

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

Amber Roberts (FKA Bolin),

Plaintiff-Appellant,

v.

Thomas Bolin,

Defendant-Appellee.

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Case No. 09CA44

DECISION AND JUDGMENT
ENTRY

: File-stamped date: 8-4-10

APPEARANCES:

Susan Gwinn, Athens, Ohio, for Appellant.

K. Robert Toy, Athens, Ohio, for Appellee.

Kline, J.:

{¶1} Amber Roberts (formerly known as “Amber Bolin” and hereinafter “Amber”), the non-custodial parent of the child at issue, appeals the judgment of the Athens County Court of Common Pleas. The trial court denied Amber’s motion to modify parental rights and responsibilities because, as a threshold matter, Amber did not demonstrate that a change in circumstances had occurred. On appeal, Amber contends that the trial court applied the wrong legal standard in denying her motion. Instead of finding that no change in circumstances had occurred, Amber argues that the trial court should have focused on the best interest of the child. We disagree. To modify a prior decree allocating parental rights and responsibilities, a trial court *must* find a change in circumstances. Next, Amber contends that the trial court acted against the weight of the evidence in denying her motion to modify parental rights and responsibilities. Because we must defer to the trial court on matters of weight and

credibility, and because a substantial amount of competent and credible evidence supports the trial court's decision, we disagree. Accordingly, we overrule Amber's assignments of error and affirm the judgment of the trial court.

I.

{¶2} Amber and Thomas Bolin (hereinafter "Thomas") were married on February 10, 1997. One child (hereinafter the "Child") was born as issue of this marriage.

{¶3} Amber and Thomas were divorced on April 4, 2001. The divorce incorporated a shared parenting plan for the Child. Subsequently, in a January 6, 2005 order, the trial court terminated the shared parenting plan and designated Thomas as the Child's residential parent and legal custodian.

{¶4} On May 7, 2008, Amber filed a motion to modify parental rights and responsibilities. The memorandum attached to Amber's motion states the following: "There has been a change in circumstances that warrant a change in who is the residential parent. The father of the parties' minor son, [the Child], who is currently the residential parent, does not permit his family (his parents) to visit with their grandchild. The mother, for the last two years, has provided them with visitation, cutting into her own visitation. The parties' minor son was only five years old at the time of the Court's last decision. He is currently nine years old and desires to live with his mother. [The Child] has not received adequate medical care and comes to visit his mother with bruises and bite marks. The defendant, Tom Bolin, has failed to foster a relationship between mother and child, and has denied the plaintiff phone contact with their son.

{¶5} "For these and other reasons, Amber Roberts requests that she be named the residential parent."

{¶6} On May 22, 2008, Thomas also filed a motion to modify parental rights and responsibilities. Essentially, Thomas requested a reduction in Amber's summer parenting time with the Child.

{¶7} On June 9, 2008, the trial court appointed a guardian ad litem for the Child.

{¶8} Shortly after Amber and Thomas filed their competing motions, Thomas filed two contempt motions against Amber. The July 10, 2008 contempt motion alleges that Amber "refused to bring [the Child] back * * * for his Father's Day visitation [and took the Child] to the doctor and put him on medication without [Thomas's] permission." In his July 23, 2008 contempt motion, Thomas alleged that Amber "did not bring [the Child] back after her two week visitation." Thomas further alleged that he "was unable to contact her and [the Child] was not at her residence when [Thomas] went to pick him up."

{¶9} On October 22, 2008, the magistrate held a hearing to address Amber's motion to modify parental rights and responsibilities, Thomas's motion to modify parental rights and responsibilities, and Thomas's two contempt motions. At the hearing, Thomas and Amber testified about the issues raised in the various motions. One other witness, a physician, testified at the hearing. This witness had treated the Child during Amber's parenting time.

{¶10} The magistrate also considered the recommendations of the guardian ad litem, who addressed Amber's motion by stating that "[t]here has not been a change in [the Child's] circumstances significant enough to warrant a change in legal custody, nor is a change in legal custody in [the Child's] best interest." Finally, in reaching a decision, the magistrate conducted an in camera interview with the Child.

{¶11} The magistrate denied all of Amber and Thomas's various motions. Amber requested findings of fact and conclusions of law, wherein the magistrate "conclude[d] that a change in circumstances ha[d not] occurred which would warrant consideration of modifying the parties' parental rights and responsibilities."

{¶12} Amber filed objections to the magistrate's findings and conclusions, but the trial court adopted the magistrate's decision. The trial court agreed that a change in circumstances had not occurred. Additionally, the trial court found that (1) Thomas provided proper medical care for the Child; (2) Thomas had "never denied visitation to [Amber] and has allowed her unlimited phone contact"; (3) Thomas's contempt motions resulted from misunderstandings; and (4) Thomas's wife was not physically abusive towards the Child. As a result, the trial court agreed with the magistrate and denied all of Amber and Thomas's various motions.

{¶13} Amber appeals and asserts the following two assignments of error: I. "The Trial Court committed prejudicial error by applying the wrong standard to what was needed for the Motion to Modify Parental Rights and Responsibilities to be granted." And, II. "The Trial Court committed prejudicial error by not granting the Motion to Modify Parental Rights and Responsibilities as the Decision was against the weight of the evidence."

II.

{¶14} We will review Amber's two assignments of error together because they are interrelated. "Appellate courts typically review trial court decisions regarding the modification of a prior allocation of parental rights and responsibilities with the utmost deference." *Wilson v. Wilson*, Lawrence App. No. 09CA1, 2009-Ohio-4978, at ¶21,

citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260; *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. See, also, *Posey v. Posey*, Ross App. No. 07CA2968, 2008-Ohio-536, at ¶10; *Jones v. Jones*, Highland App. No. 06CA25, 2007-Ohio-4255, at ¶33. Consequently, we apply an abuse-of-discretion standard when reviewing a trial court's decision regarding the modification of parental rights and responsibilities. See *Wilson* at ¶21; *Jones* at ¶33; *Posey* at ¶10.

{¶15} “In *Davis*, the court defined the abuse of discretion standard that applies in custody proceedings as follows: ‘Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court.

{¶16} ‘The reason for this standard of review is that the trial judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page. * * * The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge 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. * * * A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. The determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal, especially to the extent where the appellate court relies on unchallenged, excluded evidence in order to justify its reversal. * * * This is even more

crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well.” *Posey* at ¶10, quoting *Davis* at 418-19 (other internal quotations omitted). See, also, *Wilson* at ¶21; *Jones* at ¶33.

{¶17} R.C. 3109.04(E)(1)(a), which governs the modification of a prior decree allocating parental rights, provides: “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, the child’s residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies: * * *.”

{¶18} “Only R.C. 3109.04(E)(1)(a) expressly authorizes a court to modify a prior decree allocating parental rights and responsibilities.” *Posey* at ¶11, quoting *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, at ¶21. “Thus, a trial court may modify an allocation of parental rights and responsibilities only if the court finds (1) that a change in circumstances has occurred since the last decree, (2) that modification is necessary to serve the best interest of the child, and (3) that the advantages of modification outweigh the potential harm.” *Jones* at ¶35, citing *Beaver v. Beaver*, 143 Ohio App.3d 1, 9, 2001-Ohio-2399. The change-in-circumstances requirement “spare[s] children from a constant tug of war between their parents who would file a

motion for change of custody each time the parent out of custody thought he or she could provide the children a ‘better’ environment. The statute is an attempt to provide some stability to the custodial status of the children, even though the parent out of custody may be able to prove that he or she can provide a better environment.” *Davis* at 418 (internal quotation omitted).

A.

{¶19} In her first assignment of error, Amber contends that the trial court applied the wrong legal standard in denying her motion to modify parental rights and responsibilities. The trial court denied Amber’s motion because Amber had not demonstrated that a change in circumstances had occurred. Essentially, Amber argues that this was an improper reason for denying her motion. Instead, Amber contends that the trial court should have focused on the best interests of the child.

{¶20} To resolve this issue, we must interpret and apply the statutes involved. “When interpreting statutes and their application, an appellate court conducts a *de novo* review, without deference to the trial court’s determination.” *State v. Sufronko* (1995), 105 Ohio App.3d 504, 506.

{¶21} Here, we find no merit in Amber’s first assignment of error. In a prior entry, the trial court named Thomas “the sole legal custodian and residential parent of the parties’ minor child[.]” January 6, 2006 Judgment Entry. And in her motion to modify parental rights and responsibilities, Amber requested that the trial court designate her “the primary residential parent of the parties’ minor child.” Thus, Amber’s argument *must* fail because the Supreme Court of Ohio has held that “[a] modification of the designation of residential parent and legal custodian of a child requires a determination

that a ‘change in circumstances’ has occurred[.]” *Fisher* at syllabus. See, also, *In re Brayden James*, 113 Ohio St.3d 420, 2007-Ohio-2335, at ¶14 (“The plain language of R.C. 3109.04(E)(1)(a) precludes a trial court from modifying a prior decree allocating parental rights and responsibilities unless it finds, based on facts that have arisen since the time of the decree or were unknown to it at that time, * * * that a change has occurred in circumstances of the child, the child’s residential parent, or either parent subject to a shared-parenting decree[.]”); *Wilson* at ¶22; *Jones* at ¶35; *Pazin v. Pazin*, Columbiana App. No. 07-CO-43, 2008-Ohio-6975, at ¶46; *Barto v. Barto*, Hancock App. No. 5-08-14, 2008-Ohio-5538, at ¶27; *Andrew P. v. Jessy Z.*, 177 Ohio App.3d 837, 2008-Ohio-4124, at ¶36. This proposition is well settled, and Amber has cited no cases to the contrary.

{¶22} Amber argues that “a reading of [R.C. 3109.04(B)(1)] makes it clear that the primary concern in [modifying parental rights and responsibilities] is what is in the best interest of the child.” Brief of Appellant at 8. We would agree if this case concerned the *initial* allocation of parental rights and responsibilities under R.C. 3109.04(B)(1). See, e.g., *Gehring v. Gehring*, Warren App. No. CA2003-03-038, 2004-Ohio-95, at ¶7 (“The trial court’s primary concern is a child’s best interest when making an initial allocation.”); *Francis v. Westfall*, Jefferson App. Nos. 03-JE-20 & 03-JE-21, 2004-Ohio-4543, at ¶16; *Anthony v. Wolfram* (Sept. 29, 1999), Lorain App. No. 98CA007129. But “[m]odification of custody * * * is governed by R.C. 3109.04(E)(1)(a) and prohibits any change in allocation of parental rights and responsibilities unless there has been * * * a ‘change in circumstances[.]’” *In re Russell* (Aug. 4, 1999), Washington App. No. 98CA525.

{¶23} Accordingly, we overrule Amber’s first assignment of error.

B.

{¶24} In her second assignment of error, Amber contends that denying her motion to modify parental rights and responsibilities “was against the weight of the evidence.” Brief of Appellant at 10.

{¶25} Amber’s second assignment of error is not entirely clear. She initially claims that “[a]ll the evidence * * * constituted a change in circumstances.” Brief of Appellant at 10. However, Amber analyzes any potential change in circumstances under the “best interest standard” of R.C. 3109.04(B)(1). Thus, we are unsure whether Amber’s second assignment of error is (1) in the alternative to her first assignment of error or (2) a continuation of her argument that the trial court should have focused on the best interest of the child.

{¶26} The trial court denied Amber’s motion because Amber could not demonstrate a change in circumstances. Furthermore, the trial court did not consider whether a change in parental rights and responsibilities would be in the child’s best interest. Therefore, we construe Amber’s second assignment of error in the following manner: The trial court acted against the weight of the evidence in finding that no change in circumstances had occurred.

{¶27} “While R.C. 3109.04 does not define what constitutes a change of circumstances, courts have generally held the phrase to mean ‘an event, occurrence, or situation which has a material and adverse effect upon a child.’” *In re M.D.D.*, Butler App. No. CA2009-06-170, 2010-Ohio-326, at ¶22, quoting *Preece v. Stern*, Madison App. Nos. CA2008-09-024 & CA2008-12-029, 2009-Ohio-2519, at ¶12 (other internal quotation omitted). See, also, *Lindman v. Geissler*, 171 Ohio App.3d 650, 2007-Ohio-

2003, at ¶33; *Rohrbaugh v. Rohrbaugh* (2000), 136 Ohio App.3d 599, 604-605. In this regard, Amber essentially claims that the trial court should have granted her motion because (1) Thomas refused to set up a phone schedule for Amber and the Child; (2) Thomas did not attend to the Child's various medical issues; (3) Thomas's wife slapped the Child; and (4) Thomas filed false contempt charges against Amber.

{¶28} Here, we cannot find that the trial court acted against the weight of the evidence. First, the guardian ad litem recommended that Thomas remain as the Child's residential parent. And although a trial court is not bound to follow the recommendation of a guardian ad litem, we must afford deference to the trial court when it chooses to do so. See *Wine v. Wine*, Delaware App. No. 04 CA F 10 068, 2005-Ohio-975, at ¶75 (stating that "a trial court has discretion to follow or reject the recommendation of a guardian ad litem"); cf. *Lumley v. Lumley*, Franklin App. No. 09AP-556, 2009-Ohio-6992, at ¶46 ("Because assessment of the credibility and weight of the evidence is reserved for the trial court, we will not second guess the court's decision to disregard the guardian ad litem's recommendation.").

{¶29} Second, Thomas testified that a telephone schedule was unnecessary because Amber could call the Child "anytime[.]" October 22, 2008 Transcript at 87. Additionally, in a letter to Amber, Thomas wrote that "[t]here really is not a need for a schedule, since you can call at any reasonable time. If we are home[, the Child] is able to talk to you." Exhibit D. This evidence supports the trial court's finding that Thomas has allowed Amber unlimited phone contact with the Child, and "[a] reviewing court will not second-guess the trial court's weight and credibility of the evidence determinations regarding child custody matters." *In re Jeffreys*, Belmont App. No. 01-BA-4, 2002-Ohio-

703, citing *Davis* at 418. See, also, *In re Adoption of L.C.H.*, Scioto App. Nos. 09CA3318, 09CA3319, & 09CA3324, 2010-Ohio-643, at ¶55. (stating that “we defer to the trial court on issues of weight and credibility”).

{¶30} Third, sufficient evidence supports the trial court’s finding that the Child received appropriate medical attention for various ailments and injuries. Thomas is a registered nurse, and he testified about the Child’s medical treatment. Based on Thomas’s testimony, the trial court found that the Child received appropriate medical attention under the circumstances. Amber called a doctor to testify at the hearing. This doctor, who had treated the Child in the past, raised some questions about the Child’s medical care. But again, we must afford the trial court great deference on issues of credibility and weight, and the trial court found Thomas’s testimony to be convincing. See *Davis* at 418-19. Furthermore, the doctor acknowledged that she had not seen medical records related to the Child’s treatment while the Child was in Thomas’s care. Thus, the doctor could not testify that Thomas provided inadequate medical care for the Child.

{¶31} Fourth, although Thomas’s wife slapped the Child, the trial court found that it was an isolated incident and not worthy of concern. In regards to the slap, Thomas’s testimony supports the following: (1) the Child was acting disrespectful towards Thomas’s wife; (2) Thomas’s wife lost her temper and slapped the Child; (3) Thomas’s wife subsequently apologized to the Child; and (4) there have been no further incidents of physical discipline. In addition to Thomas’s testimony, we again note the guardian ad litem recommended that Thomas remain as the Child’s residential parent. As such, the

guardian ad litem (1) was not concerned about the possibility for physical abuse and (2) reported that the Child did not appear upset by the incident.

{¶32} Finally, the trial court found that Thomas's two contempt motions were based on misunderstandings between the parties, not deliberate attempts to fabricate charges against Amber. In the proceedings below, Amber argued that Thomas did not foster a relationship between herself and the Child. And on appeal, Amber claims that "[t]he sheer act of filing the false contempt charges and then lying to the court alone should prove to the court that he was not facilitating visitation." Brief of Appellant at 10.

However, the testimony from Thomas and Amber supports the finding that the contempt charges resulted from misunderstandings, and Amber points to no evidence that directly contradicts this finding. The mere fact that the trial court denied Thomas's two contempt motions does not establish a pattern of deliberate fabrication.

{¶33} In sum, we must defer to the trial court on issues of weight and credibility, and the trial court found Thomas's testimony credible as to the relevant issues on appeal. Therefore, pursuant to cases like *Davis*, a substantial amount of competent and credible evidence supports the trial court's finding that a change in circumstances had not occurred.

{¶34} Accordingly, we overrule Amber's second assignment of error.

C.

{¶35} In conclusion, we find that the trial court applied the correct legal standard and that the court's decision is not against the weight of the evidence. As a result, we find that the trial court did not abuse its discretion when it denied Amber's motion to

modify parental rights and responsibilities. Having overruled both of her assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

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

McFarland, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, 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.