

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

BOBBIE R. MASSIE, : Case No. 14CA3630
Plaintiff-Appellee, :
v. : DECISION AND
THOMAS SAMMONS, : JUDGMENT ENTRY
Defendant-Appellant. : **RELEASED: 12/30/2014**

APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio, for appellant.

Robert R. Dever, Bannon, Howland & Dever Co., L.P.A., Portsmouth, Ohio, for appellee.

Harsha, J.

{¶1} Thomas Sammons appeals from a judgment, denying his motion for change of custody of his minor son from his ex-wife, Bobbie Massie. The trial court adopted a magistrate's decision and denied the motion because Sammons had not established a change in circumstances warranting the requested modification.

{¶2} In his first assignment of error Sammons contends that the trial court's decision was against the manifest weight of the evidence because it failed to recognize that a significant change in circumstances had occurred concerning the minor child, that a modification of custody was in the child's best interest, and that the benefits of the requested modification outweighed any potential harm. Sammons claims that he established a change in circumstances because Massie limited his parenting time with their child, Massie withheld the child's medication, and a new child had moved into the child's home.

{¶3} Notwithstanding Sammons's claims, other evidence before the trial court showed: 1) that because of his own fault, Sammons did not exercise all of the parenting time with the child that he had been granted, 2) a physician had approved Massie's decision to limit and eventually stop the child's seizure medication and the child had not suffered a recurrence since then, and 3) the child had not been adversely affected by the addition of another child to the home. The trial court was within its wide latitude to credit this evidence. Because the trial court did not abuse its broad discretion in determining that Sammons did not establish a change in circumstances, his claim is meritless.

{¶4} In his second assignment of error Sammons asserts that the trial court failed to conduct a sufficient de novo review of the magistrate's decision after he filed objections. Because Sammons has not affirmatively demonstrated that the trial court failed to perform an independent analysis of the objections, we reject his argument.

{¶5} Therefore, we overrule his assignments of error and affirm the judgment of the trial court.

I. FACTS

{¶6} Bobbie Massie and Thomas Sammons married in 2002, and had a son, Braxton, who was born in 2003. The Scioto County Court of Common Pleas, Domestic Relations Division granted the parties a divorce based on incompatibility in 2008. Under a separation agreement adopted and incorporated in the divorce decree, the trial court designated Massie as the residential parent and legal custodian of their son and awarded Sammons parenting time in accordance with Loc.R. 6.0.

{¶7} Over five years later in 2013, Sammons filed a motion for change of custody in which he sought to be designated as Braxton's residential parent and legal custodian. In his motion Sammons claimed that Massie had refused to comply with the parenting time ordered in their divorce decree and had refused to administer the proper medication to their son.

{¶8} In February 2014, a magistrate held a hearing on Sammons's motion and the evidence established that the parties had remarried since their divorce. Sammons lives with his wife, her daughter from a previous relationship, and their son. Massie lives with her husband, Braxton, and a 17-year-old boy for whom Massie and her husband are guardians. The parties testified that Braxton is doing well in school, is engaged in many extracurricular activities, including several sports, and interacts well with everyone in the parties' homes.

{¶9} To establish his first basis for a change in circumstances, Sammons testified that Massie had denied him from exercising all the parenting time he was entitled to under the divorce decree because birthday parties, ball games, weddings, and family reunions occurred during his visitation time. He also asserted Massie would transport their son to him later than she had promised. He further testified that he permitted Massie to take their son to church on Sundays during his parenting time.

{¶10} Nevertheless, Sammons admitted that it was his fault for not exercising all the parenting time he was entitled to under the decree because he did not understand Loc.R. 6 and did not request a copy of it. Sammons also conceded that previous jobs had prevented him from exercising his visitation. He further stated that he had no problem with his son spending time at church during his weekend visitation.

Sammons's wife testified that at times his work prevented Sammons from exercising his visitation.

{¶11} Massie testified that Sammons exercises only about 50-75% of his available parenting time during the week and that when he has weekend visitation, their son spends half of that time with Sammons's parents. She has notified Sammons beforehand if there are events that conflict with his parenting time, but she never prevented him from exercising his visitation and has offered him makeup time that Sammons has, at times, turned down.

{¶12} To support his second claim of a change in circumstances, Sammons testified that Massie modified the dosage of their son's prescribed seizure medication without the doctor's approval. Sammons claimed to have recorded a conversation with Massie in which she said she had limited the child's medication dosage because it had slowed him down. Massie rebutted this by testifying that she started weaning their son off of the medication around the start of school in 2013 and when she told the doctor, she approved of it and scheduled an EEG, which revealed no problem. The medication had been stopped for several months without Braxton suffering any recurrence of seizures by the date of the hearing.

{¶13} Finally, Sammons testified that the 17-year-old boy had moved into Massie's home recently, which had forced Braxton to move from his bedroom to another room that had been the laundry room. Massie countered that she and her husband had become guardians of the boy, who was homeless because his mother had been imprisoned, and that Braxton had already moved into a new, remodeled bedroom

before the boy moved in. She further testified that Braxton enjoys the boy's company, the boy helps him with his homework, and they have a great relationship.

{¶14} The magistrate conducted an in camera interview of the child, who testified that he had good relationships with both his parents, his stepparents, and the people living at his parents' homes. The child testified that he would like to spend a little more time with his father, but that he felt more comfortable at his mom's home. He confirmed that his father had missed some of his visitation time during the school week because he had not realized that he had that time until a week or two before the hearing. He also testified that his medication dosage was changed and eventually stopped by the doctor and that he had not experienced any seizures or other problems since then.

{¶15} The magistrate issued a decision, which was adopted by the trial court that same day, that denied Sammons's motion to modify parental rights and responsibilities because the credible evidence and testimony did not establish that there had been a change in circumstances since the divorce decree. The court noted that the change cannot be based on a slight or inconsequential change, but must be of substance. After Sammons filed timely objections to the magistrate's decision, the trial court entered a judgment overruling them and denying his motion to modify parental rights and responsibilities.

{¶16} The trial court found that Massie had engaged in no medical neglect or irresponsibility, Sammons had failed to exercise all of the parenting time that had been afforded to him by the divorce decree, and the court had assigned more weight to Massie's testimony. The trial court determined that "any changes that have occurred in

the parties' home have been slight and inconsequential." The trial court further determined in dicta that it would not be in the best interest of the child to modify the prior decree and that the advantages likely to be caused by the modification would be outweighed by the harm of the modification. This appeal ensued.

II. ASSIGNMENTS OF ERROR

{¶17} Sammons assigns the following errors for our review:

1. The Magistrate's Decision of March 4, 2014 and subsequent judgment entry of the Trial Court dated May 6, 2014, adopting said decision failed to properly analyze the change of circumstances test along with the best interests standard promulgated by O.R.C. 3109.04 used to determine the children's best interests in allocating parental rights and responsibility and failed to properly conclude how the benefits of a modification of parental rights and responsibility outweighed potential harms under O.R.C. 3109.04(E) and as such was against the manifest weight of the evidence and an abuse of discretion.
2. The trial court failed to give proper scrutiny in its review of findings of facts and conclusions of law in its review of the Appellant's Objections to the Magistrate's Decision.

III. STANDARD OF REVIEW

{¶18} Appellate courts review decisions concerning the modification of parental rights, including custody, with the utmost deference, so a reviewing court will not reverse a trial court's decision absent an abuse of discretion. *In the Matter of P.A.R.*, 4th Dist. Scioto No. 13CA3550, 2014-Ohio-802, ¶ 18. This standard is warranted because trial courts must have wide latitude in considering the evidence, and assessing the parties' demeanor, attitude, and credibility. *See Davis v. Flickinger*, 77 Ohio St.3d 415, 418-419, 674 N.E.2d 1159 (1997); *In re Z.A.P.*, 177 Ohio App.3d 217, 2008-Ohio-3701, 894 N.E.2d 342, ¶ 18 (4th Dist.) ("A deferential review in a child-custody case is appropriate because much may be evident in the parties' demeanor and attitude that

does not translate to the record well”). The term “abuse of discretion” implies that the court’s attitude was unreasonable, arbitrary, or unconscionable. *In re H.V.*, 138 Ohio St.3d 408, 2014-Ohio-812, 7 N.E.3d 1173, ¶ 8. If there is some competent, credible evidence to support the trial court’s determination, the trial court does not abuse its discretion. See, e.g., *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 696 N.E.2d 575 (1998); *In re E.W.*, 4th Dist. Wash. Nos. 10CA18, 10CA19, and 10CA20, 2011-Ohio-2123, ¶ 1.

{¶19} “While a trial court’s discretion in a custody modification proceeding is broad, it is not absolute, and must be guided by the language set forth in R.C. 3109.04.” *In the Matter of C.D.M.*, 4th Dist. Hocking No. 13CA1, 2013-Ohio-3792, ¶ 13, quoting *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). R.C.

3109.04(E)(1)(a) 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:

- (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.

IV. LAW AND ANALYSIS

Change in Circumstances

{¶20} In his first assignment of error Sammons asserts that the judgment of the trial court is against the manifest weight of the evidence because the court failed to properly analyze the change of circumstances, best interest of the child, and the benefits and harms of a modification of parental rights and responsibilities. Although Sammons attempts to frame his argument under the manifest-weight standard, given our utmost deference to the trial court’s factual findings in custody-modification cases, the applicable standard of review is—as we previously discussed—the more deferential abuse-of-discretion standard. *See Thebau v. Thebau*, 4th Dist. Lawrence No. 07CA34, 2008-Ohio-4751, ¶ 25.

{¶21} R.C. 3109.04(E)(1)(a) precludes a trial court from modifying a prior custody decree unless it finds that a change in circumstances has occurred in the child, the child’s residential parent, or a parent subject to a shared-parenting agreement and the modification is necessary to serve the best interest of the child. *In re A.G.*, 139 Ohio St.3d 572, 2014-Ohio-2597, 13 N.E.3d 1146, ¶ 66. Therefore, whether the movant has established a change in circumstances is a threshold question in a custody modification case. *P.A.R.*, 4th Dist. Scioto No. 13CA3550, 2014-Ohio-802, ¶ 20.

{¶22} “The requirement that a parent seeking modification of a prior decree allocating parental rights and responsibilities show a change of circumstances is purposeful.” *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, ¶ 34. “The statute is an attempt to provide some stability to the custodial status of children, even though the parent out of custody may be able to prove that he or she can

provide a better environment.’ ” *Davis*, 77 Ohio St.3d at 418, 674 N.E.2d 1159, quoting *Wyss v. Wyss*, 3 Ohio App.3d 412, 416, 445 N.E.2d 1153 (10th Dist.1982).

{¶23} Although the change need not be monumental, it must be something more than slight or inconsequential—it must be a change of substance. See, *Davis* at 417-418; *S.J. v. J.T.*, 6th Dist. Lucas No. L-11-1011, 2011-Ohio-6316, ¶ 15; *Depascale v. Finocchi*, 7th Dist. Mahoning No. 08 MA 216, ¶ 33. The Supreme Court of Ohio has referred to this as a “high standard.” *Fisher* at ¶ 33. Ohio courts have generally interpreted “change in circumstances” in custody-modification cases to mean an event, occurrence, or situation which has a material and adverse effect upon a child. See *C.D.M.*, 4th Dist. Hocking No. 13CA1, 2013-Ohio-3792, ¶ 16, and cases cited therein; see also *Southworth v. Eskins*, 12th Dist. Fayette No. CA2013-10-028, 2014-Ohio-4523, ¶ 11; *Murphy v. Murphy*, 5th Dist. Tuscarawas No. 2014 AP 01 0002, 2014-Ohio-4020, ¶ 22.

{¶24} Sammons claims that three changes in circumstances occurred since the divorce decree designated Massie the residential parent and legal custodian of their son, Braxton: (1) Massie’s interference with his parenting time with Braxton; (2) Massie’s withholding of prescribed medication for Braxton; and (3) the addition of another child in Massie’s home.

{¶25} We look first to parenting time. “It is a well-settled rule in Ohio that a custodial parent’s interference with visitation by a noncustodial parent may be considered as part of a ‘change in circumstances’ which would allow for modification of custody.” *Holm v. Smilowitz*, 83 Ohio App.3d 757, 773, 615 N.E.2d 1047 (4th Dist.1992). Nevertheless, for interference with visitation to constitute a change in

circumstances, the interference must be systematic, continuous, and willful. *P.A.R.*, 4th Dist. Scioto No. 13CA3550, at ¶ 22. Conversely, frequent conflicts, misunderstandings, defects, and defaults in literal visitation compliance may be insufficient to establish a change of circumstances so as to warrant modification of custody. *Id.*

{¶26} Here, the trial court did not abuse its broad discretion in determining that Sammons had failed to establish interference with visitation sufficient to constitute a change in circumstances. In its judgment entry the trial court expressly gave greater weight to the testimony of Massie than to the testimony of Sammons. The trial court was authorized to do so because as the trier of fact, it was free to believe all, part, or none of the testimony of any witness. *See McKim v. Finley*, 4th Dist. Wash. No. 13CA5, 2014-Ohio-4012, ¶ 20; *Sellers v. Sellers*, 4th Dist. Wash. No. 09CA45, 2010-Ohio-3712, ¶ 17. Sammons himself testified that it was his own fault for failing to exercise all of his parental rights and responsibilities because he did not understand Loc.R. 6 and did not request a copy of it. And both he and his wife testified that Sammons's work at times prevented him from exercising his visitation. Massie testified that she never denied Sammons's parenting time. *See Warnecke v. Warnecke*, 3d Dist. No. 12-01-05, 2002 WL 479158, *3 (Mar. 29, 2002) ("Although there is a well-settled rule in Ohio that a custodial parent's interference with visitation by a noncustodial parent may be considered as part of a change in circumstances, which would allow for modification of custody, the evidence relating to this issue is conflicting, and therefore we are precluded from finding that the trial court's decision was against the manifest weight of the evidence").

{¶27} We turn to the claim that Massie withheld their son’s prescribed seizure medication. The trial court’s finding that Massie has committed no medical neglect or irresponsibility was supported by her and the child’s testimony that the reduction and stopping of the medication was approved by the doctor and did not result in any harm to the child.

{¶28} Finally, Massie’s testimony established that the 17-year-old boy who moved into her home did not have a material and adverse effect on Braxton, who also testified he got along well with the people living in both homes.

{¶29} After according the utmost deference to the trial court’s determination, we can only conclude it did not act in an unreasonable, arbitrary, or unconscionable manner in determining that Sammons had not established a change in circumstances sufficient to warrant modification of the prior decree.¹ None of the purported changes were proven to have had a material and adverse effect on Braxton.

{¶30} Moreover, insofar as Sammons argues that the trial court and magistrate erred in failing to properly determine whether modification was in the best interest of the child and whether the benefits from modification outweighed the harm, “ [i]f no change in circumstances occurred, the requirements for a change of custody cannot be satisfied, and a reviewing court need not examine the court’s determination of the child’s best interests.’ ” *Thebeau*, 4th Dist. Lawrence No. 07CA34, 2008-Ohio-4751, at

¹ There is some language in the trial court’s judgment that references the incorrect standard of a “substantial” change of circumstances. See *Davis*, 77 Ohio St.3d at 417-418, 674 N.E.2d 1159. For example, in one of its conclusions, the trial court notes in dicta that “[a]lthough further analysis is not required since the Defendant has failed to prove a ‘substantial’ change in circumstances, * * *.” Ultimately, however, the trial court concluded that “any changes that have occurred in the parties’ homes have been slight and inconsequential,” which is the proper standard to support its determination that Sammons had not established a sufficient change in circumstances to warrant modification of custody. Furthermore, Sammons does not specifically contest these references in the trial court’s judgment. Under these circumstances, we deem the trial court’s isolated references to a “substantial” standard to be harmless.

¶ 27, quoting *Cowan v. Cowan*, 4th Dist. Wash. No. 04CA5, 2004-Ohio-6119, ¶ 16.

Therefore, we need not address Sammons's remaining arguments in his first assignment of error. We overrule Sammons's first assignment of error.

Independent Review of Magistrate's Decision on Objections

{¶31} In his second assignment of error Sammons claims that the trial court failed to give proper scrutiny in its review of his objections to the magistrate's decision.

{¶32} Under Civ.R. 53(D)(4)(d), "[i]n ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate properly determined the factual issues and appropriately applied the law." *Faulks v. Flynn*, 4th Dist. Scioto No. 13CA3568, 2014-Ohio-1610, ¶ 27. "A presumption of regularity attaches to all judicial proceedings." *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, ¶ 19. Appellate courts thus presume that a trial court conducted an independent analysis in reviewing a magistrate's decision in accordance with Civ.R. 53(D)(4)(d), and the party claiming that the trial court did not do so bears the burden of rebutting the presumption. See *Sheeter v. Sheeter*, 4th Dist. Jackson No. 12CA7, 2013-Ohio-1524, ¶ 27. This burden requires more than a mere inference, and simply because a trial court adopted a magistrate's decision does not mean that the court failed to exercise independent judgment. *Id.*

{¶33} Sammons claims that "[t]he trial court's decision, much like the magistrate's completely fails to address the evidence presented by Appellant which demonstrated that Appellee had repeatedly interrupted his parenting time which had created a rift between Appellant and his son." In its judgment, however, the trial court specified that it considered Sammons's objections and independently reviewed the

magistrate's decision. The trial court emphasized that it gave greater weight to Massie's testimony than to Sammons's testimony on his motion to modify parental rights and responsibilities. The trial court also found that Sammons had admitted that he had failed to exercise all of the parenting time afforded him pursuant to the court's 2008 divorce decree and that the parties' son confirmed that Sammons had missed parenting time.

{¶34} Therefore, Sammons has not met his burden of rebutting the presumed validity of the trial court's decision. Civ.R. 53(D)(4)(d) authorizes a trial court to overrule objections and adopt a magistrate's decision " 'if the court completely agree[s] with it.' " See *Faulks* at ¶ 31, quoting *Arnold v. Arnold*, 4th Dist. Athens No. 04CA36, 2005–Ohio–5272, ¶ 33. As in *Arnold*, the magistrate here prepared a detailed decision concerning parental rights, which contained sufficient facts to assist the trial court in independently determining the best interest of the child. And the trial court's judgment here included additional findings and conclusions that were not contained in the magistrate's decision. We overrule Sammons's second assignment of error.

VI. CONCLUSION

{¶35} The trial court did not abuse its considerable discretion in denying Sammons's motion to modify parental rights and responsibilities. We affirm the judgment of the trial court.

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 Scioto County Court of Common Pleas, 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.

Abele, P.J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, 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.