	
ANN MARIE LOWERS,	:	DECISION AND JUDGMENT ENTRY
Petitioner-Appellant.	:	**Released 7/23/09**

APPEARANCES:

Ethan Vessels, Marietta, Ohio, for Appellant.

Paul Bertram, III, Marietta, Ohio, for Appellee.

PER CURIAM.

{¶1} Ann Marie Lowers appeals the trial court's judgment that prospectively modified the terms of a prior shared parenting plan. She asserts that the trial court incorrectly concluded that her potential relocation constitutes a change in circumstance sufficient to modify the shared parenting plan. However, the trial court did not modify the prior allocation of parental rights and responsibilities; it only modified the terms of the shared parenting plan and the R.C. 3109.04(E)(1)(a) change in circumstance standard does not apply. Rather, the best interest standard contained in R.C. 3109.04(E)(2)(b) does. Thus, Lowers' entire argument rests upon the erroneous assumption that the R.C. 3109.04(E)(1)(a) change in circumstance standard applies to the modification.

Because that standard is inapplicable, her assertion that her potential relocation is not a sufficient change in circumstance is irrelevant to our disposition of this appeal. Instead, we need only decide whether the trial court abused its discretion by determining that modifying the terms of the shared parenting plan would serve the child's best interest. Due to Lowers' failure to request findings of fact and conclusions of law, we must presume the regularity of the trial court's decision, and we are unable to find that the trial court abused its discretion. Accordingly, we overrule Lower's sole assignment of error and affirm the trial court's judgment.

I. FACTS

{¶2} Lowers and Nicholas Picciano married in 1992 and had one child during the course of the marriage, Lucia Marie, born May 20, 1998. In 2002, the parties dissolved their marriage. They entered into a mediated shared parenting plan that designated Lowers the residential parent and designated both parties the child's legal custodian. The plan stated that the parties "agree that it is in the best interest of [the child] to be enrolled in the school district in which the mother resides." The parties further agreed "that neither party shall move without notification to the other." The court incorporated the parties' shared parenting plan into its dissolution decree.

{¶3} In early 2008, Lowers filed a notice of intent to relocate. Shortly thereafter, Picciano filed a motion to terminate the shared parenting plan and requested the court to designate him the child's residential parent and legal custodian. He also filed a motion for an ex parte order prohibiting Lowers from

removing the child from the court's jurisdiction until the court adjudicated his motion. The trial court granted Picciano's motion to prevent Lowers from removing the child from the court's jurisdiction and scheduled a hearing before a magistrate to determine whether to terminate the shared parenting plan and to designate Picciano the child's residential parent and legal custodian.

{¶4} At the hearing, Lowers explained that she wished to relocate to Colorado to further her career. She stated that she had become dissatisfied with her current employment and that she would not be able to gain the career growth she desired by staying in the area. Lowers testified that she had applied for a job in Colorado. She admitted that her current income is approximately $100,000 per year and that her husband also makes over $100,000 per year. Picciano thus asserted that her relocation arguably is not financially necessary and remaining in the area would not prevent her from earning a comfortable standard of living.

{¶5} The evidence also showed that both parents love the child and have cooperated in the shared parenting of the child since their dissolution. The child shares loving relationships with both parents and their new families. Lowers' new husband has two adult children, and Picciano's new wife has three children from a former marriage. Picciano's step-children range in age from ten to thirteen. The ten-year old child is a girl with whom Lucia shares a close relationship. She also shares a close relationship with the other two children, with her step-mother, and with her step-mother's extended family. Additional members of her extended family live in northern Ohio.

{¶6} The guardian ad litem filed a report and indicated that the child does not want to move. The child informed the guardian that "she does not want to move and 'leave half my family behind.'" The guardian related that the child's family relationships and friendships are important to her and explained: "[I]f [Lowers] moves to Colorado, [the child] will not have the opportunity for regular personal contact with her extended family and her friends. They are a large portion of her support system. Certainly, in this day and age she can keep in touch by telephone or computer. It sounds easy. But for a 10 year old, it is not as easy as it sounds . . . its [sic] takes time to establish new support systems. [The child] can travel back and forth on a plane between Colorado and Ohio during spring breaks. However, is that what is in this 10-year old child's best interest? This reporter does not think so. Leaving the familiar and going to the unknown is difficult enough when a family is together. But when the family is divided, it becomes more difficult. Relationships appear to be the core for [the child]. Relationship with her friends and family. * * *."

{¶7} The magistrate subsequently denied Picciano's motion to terminate the shared parenting plan. However, the magistrate sua sponte prospectively modified the shared parenting plan should Lowers decide to relocate. In modifying the shared parenting plan, the magistrate found that R.C. 3109.04(E)(1)(a) did not apply, but instead determined that R.C. 3109.04(E)(2)(b) applied. The magistrate found that if Lowers relocates, it would be in the child's best interest to continue in a shared parenting plan that maximizes her time and relationship with both parents. The magistrate recommended that if Lowers

follows through with her relocation, then the shared parenting plan should be modified as follows: (1) The child would live with Picciano from one week before the school year begins until one week after the school year ends; (2) the child would live with Lowers for the remainder of the summer vacation; and (3) Lowers would have the child for the week of Thanksgiving, Christmas break, and spring break.

{¶8} The trial court adopted the magistrate's decision. The court found that if Lowers relocated, the child's best interests will be served by modifying the plan as the magistrate recommended.

II. ASSIGNMENT OF ERROR

{¶9} Lowers raises one assignment of error:

> "The trial court erred in modifying the shared parenting agreement between Ann Marie Lowers and Nicolas Picciano to redesignate the residential parent if Ann Marie Lowers moves from Ohio."

III. ANALYSIS

{¶10} In her sole assignment of error, Lowers argues that the trial court erred by sua sponte modifying the parties' shared parenting plan to provide that if Lowers relocates to Colorado, then Picciano will become the child's residential parent.

A. Jurisdiction

{¶11} Before we can address the merits of Lowers' assignment of error, we first must consider whether we have jurisdiction to review the trial court's decision that prospectively modifies the parties' shared parenting plan.

> "Section 4(B), Article IV of the Ohio Constitution provides that '[t]he courts of common pleas and divisions thereof shall have

> such original jurisdiction over all justiciable matters * * * as may be provided by law.' See, also, *North Canton v. Hutchinson* (1996), 75 Ohio St.3d 112, 114, 661 N.E.2d 1000. 'For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties.' *State v. Stambaugh* (1987), 34 Ohio St.3d 34, 38, 517 N.E.2d 526 (Douglas, J., concurring in part and dissenting in part), citing *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97-98, 296 N.E.2d 261. Parties are not entitled to litigate questions that may never affect them, and jurisdiction cannot be conferred upon the court by consent of the parties. 35 Ohio Jurisprudence 3d, Declaratory Judgments and Related Proceedings, Section 7. The court is required to raise justiciability issues sua sponte. *Stewart v. Stewart* (1999), 134 Ohio App.3d 556, 558, 731 N.E.2d 743, citing *Neiderhiser v. Borough of Berwick* (C.A.3, 1988), 840 F.2d 213, 216.
>
> 'To determine whether an issue is ripe for judicial review, the court must weigh (1) the likelihood that the alleged future harm will ever occur, (2) the likelihood that delayed review will cause hardship to the parties, and (3) whether the factual record is sufficiently developed to provide fair adjudication.' *Stewart*, citing *Ohio Forestry Assn., Inc. v. Sierra Club* (1998), 523 U.S. 726, 731-733, 118 S.Ct. 1665, 140 L.Ed.2d 921. Generally, a claim is not ripe if the claim rests upon 'future events that may not occur as anticipated, or may not occur at all.' *Texas v. United States* (1998), 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406. Rather, the issues the parties seek to litigate must have a 'direct and immediate impact on the parties.' *State ex rel. Keller v. Columbus*, 164 Ohio App.3d 648, 2005-Ohio-6500, 843 N.E.2d 838, at ¶19."

McLaughlin v. McLaughlin, Athens App. No. 06CA14, 2007-Ohio-260, at ¶¶11-12.

{¶12} Here, the issue is ripe for judicial review. First, the future harm (that the child will live with Picciano during the school year, which necessarily will result in a reduction in Lowers' parenting time) will only occur if Lowers decides to move to Colorado. The likelihood of Lowers relocating to Colorado is unknown, but it appears she is hesitant to do so if it means a substantial reduction in her parenting time with the child.

{¶13} Second, Lowers would suffer hardship if we delay review of this issue until she in fact relocates. Her decision to relocate appears to be based upon the outcome of these proceedings, i.e., if we reverse the trial court's judgment, she has asserted an intent to relocate. If we do not, then we can only speculate what Lowers will choose. In any event, the trial court's decision appears to be preventing her from relocating to Colorado.

{¶14} Third, the record is sufficiently developed regarding the child's best interests in relation to Lowers' relocation to permit appropriate appellate review. Consequently, the matter is ripe for consideration.

B. Failure to Object to Magistrate's Decision

{¶15} Lowers did not file any objections to the magistrate's decision. Civ.R. 53(D)(3)(b)(iv) provides that "a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b)." See *Hose v. Gatliff*, 176 Ohio App.3d 356, 2008-Ohio-2430, 891 N.E.2d 1263, at ¶14. "In essence, the rule is based on the principle that a trial court should have a chance to correct or avoid a mistake before its decision is subject to scrutiny by a reviewing court." *Cunningham v. Cunningham*, Scioto App. No. 01CA2810, 2002-Ohio-4094, at ¶8.

{¶16} If a party fails to comply with any of the provisions in Civ.R. 53(D)(3)(b), then "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion,

whether or not specifically designated as a finding of fact or conclusion of law." *Barnett v. Barnett*, Highland App. No. 04CA13, 2008-Ohio-3415, at ¶17, quoting Civ.R. 53(D)(3)(b)(iv); see, also, *State ex rel. Booher v. Honda of Am. Mfg.* (2000), 88 Ohio St.3d 52, 53-54, 723 N.E.2d 571.

{¶17} Here, Lowers failed to object to the magistrate's decision. However, the magistrate's decision did not advise the parties under Civ.R. 53(D)(3)(a)(iii)[1] that a party cannot assign as error on appeal the court's adoption of any factual finding or legal conclusion, unless the party has timely and specifically objected to that finding or conclusion. A magistrate's decision must include conspicuous language informing the parties of this process. See Civ.R. 53(D)(3)(a)(iii); *Rocky v. Rockey*, Highland App. No. 08CA4, 2008-Ohio-6525, at ¶9. If the magistrate's decision does not comply with Civ.R. 53(D)(3)(a)(iii), then a party may assign as error on appeal the trial court's adoption of the magistrate's findings of fact and conclusions of law. *Rocky*, at ¶12; see, also, *D.A.N. Joint Venture III, L.P. v. Armstrong*, Lake App. No. 2006-L-89, 2007-Ohio-898, at ¶22. Accordingly, Lowers' failure to object to the magistrate's decision does not preclude her from appealing the trial court's decision or from raising the assigned errors. See *Rocky*, at ¶12.

C. Legal Standard

{¶18} To determine which legal standard applies to the trial court's decision, either R.C. 3109.04(E)(1)(a) or R.C. 3109.04(E)(2)(b), we first must

[1] Civ.R. 53(D)(3)(a)(iii) provides: "A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under

determine whether it merely modified a term contained in the parties' shared parenting plan, or alternatively, whether it effectively modified the parties' prior allocation of parental rights and responsibilities. See *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546. Lowers basically asserts that the trial court changed the residential parent designation, which constitutes a modification of the parties' prior allocation of parental rights and responsibilities. If she is correct, the change in circumstance standard contained in R.C. 3109.04(E)(1)(a) governs. Conversely, Picciano asserts that the trial court simply modified the terms of the shared parenting plan and, thus, that the best interest standard contained in R.C. 3109.04(E)(2)(b) applies.

{¶19} Although the trial court found that R.C. 3109.04(E)(2)(b) applied, that determination is not controlling. Rather, the question of which statutory standard applies is a question of law that we review de novo. See *Sanders-Bechtol v. Bechtol*, Hancock App. No. 5-08-08, 2009-Ohio-186, at ¶10 (stating that determination of whether R.C. 3109.04(E)(1)(a) or R.C. 3109.04(E)(2)(b) applies is a question of law).

{¶20} In *Fisher*, the court held that a "change in the designation of residential parent and legal custodian of children [does not constitute] a 'term' of a court approved shared parenting decree, allowing the designation to be modified solely on a finding that the modification is in the best interest of the children pursuant to R.C. 3109.04(E)(2)(b) and without a determination that a 'change in circumstances' has occurred pursuant to R.C. 3109.04(E)(1)(a)."

Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b)."

Fisher at ¶1. The court thus concluded that when a court modifies a prior decree allocating parental rights and responsibilities, which includes a change in the designation of the residential parent or legal custodian, the court must find that a change in circumstance has occurred. Id. at ¶26. Conversely, when the modification concerns only the terms of a shared parenting plan, the court need not find that a change in circumstance has occurred but simply that the modification serves the child's best interests. See id. at ¶33.

{¶21} The standard for modifying the terms of a shared parenting plan is lower than the standard for modifying a prior allocation of parental rights and responsibilities "because the factors contained in a shared-parenting plan are not as critical to the life of a child as the designation of the child's residential parent and legal custodian. The individual or individuals designated the residential parent and legal custodian of a child will have far greater influence over the child's life than decisions as to which school the child will attend or the physical location of the child during holidays. Further, factors such as the physical location of a child during a particular weekend or holiday or provisions of a child's medical care are more likely to require change over time than the status of the child's residential parent and legal custodian." Id. at ¶36.

{¶22} To determine whether the trial court merely modified the terms of the parties' shared parenting plan or, alternatively, whether it changed the allocation of parental rights and responsibilities, we look further to the meaning of those terms. "[P]arental rights and responsibilities" essentially means "custody and control" and "parental rights and responsibilities reside in the party or parties

who have the right to the ultimate legal and physical control of a child." Id. at ¶22. "[T]he residential parent and legal custodian is the person with the primary allocation of parental rights and responsibilities." Id. at ¶23. In other words, the residential parent is the party having "the right to the ultimate legal and physical control of a child." Id. at ¶22. The Ohio Supreme Court has interpreted the phrase "custody" or "ultimate legal control" to mean "the legal authority to make fundamental decisions about the child's welfare." *In re Gibson* (1991), 61 Ohio St.3d 168, 171, 573 N.E.2d 1074. The party or parties with "ultimate physical control" share a permanent residence with the child where the child and party live together as a single family unit. See id. (discussing distinction between "custody" and "visitation" under former law), citing *Patrick v. Patrick* (1962), 17 Wis.2d 434, 438, 117 N.W.2d 256, 259 (stating that party having visitation does "not have custody during * * * visits, but only such obligation and authority as are practical necessities during such visits"); *Westrate v. Westrate* (App.1985), 124 Wis.2d 244, 248, 369 N.W.2d 165, 168 (stating that "visitation differs from custody because the noncustodial parent and child do not live together as a single family unit")." See, also, *Braatz v. Braatz* (1999), 85 Ohio St.3d 40, 44, 706 N.E.2d 1218.

{¶23} In contrast, the terms of a shared parenting plan do not allocate ultimate legal and physical control. See *Fisher*. Instead, the terms of a shared parenting plan "include[] provisions relevant to the care of a child, such as the child's living arrangements, medical care, and school placement. R.C. 3109.04(G). A plan details the implementation of the court's shared-parenting

order. For example, a shared-parenting plan must list the holidays on which each parent is responsible for the child and include the amount a parent owes for child support." Id. at ¶31.

{¶24} In the case at bar, according to a literal interpretation of *Fisher*, the trial court did not modify the parties' prior allocation of parental rights and responsibilities. The trial court did not modify the designation of Lowers as the residential parent or of both parents as the child's legal custodians. The original plan designated Lowers as the child's residential parent and designated both parents as the child's legal custodians, and the trial court left these designations unchanged. The court simply modified the terms of the parties' shared parenting plan regarding where the child would go to school and how much time she would live with each parent. The original plan provided that the child would spend two nights each week and every other weekend with her father. The plan further outlined the amount of holiday and vacation time the child would spend with each parent. The plan additionally stated that the parties agreed that the child's best interest would be served by enrolling her in the school district where Lowers resides. The trial court modified the plan so that if Lowers relocates, then the child would live with Picciano during the school year, in which case she obviously would not attend the school district where Lowers resides. The court's decision modifies the details of the parties' shared parenting plan regarding where the child will live during the school year and where she will spend vacations and holidays. According to *Fisher*, these modifications concern the implementation of the shared parenting plan, not which party is the residential parent and legal

custodian. See *Herdman v. Herdman*, Marion App. No. 9-08-32, 2009-Ohio-303, at ¶6 (stating that "[t]he allocation of parenting time is a 'term' of a shared parenting plan, which is modifiable if the change is in the children's best interests"); see, also, *Ralston v. Ralston*, Marion App. No. 9-08-30, 2009-Ohio-679, at ¶17 (stating that R.C. 3109.04(E)(2)(b) governs a modification which retains both parents as the residential parent and legal custodian but names one of those parents the residential parent for school purposes). While the effect of the modification is to deprive Lowers of a substantial amount of time that she otherwise would have enjoyed with the child, the modification does not deprive her of her parental rights and responsibilities under the plan.[2] See *Sanders-Bechtol*, supra, at ¶16-18 (concluding that even though modification reduced parent's parenting time with child, the modification did not constitute a modification of the parties' parental rights and responsibilities). Even with the modification, Lowers still retains the ability to make decisions regarding the child's welfare and her home will be the child's permanent residence when the child is not in school. Neither party has sole physical and legal control of the

[2] We are uncertain whether the *Fisher* court contemplated a situation such as the one involved in this case, i.e., where the "residential parent" designation is retained but the effect of the court's decision is to substantially reduce the amount of time that the child lives with that parent. Part of the problem may stem from the lack of an adequate definition of "residential parent." Common sense would seem to indicate that the "residential parent" should mean the parent with whom the child resides the majority of the time. However, *Fisher* does not so define "residential parent," and neither has the legislature. Although judicial restraint compels us to refrain from developing our own definition of "residential parent," the Ohio Supreme Court or legislature may wish to consider this issue.

Additionally, if Lowers relocates to Colorado, the distance between her and the child may make it difficult for her to exercise ultimate legal and physical control of the child. However, the trial court's decision does not take away these rights, and *Fisher* seems to support the conclusion that even though the distance may make Lowers' exercise of these rights more problematic, because she still retains them, she continues to be the child's "residential parent" and one of the child's legal custodians.

child. Instead, the parties continue to share physical and legal control of the child. The court's decision does not deprive Lowers of the ultimate physical control of the child—just the amount of time that she will be able to exercise the ultimate physical control of the child. Furthermore, the court's decision does not make any express changes to Lowers' status as the residential parent and does not change either parties' status as the child's legal custodian. Rather, the court's decision retains the designations made under the prior decree. In short, the court's decision does not modify the child's residential parent or legal custodian. Because the court's decision does not modify the child's residential parent or legal custodian, the standard contained in R.C. 3109.03(E)(2)(b) governs our analysis of Lowers' assignment of error. Accordingly, her assumption that the R.C. 3109.04(E)(1)(a) change in circumstance standard controls is erroneous.

D. R.C. 3109.04(E)(2)(b) Standard for Modifying the Terms of a Shared Parenting Plan

1. Appellate Standard of Review

{¶25} As with an R.C. 3109.04(E)(1)(a) modification of parental rights and responsibilities, we review the merits of a trial court's R.C. 3109.04(E)(2)(b) modification of the terms of a shared parenting plan under an abuse of discretion standard. See *Herdman*, supra, at ¶7 (applying abuse of discretion standard to R.C. 3109.04[E][2][b]); see, generally, *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159. An abuse of discretion implies that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. See, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. "A

decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597, 601. Moreover, when applying an abuse of discretion standard, we are not free to merely substitute our judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181. Additionally, we presume that the trial court's findings are correct, since the trial court is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use its observations in weighing the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Thus, deferential review in domestic matters involving a child is crucial as there may be much evident in the parties' demeanor and attitude that does not translate to the record well. *Davis*, 77 Ohio St.3d at 419.

2. Legal Standard

{¶26} R.C. 3109.04(E)(2)(b) allows a court to modify the terms of a shared parenting plan "upon its own motion at any time if the court determines that the modifications are in the best interest of the children * * *." Thus, to modify the terms of a shared parenting plan, the trial court need only determine that the modification would serve the child's best interest. See *Fisher*, supra.

{¶27} R.C. 3109.04(F)(1) requires a trial court to weigh all relevant factors, in addition to specific factors, when determining whether a modification would serve a child's best interest. The statute lists the following factors for the court to consider:

> (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 [certain criminal offenses];
>
> (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.

3. Analysis

{¶28} Here, we are unable to determine that the trial court abused its discretion by concluding that the child's best interest would be served by modifying the terms of the parties' shared parenting plan to specify that the child would live with Picciano during the school year. Instead, because Lowers did not request findings of fact and conclusions of law, we will presume the regularity of the trial court proceedings.

{¶29} Civ.R. 52 provides that "judgment may be general for the prevailing party unless one of the parties in writing requests otherwise." The failure to request findings of fact and conclusions of law results in a waiver of the right to challenge the trial court's lack of an explicit finding concerning an issue. See *Pawlus v. Bartrug* (1996), 109 Ohio App.3d 796, 801, 673 N.E.2d 188; *Wangugi v. Wangugi* (Apr. 12, 2000), Ross App. No. 2531; *Ruby v. Ruby* (Aug. 11, 1999), Coshocton App. No. 99CA4. "[W]hen a party does not request that the trial court make findings of fact and conclusions of law under Civ.R. 52, the reviewing court will presume that the trial court considered all the factors and all other relevant facts." *Fallang v. Fallang* (1996), 109 Ohio App.3d 543, 549, 672 N.E.2d 730; see, also, *In re Barnhart*, Athens App. No. 02CA20, 2002-Ohio-6023, at ¶23.

{¶30} In the absence of findings of fact and conclusions of law, we must presume the trial court applied the law correctly and must affirm if there is some evidence in the record to support its judgment. See, e.g., *Bugg v. Fancher*, Highland App. No. 06CA12, 2007-Ohio-2019, at ¶10, citing *Allstate Financial Corp. v. Westfield Serv. Mgt. Co.* (1989), 62 Ohio App.3d 657, 577 N.E.2d 383. As the court explained in *Pettit v. Pettit* (1988), 55 Ohio App.3d 128, 130, 562 N.E.2d 929:

> "[W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position superior to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence.
>
> The message is clear: If a party wishes to challenge the * * * judgment as being against the manifest weight of the evidence he

> had best secure separate findings of fact and conclusions of law. Otherwise his already 'uphill' burden of demonstrating error becomes an almost insurmountable 'mountain.'"

See, also, *Bugg; International Converter, Inc. v. Ohio Valley Converting, Ltd.* (May 26, 1995), Washington App. No. 93CA34.

{¶31} In this case, there is some evidence to support the trial court's finding that modifying the terms of the shared parenting plan would serve the child's best interest. Because Lowers did not request findings of fact and conclusions of law, the trial court was not required to detail the findings to support its conclusion, and we presume that the trial court considered the appropriate statutory factors and reached the correct decision. We simply note that some evidence supports the court's decision. The record shows that the child does not want to move. Furthermore, the child has extended family and friends in the area, whereas she has none in Colorado. We cannot state that the trial court abused its discretion.

{¶32} Finally, although Lowers devotes most of her argument to asserting that her relocation could not serve as a basis for the trial court's modification, as we previously explained, her argument is based upon the erroneous presumption that the change in circumstance standard applies. Because this standard does not apply, her argument that her relocation is not a sufficient change in circumstance is irrelevant.

{¶33} Accordingly, we overrule Lowers' lone assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court, Domestic Relations Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J.: Concurs in Judgment and Opinion.
Abele, J. and Harsha, J.: Concur in Judgment Only.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

BY: _____
William H. Harsha, Judge

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.