[Cite as *Hobbs v. Hobbs*, 2015-Ohio-1963.]

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

BRANDY M. HOBBS (nka BASHAM),	:	
Plaintiff-Appellee,	:	Case No. 14CA3635
vs.	:	
BRENT A. HOBBS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT:	Robert M. Johnson, 611 Court Street, Portsmouth, Ohio 45662
COUNSEL FOR APPELLEE:	Robert R. Dever, 325 Masonic Building, P.O. Box 1384, Portsmouth, Ohio 45662

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 5-6-15
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court, Domestic Relations Division, judgment that modified the prior allocation of parental rights and responsibilities in the divorce proceedings between Brandy M. Hobbs (nka Basham), plaintiff below and appellee herein, and Brent A. Hobbs, defendant below and appellant herein.

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-APPELLEE'S MOTION TO EXTEND THE INTERIM

ORDER IN ITS MARCH 21, 2014, JUDGMENT ENTRY WHEN THERE WAS NO INTERIM ORDER IN EXISTENCE AND IMMEDIATE RELIEF WAS NOT JUSTIFIED, PURSUANT TO OHIO RULE OF CIVIL PROCEDURE 53(D)(4)(e)."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT FAILED TO GIVE PROPER SCRUTINY IN REVIEW OF DEFENDANT-APPELLANT'S OBJECTIONS TO THE MAGISTRATE'S DECISION, SPECIFICALLY IN REGARD TO THE MAGISTRATE'S FINDINGS OF FACT, AS REQUIRED BY OHIO RULE OF CIVIL PROCEDURE 53(D)(4)(d)."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE UNSUPPORTED BY COMPETENT EVIDENCE ON THE RECORD."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT'S JUDGMENT ENTRY OF MAY 27, 2014, FAILED TO PROPERLY ANALYZE THE CHANGE OF CIRCUMSTANCES STANDARD PROMULGATED BY O.R.C. 3109.04(E)(1)(a), AND AS SUCH WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT'S JUDGMENT ENTRY OF MAY 27, 2014, FAILED TO PROPERLY ANALYZE THE BEST INTEREST STANDARD PROMULGATED BY O.R.C. 3109.04(F)(1) USED TO DETERMINE THE CHILDREN'S BEST INTERESTS IN ALLOCATING PARENTAL RIGHTS AND RESPONSIBLY, AND AS SUCH WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

SIXTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT'S JUDGMENT ENTRY OF MAY 27, 2014, FAILED TO PROPERLY ANALYZE O.R.C. 3109.04(E)(1)(a)(iii) IN DETERMINING WHETHER THE HARM LIKELY TO BE CAUSED BY A CHANGE OF

ENVIRONMENT IS OUTWEIGHED BY THE ADVANTAGES OF THE CHANGE OF ENVIRONMENT TO THE CHILDREN, AND AS SUCH WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

I

BACKGROUND

{¶ 3} The parties married in 2001 and later had two children, B.H. and E.H., now ages eleven and twelve respectively. In May 2012, the parties divorced. The trial court designated appellant the children's residential parent and legal custodian.

{¶ 4} Between September 2012 and June 2013, appellee filed two motions to find appellant in contempt, one ex parte motion for emergency custody, and a motion to modify the prior allocation of parental rights and responsibilities. Appellee's contempt motions alleged that appellant (1) failed to provide clothing for the children when they stayed with her, (2) failed to provide school documents, (3) failed to notify appellee of the children's sports schedules, and (4) failed to allow telephone contact. Appellee sought emergency custody of the children because she believed that the children slept in the same bed with appellant and appellant did not wear clothing. In her motion to modify, appellee generally alleged that circumstances had changed.

{¶ 5} The trial court denied appellee's motion for emergency custody. The parties resolved the remaining issues, and the court dismissed all pending motions.

{¶ 6} In June and July 2013, appellee filed two more contempt motions. These motions alleged that appellant (1) failed to provide appellee companionship time with the children while appellant was at work, (2) failed to provide clothing for the children when they

stayed with her, (3) failed to provide his work schedule, (4) failed to exchange the children for an extended visit, and (5) failed to return the children as scheduled.

{¶ 7} On October 1, 2013, appellee filed a motion to modify the prior allocation of parental rights and responsibilities. She generally asserted that there had been a change of circumstances in appellant's home that warranted a modification, but did not specify what circumstances had changed.

{¶ 8} On November 15, 2013, appellee filed another contempt motion. She alleged that appellant failed to provide visitation with the children and failed to provide clothing for their visit.

{¶ 9} On January 8, 2014, the trial court denied appellee's June and November contempt motions, but granted appellee's July motion and found appellant in contempt for failing to provide parenting time to appellee. The court determined that this was appellant's "first offense."

{¶ 10} On December 23, 2013, appellee filed another motion to find appellant in contempt for failing to provide parenting time.

{¶ 11} On January 22, 2014, the magistrate held a hearing to consider appellee's motion to modify and her December 2013 contempt motion.[1] Although the motion to modify did not specify any particular changed circumstances, she alleged at the hearing that the children's most recent report cards showed that their grades had dropped and claimed that

[1] It does not appear that the court expressly ruled on the December 2013 contempt motion.

appellant's failure to impose proper structure and discipline in the children's lives caused the drop in their grades.

{¶ 12} At the hearing, the parties introduced the children's school records, which included the children's (1) 2013-2014 first quarter progress reports, (2) 2013-2014 first and second quarter interim reports, (3) 2013-2014 first and second quarter subject reports showing their individual scores on homework, classwork, tests, and quizzes; and (4) the children's 2012-2013 final progress reports.

A

B.H.'s SCHOOL RECORD

1

2012-2013 School Year

{¶ 13} B.H.'s 2012-2013 report card does not contain letter grades. Instead, in the 2012-2013 school year, B.H.'s grades were evaluated under the following criteria: (1) pluses for "[e]xceed[ing] the Standard," (2) checkmarks for "[m]eet[ing] the Standard," (3) "I" for "[i]mproving, but not yet meeting the Standard," and (4) "N" for "not meet[ing] the Standard." B.H. received mostly checkmarks throughout the 2012-2013 school year, with some pluses and Is scattered here and there. The 2012-2013 report card also contains his teacher's comments that state (1) he "is doing well" and the teacher "hope[s] he continues to improve"; (2) he "is working hard" and the teacher "hope[s he] continues to grow"; (3) he "has room for improvement"; and (4) the teacher "hope[s] he will work to strive for his best."

{¶ 14} A May 24, 2013 "Life Skills Report" indicates whether B.H. needs improvement in any of the following areas: "thinking and reasoning;" "self-regulation;" "life

work;" and "working with others." Each of these areas specifies certain skills and allows the educator to place an "N," if the child needs improvement. This life skills report indicated that B.H. needed to improve the following skills: (1) obeying school and classroom rules; (2) taking ownership for actions; (3) showing self-control; (4) displaying a positive attitude; and (5) working without disturbing others.

2

2013-2014 School Year

{¶ 15} Appellee submitted B.H.'s September 17, 2013 grade reports from reading, religion, math, science, health, and spelling. Each subject has an individual grade report that shows the date of the assignment, what the assignment was, how many points were possible, and how many points he received. After listing all of the individual scores, the grade report averages the scores received on tests, homework, quizzes, classwork, and any extra credit. In reading, B.H.'s average scores were as follows: (1) 75.7% for tests; (2) 80.9% for homework; (3) 81% for quizzes; (4) 100% for classwork; and (5) a cumulative average of 77.6%. In religion, B.H.'s average scores were as follows: (1) 73.5% for tests; (2) 91.7% for homework; (3) 100% for quizzes; (4) 73.3% for classwork; and (5) a cumulative average of 79.8%. In math, B.H.'s average scores were as follows: (1) 85.9% for homework; (2) 85% for quizzes; (3) 100% for classwork; and (4) a cumulative average of 85.4% (there are no test scores listed for math). In science, B.H. received an average score of 70% for his homework assignments. No other scores were reported. Thus, his cumulative average in science was 70%. In health, B.H.'s average homework score was 100%. He also received some extra credit, which raised

his health cumulative average to 120%. In spelling, B.H.'s average test score was 92.3%. No other scores were reported. Thus, his cumulative average in spelling was 92.3%.

{¶ 16} For each subject, appellee highlighted the scores B.H. received on the dates he stayed with her. She testified that his individual grades are higher when he stays with her than when he stays with appellant. Appellee testified that his scores average as follows: (1) in reading, 80 when staying with her and 70 when staying with appellant; (2) in religion, 94 when staying with her and 76 when staying with appellant; (3) in math, 90 when staying with her and 79 when staying with appellant; (4) in science, 70 when staying with her and 58 when staying with appellant; (5) in spelling, 98 when staying with her and 81 when staying with appellant.

{¶ 17} A September 19, 2013 interim report shows that B.H. received an F in history and a D in science (it does not contain grades in other subjects). The teacher's comments state: "inconsistent work and effort in and outside of class," and "I know [B.H.] can do better. His behavior and attitude are dragging him down!"

{¶ 18} Appellee also submitted B.H.'s October 13, 2013 grade reports from religion, math, and science. In religion, B.H.'s average scores were as follows: (1) 78.8% for tests; (2) 91.7% for homework; (3) 86.7% for quizzes; (4) 88.3% for classwork; and (5) a cumulative average of 82.5%. In math, B.H.'s average scores were as follows: (1) 87% for tests; (2) 83.1% for homework; (3) 84.3% for quizzes; (4) 100% for classwork; and (5) a cumulative average of 85.3%. In science, B.H.'s average scores were as follows: (1) 48% for homework; (2) 71.8% for classwork; and (3) a cumulative average of 63.9%. Appellee did not testify whether B.H.'s October 2013 individual scores averaged higher when he stayed with her as opposed to when he stayed with appellant.

{¶ 19} An October 25, 2013 "Life Skills Report" indicates that B.H. needs to improve the following skills: (1) listening attentively; (2) obeying school and classroom rules; (3) exhibiting self-control; (4) displaying a positive attitude; (5) showing respect for others; and (6) working without disturbing others. The teacher's comment states: "[B.H.] is a very intelligent child. However, his lack of self-control is keeping him from reaching his full potential. We have a behavior plan in place and will continue to work on his behavior throughout the next quarter."

{¶ 20} The first quarter progress report assigned letter grades and also evaluated B.H.'s progress using pluses, checkmarks, Is, and Ns, as described above. During the first quarter, B.H. received Cs in religion, English, math, and health and Fs in social studies and science.[2] He received mostly checkmarks and Is, along with two Ns.

{¶ 21} B.H.'s interim report dated December 6, 2013 shows that his interim grades improved from his first quarter report card as follows: (1) an F to a C in social studies; (2) an F to a B in science; and (3) a C to a B in reading. He received the same grade in math–a C–and his religion grade dropped from a C to a D. The report also contained teachers' comments. One teacher wrote that B.H.'s behavior and cooperation improved but stated that his homework is still a problem. Another teacher stated that B.H. could improve his grade if he completed his work and studied for tests.

B

E.H.'s SCHOOL REPORTS

[2] The parties did not present evidence showing exactly when the first quarter ended, but it appears to have ended sometime in mid to late October.

1

2012-2013 School Year

{¶ 22} E.H.'s 2012-2013 final progress reports show the letter grade she received in her subjects and also contain the plus, checkmark, I, and N evaluations. In the first quarter of 2012-2013, E.H. received all Cs. In the second quarter, she received five Cs and a D. In the third quarter, she received two Ds, two Bs, and two Cs. In the fourth quarter, she received one B, one C, three Ds, and one F. Throughout the school year, E.H. received a number Is, some Ns, some checkmarks, and a few pluses.

2

2013-2014 School Year

{¶ 23} In the first quarter of the 2013-2014 year, E.H. received two Bs, two Cs, and one D. She received mostly checkmarks, along with some Is, two Ns, and a few pluses.

{¶ 24} Appellee presented only one individual grade report that contained E.H.'s social studies scores. Appellee did not present any of E.H.'s other individual grade reports, as she did for B.H. E.H.'s social studies report shows five projects and lists the points that E.H. received, along with the points possible. The report states that E.H. received 340 points out of a possible 500, for a cumulative average of 68%. Appellee stated that E.H.'s individual scores reveal that her scores were higher when E.H. stayed with her. Appellee testified that E.H.'s average score was 74 when staying with her and 62 when staying with appellant.

C

APPELLEE'S TESTIMONY

{¶ 25} Appellee stated that she obtained a counselor for the children. She believed that the divorce had been difficult for them and that they could benefit from counseling. Appellee explained that B.H.'s "behavior at school was very bad, very very [sic] bad." She explained: "He picks on other kids, he's very, he just has an attitude problem with the teacher and all the kids in general and I was hoping that it would help that." Appellee stated that when appellant learned that she obtained a counselor for the children, he went to the school and informed the school that he did not want the children to receive counseling at school. Appellee then engaged the counselor to come to her home. After a few sessions, the counselor informed her that appellant stated that appellant did not want the children to have counseling.

{¶ 26} Appellee stated that she believed the counseling helped the children. She testified that she noticed "a difference in [B.H.]'s attitude and his behavior." She explained:

> "He was * * * getting a chance to talk about why he was behaving like he was and he was getting held accountable for what he was doing as well which made him, I think, think about it more and realize the situation he was in and how he could change it. He didn't have to take his anger out on the other kids, he could talk to somebody."

{¶ 27} Appellee further claimed that B.H. improved his grades and behavior while undergoing counseling. She also stated that B.H.'s grades are better when he stays with her. She testified that she "make[s] him make an effort. If there's a test the next day we sit down together and we study together."

{¶ 28} Appellee stated that she and appellant nearly equally divide their time between the children, but she believes that it is a lot of back-and-forth for the children. Appellee opined that the children would benefit from a more consistent schedule.

{¶ 29} Appellee described a typical day with the children. She picks up the children from school, they come home and do homework together, and she cooks dinner. Appellee claimed that when the children are with appellant "[t]hey eat primarily drive-thru food or restaurant food."

{¶ 30} Appellee also stated that she has experienced problems exercising her parenting time with the children. She testified that appellant sometimes arrives late to exchanges or completely fails to arrive. Other times, he picks up the children from school when it is her scheduled time. Appellant further stated that when she calls appellant's home to speak to the children, appellant does not answer. She further alleged that appellant failed to allow her to exercise her parenting time scheduled for December 20, 21, 22, 2013.

D

APPELLANT'S TESTIMONY

{¶ 31} Appellant testified that he is involved in the children's school. He volunteers at the school, he coaches B.H.'s basketball team, and he speaks with the children's teachers almost every day.

{¶ 32} Appellant stated that on a typical day when the children are with him, they do their homework shortly after they return home from school. He denied appellee's allegation that he feeds the children fast food every night. Appellant stated that he and the children have home-cooked meals.

{¶ 33} Appellant explained that he did not want the children undergoing counseling at the school because the children were "embarrassed." He spoke with the counselor, and the counselor informed him that "there was no reason for the children to be involved in

counseling." Appellant does not believe that the counseling helped the children, and he does not think counseling would benefit the children. He also does not believe that the counseling caused the children's grades or behaviors to improve. Appellant noted that during the 2012-2013 school, the children did not have counseling and their academic performance was fine.

E

MAGISTRATE'S RECOMMENDATION

{¶ 34} On February 20, 2014, the magistrate recommended that the trial court grant appellee's motion to modify the prior allocation of parental rights and responsibilities. The magistrate found that (1) "both children have struggled academically while in the care and custody of the Father," (2) appellee "is currently able to provide a more stable environment for the children and seems genuinely concerned about improving the academics of these children," and (3) the children's "poor academic performance * * * constitutes a substantial change of circumstances." The magistrate "specifically [found] that the academic performance of both children has suffered while in the care and custody of the Father." The magistrate additionally determined that appellant had been found in contempt for failing to provide parenting time to appellee and that appellant has not complied with prior parenting time orders. The trial court adopted the magistrate's decision the very same day.

F

APPELLANT'S OBJECTIONS TO THE MAGISTRATE'S DECISION

{¶ 35} On February 27, 2014, appellant filed a notice of objections to the magistrate's decision, a motion for extension of time to file specific objections, and a motion to admit new

evidence. On February 28, 2014, the court granted appellant's motion for extension of time. On March 17, 2014, appellant filed his objections to the magistrate's decision. The trial court later granted his motion to admit new evidence.

{¶ 36} On March 19, 2014, appellee filed a "motion to extend the interim order." On March 21, 2014, the trial court granted appellee's motion and ordered that she remain the children's residential parent and legal custodian. On March 26, 2014, appellant filed a motion to vacate the court's March 21 entry. On March 28, 2014, the court overruled appellant's motion without explanation.

{¶ 37} On May 14, 2014, the trial court held a hearing to consider the children's second quarter progress reports, which were unavailable at the time of the magistrate's January 22, 2014 hearing and which were finalized before the children were placed in appellee's custody. The second quarter progress report shows that B.H. improved his religion grade from a C to an A, his English grade from a C to a B, his social studies and science grades from Fs to Cs, and maintained Cs in math and health. B.H. received mostly checkmarks in the second quarter with a few Is. His January 17, 2014 "Life Skills Report" states that he is improving in the following areas: (1) showing a positive attitude; and (2) working without disturbing others. The teacher's comment states that B.H. "has been working hard on self-control this quarter and has made great progress. I am so proud of his accomplishments."

{¶ 38} In the second quarter, E.H. received three Bs and two Cs. She received mostly checkmarks and a couple pluses. Her teacher's comment states: "If [E.H.] works as hard this next quarter as she finished the last quarter she will be on the Honor Roll. I was very impressed with the way she works."

{¶ 39} The children's school principal testified that B.H. is meeting all school standards, is not in danger of being suspended or expelled, and is not in danger of being required to repeat fourth grade. The principal stated that E.H.'s grades have remained consistent.

{¶ 40} Appellant testified that between the first and second quarters, he made sure that B.H. spent more time studying and completing his homework.

{¶ 41} The children's counselor testified that he met with the children four times between October and November 2013. The counselor believed that the children suffered from adjustment disorder as a result of the divorce, but he told appellant that he did not feel there was "anything major going on."

{¶ 42} On May 27, 2014, the trial court overruled appellant's objections to the magistrate's decision and designated appellee the children's residential parent and legal custodian. The court noted that it had interviewed the children and gave "great weight" to their statements. The court also determined appellee's testimony to be more credible than appellant's. The court found that: (1) "both children have struggled academically while in the care and custody of [appellant]"; (2) "[t]he grade reports submitted were not stellar"; (3) the children's most recent report cards show improvement; (4) appellee's actions "contributed to the slight improvement and/or maintenance of the children's grades"; (5) appellee "appropriately disciplines the children"; (6) appellee "is currently able to provide a more stable and structured environment for the children and seems more genuinely concerned about improving the academics of the children"; (7) appellee "is the parent most likely to promote, encourage, and facilitate parenting time"; (8) appellant "failed to provide the children with a

stable and structured environment that promotes appropriate behavior and increased academic performance"; (9) appellant "has been lackadaisical in shoring up the academic progress of the children"; (10) "the children's academic performances have been stagnant" due to appellant's "inactions"; and (11) appellant "failed to provide an environment in which academic improvement is highlighted."

{¶ 43} The trial court thus determined that the foregoing facts demonstrated a change in the children's and residential parent's circumstances. The court explained its reasoning as follows: "[I]t is not the first glance at poor or below-average grades that denotes a change in circumstances, [but] rather, it is the actions and/or inactions taken by the custodial parent that constitutes a change in circumstances."

{¶ 44} The court additionally found that the parties had "issues regarding the denial of parenting times" and that the court previously found appellant in contempt for failing to provide parenting time to appellee.

{¶ 45} The trial court determined that the above changes "when bundled together, produce a change in circumstances that can have an adverse effect upon the children." The court explained: "[T]he children's lack of academic potential, coupled with [appellant]'s lackadaisical approach to structured parenting are, indeed, substantial–not slight or inconsequential."

{¶ 46} The trial court further found that modifying custody would serve the children's best interests, that awarding appellee custody would be advantageous, and that the advantages outweighed any harm. The court thus granted appellee's motion to modify the prior allocation

of parental rights and responsibilities and designated appellee the children's residential parent and legal custodian. This appeal followed.

II

ASSIGNMENTS OF ERROR

{¶ 47} We find appellant's fourth assignment of error dispositive of this appeal. In his fourth assignment of error, appellant contends that the trial court's finding that a change in circumstances occurred is against the manifest weight of the evidence. He asserts that the evidence fails to show that the children's grades have changed in a consequential manner, but instead, shows that the children experienced, at most, a temporary drop in their grades that does not affect their overall academic performance. Appellant further contends that the evidence fails to show that he continuously or systemically interfered with appellee's parenting time rights so as to deprive her of a meaningful relationship with the children. He thus argues that the court's one contempt finding does not support a change in circumstances finding.

A

STANDARD OF REVIEW GOVERNING CHILD CUSTODY DECISIONS

{¶ 48} Appellate courts generally review trial court decisions regarding the modification of a prior allocation of parental rights and responsibilities with the utmost deference. Davis v. Flickinger, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997); Miller v. Miller, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). Consequently, absent an abuse of discretion, we will not disturb a trial court's decision to modify parental rights and responsibilities. Davis, 77 Ohio St.3d at 418. "'Abuse of discretion' has been defined as an

attitude that is unreasonable, arbitrary or unconscionable."[3] AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990), citing Huffman v. Hair Surgeon, Inc., 19 Ohio St.3d 83, 87, 482 N.E.2d 1248 (1985). "It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary." Id. "A decision is

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[3] We note that this court and countless others have frequently defined the abuse-of-discretion standard as "more than an error of law or judgment," thus implying "that a trial court may commit an error of law without abusing its discretion." State v. Watkins, 186 Ohio App.3d 619, 2010-Ohio-740, 929 N.E.2d 1072, ¶41 (2nd Dist.), citing State v. Boles, Montgomery App. No. 23037, 2010-Ohio-278, 2010 WL 334852, ¶15. The Second District Court of Appeals noted, however, that "'[n]o court—not a trial court, not an appellate court, nor even a supreme court—has the authority, within its discretion, to commit an error of law.'" Id., quoting Boles at ¶26. The Second District has suggested that "[t]he abuse-of-discretion standard is more accurately defined as '"[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence."' [Boles] at ¶18, quoting Black's Law Dictionary (8th Ed.2004) 11." Watkins at ¶41 (2nd Dist.).

The authors of Ohio Appellate Practice have "join[ed] in the chorus of those who would reformulate the abuse-of-discretion standard" and explained:

> "If the law and evidence permit the trial court to choose among a range of choices, the trial court should not be reversed for selecting a choice within that range. But the standard should permit a court of appeals to reverse any ruling premised on an erroneous construction of the law, factual findings unsupported by the evidence of record, or the selection of a choice outside the permissible range."

Painter and Pollis, Ohio Appellate Practice, Appendix G, Standards of Review (footnote omitted). Compare Independence v. Office of the Cuyahoga Cty. Executive, — Ohio St.3d —, 2014-Ohio-4650, — N.E.3d —, ¶49, quoting Doe v. Natl. Bd. of Med. Examiners, 199 F.3d 146, 154 (3d Cir.1999) ("'A court abuses its discretion when its ruling is founded on an error of law or a misapplication of law to the facts'"), with Stammco, L.L.C. v. United Tel. Co. of Ohio, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶25, quoting Marks v. C.P. Chem. Co., 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987) ("'Abuse of discretion has been defined as more than an error of law or judgment; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable.'"); see also Seasons Coal Co. v. Cleveland, 10 Ohio St.3d 77, 81, 461 N.E.2d 1273 (1984) ("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.").

unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." Id.

{¶ 49} In Davis, the court more specifically defined the standard of review 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. (Trickey v. Trickey [1952], 158 Ohio St. 9, 47 O.O. 481, 106 N.E.2d 772, approved and followed.)' [Bechtol v. Bechtol (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus].
>
> 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. As we stated in Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80–81, 10 OBR 408, 410–412, 461 N.E.2d 1273, 1276–1277:
>
> '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.'"

Id. at 418–419.

{¶ 50} Additionally, deferring to the trial court on matters of credibility is "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." Id. at 419. Furthermore, "custody issues are some of the

most difficult and agonizing decisions a trial judge must make. Therefore, a trial judge must have wide latitude in considering all the evidence." Id. at 418. As the Ohio Supreme Court long-ago explained:

> "In proceedings involving the custody and welfare of children the power of the trial court to exercise discretion is peculiarly important. The knowledge obtained through contact with and observation of the parties and through independent investigation can not be conveyed to a reviewing court by printed record."

Trickey, 158 Ohio St. at 13.

{¶ 51} Thus, this standard of review does not permit us to reverse the trial court's decision if we simply disagree with it. We may, however, reverse a trial court's custody decision if the court made an error of law, if its decision is unreasonable, arbitrary, or unconscionable, or if substantial competent and credible evidence fails to support it. Davis, 77 Ohio St.3d at 418-419, 421 (explaining "abuse of discretion standard" and stating that courts will not reverse custody decisions as against the manifest weight of the evidence if substantial competent and credible evidence supports it, courts must defer to fact-finder, courts may reverse upon error of law, and trial court has broad discretion in custody matters).

B

LEGAL STANDARD GOVERNING CUSTODY MODIFICATION

{¶ 52} R.C. 3109.04(E)(1)(a) governs the modification of a prior custody decree and states:

> 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.

{¶ 53} The statute thus creates a strong presumption in favor of retaining the residual parent and precludes a trial court from modifying a prior parental rights and responsibilities decree unless the court finds all of the following: (1) a change occurred in the circumstances of the child, the child's residential parent, or a parent subject to a shared-parenting decree, (2) the change in circumstances is based upon facts that arose since the court entered the prior decree or that were unknown to the court at the time of the prior decree; (3) the child's best interest necessitates modifying the prior custody decree; and (4) one of the circumstances specified in R.C. 3109.04(E)(1)(a)(I)-(iii) applies. In re Brayden James, 113 Ohio St.3d 420, 2007-Ohio–2335, 866 N.E.2d 467, ¶14; accord Sites v. Sites, 4th Dist. Lawrence No. 09CA19, 2010-Ohio-2748, ¶17. Thus, the threshold question in a parental rights and responsibilities modification case is whether a change in circumstances has occurred.

C

CHANGE IN CIRCUMSTANCES

{¶ 54} The change in circumstances requirement is intended "'to spare children from a constant tug of war,'" and "'to provide some stability to the custodial status of the children,'" even if the nonresidential parent shows that "'he or she can provide a better environment.'" Davis, 77 Ohio St.3d at 418, quoting Wyss v. Wyss, 3 Ohio App.3d 412, 416, 445 N.E.2d 1153 (1982). The change in circumstances requirement also is intended "'to prevent a constant relitigation of the issues raised and considered when the trial court issued its prior custody order.'" Price v. Price, 4th Dist. Highland No. 99CA12, 2000 WL 426188, *2 (Apr. 13, 2000).

{¶ 55} Because a child needs stability, parents should not "view final orders allocating parental rights and responsibilities as subject to easy revision as the child's life develops." Averill v. Bradley, 2nd Dist. Montgomery No. 18939, 2001 WL 1597881, *5 (Dec. 14, 2001). Easy revision of final orders allocating parental rights and responsibilities conflicts "with the principle of finality that attaches to all final orders, even those that may be modified." Id. Furthermore, "[i]t perpetuates instability into the child's life" and "promotes antagonisms between the child's parents." Id. It also "treats the court as a kind of supernumerary third parent that is available to resolve disputes which the parties should resolve themselves." Id. Thus, a party seeking to reallocate parental rights and responsibilities carries a significant burden to show that a change in circumstance has occurred. See Fisher v. Hasenjager, 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, ¶33 (explaining that change in circumstance standard is "high"). Appellate courts must not, however, "make the threshold for change so high as to prevent a trial judge from modifying custody if the court finds it necessary for the best interest of the child." Davis, 77 Ohio St.3d at 420–421. Accordingly, the change need not be "substantial," but it must be more than "slight or inconsequential." Id. at 417–418;

Bragg v. Hatfield, 152 Ohio App.3d 174, 2003-Ohio-1441, 787 N.E.2d 44, ¶23 (4th Dist.) ("The change must be significant—something more than a slight or inconsequential change."). A change in circumstances must be one of consequence—one that is substantive and significant—and it must relate to the child's welfare. Davis, 77 Ohio St.3d at 418; In re D.M., 8th Dist. Cuyahoga No. 87723, 2006–Ohio–6191, ¶35, quoting Rohrbaugh v. Rohrbaugh, 136 Ohio App.3d 599, 604–05, 737 N.E.2d 551 (7th Dist., 2000) (explaining that a change in circumstance generally means an event, occurrence, or situation that materially affects a child's welfare); Beaver v. Beaver, 143 Ohio App.3d 1, 10, 757 N.E.2d 41 (4th Dist., 2001), quoting Holtzclaw v. Holtzclaw, Clermont App. No. CA92–04–036 (Dec. 14, 1992) ("'Implicit in the definition of changed circumstances is that the change must relate to the welfare of the child.'"). Additionally, the change in circumstances must be based upon facts that have arisen since the prior allocation or that were unknown at the time. R.C. 3109.04(E)(1)(a); Brammer v. Brammer, 194 Ohio App.3d 240, 2011–Ohio–2610, 955 N.E.2d 453, ¶17 (3rd Dist.).

{¶ 56} Generally, a change in a child's academic performance does not demonstrate a change in circumstances under R.C. 3109.04(E)(1)(a), unless the change materially affects the child's overall academic progress. Vent v. Vent, 3rd Dist. Wyandot No. 16-12-05, 2012-Ohio-5946; Williams v. Evans, 12th Dist. Clermont No. CA2011-05-043, 2012-Ohio-3204, ¶13 (observing that alleged change did not affect child's ability to progress from kindergarten to first grade); Averill, supra (finding that child's summer school requirement between second grade and third grades and poor performance in third grade necessitating a return to second grade did not materially affect the child's overall academic progress when evidence showed that he lacked maturity necessary for third grade and when he

"was doing very well in the second grade upon repeating it"). Thus, temporary and minor grade fluctuations ordinarily do not show a change in circumstances. Sites v. Sites, 4th Dist. Lawrence No. 09CA19, 2010-Ohio-2748, ¶20 (upholding trial court's decision that change in circumstances had not occurred when evidence showed, inter alia, that child experienced a temporary drop in one grade and child's grade quickly rebounded); Harter v. Harter, 3rd Dist. Allen No. 1-97-55 (Feb. 26, 1998) (concluding that six-week improvement in grades did not demonstrate change in circumstances). Additionally, the parent seeking to reallocate parental rights and responsibilities must show that a child's academic performance has actually changed since the divorce. Klein v. Botelho, 2nd Dist. Montgomery No., 2011-Ohio-4165, ¶33 (determining that trial court did not abuse its discretion by concluding that a child's "bad behavior, poor grades, and resentment of his mother's discipline" failed to demonstrate a change in circumstances when child's "problems were not new"). Showing that a child's academic progress has remained stagnant or that the child's grades have always been "lackluster" is not sufficient. Rowe v. Rowe, 11th Dist. Lake Nos. 98-L-163 and 98-L-073, 1999 WL 1313628, *6 (Dec. 17, 1999) (concluding change had not occurred when child's academic performance was lackluster from the start); Kraus v. Kraus, 10 Ohio App.3d 63, 70, 460 N.E.2d 680 (8th Dist. 1983) (observing that children received low grades before parents' divorce). Moreover, under the logic expressed in Davis, a nonresidential parent cannot predicate a change in circumstances upon an allegation that he or she can provide a better environment to foster academic development. Vent. Furthermore, the vast majority of cases holding that a change in academic performance constitutes a change in circumstances also involve other factors, such as (1) the residential parent's move, (2) a change in the child's care

providers, (3) parental hostility that significantly interferes with the nonresidential parent's ability to share a relationship with child, (4) poor school behavior, (5) poor school attendance, (6) the residential parent's failure to respond to educators' concerns regarding a child's academic progress, (7) a strained relationship between a child and the residential parent, (8) a child's desire to live with the nonresidential parent, and (9) a residential parent's felony conviction. In re C.D., 7th Dist. Harrison No. 11HA5, 2012-Ohio-4494 (noting that child in danger of failing first grade, mother was unresponsive to educator's concerns, child had behavioral issues, child lacked proper hygiene, and mother had numerous men moving in and out of home); accord Kurfess v. Gibbs, 6th Dist. Lucas No. L-09-1295, 2011-Ohio-2698 (noting that mother did not comply with parenting agreement, mother refused to provide educational information, child had excessive absences and truancy, mother interfered with father's ability to have a relationship with child); Wallace v. Willoughby, 3rd Dist. Shelby No. 17-10-15, 2011-Ohio-3008, ¶28 (observing that mother moved thirty miles from father and only home children had known, mother had difficulty controlling child as he matured, child wanted to live with father, mother enrolled both children in three different schools within span of nine months); Harley v. Harley, 4th Dist. Athens No. 02CA25, 2003-Ohio-232 (observing that child fell behind in academic skills, mother moved, mother changed care-providers, mother failed to promote father's involvement in child's life); In re Johnson, 7th Dist. Belmont No. 00-BA-04 (June 6, 2001) (finding change in circumstance when mother agreed to let children live with father for one year, children attended school near father's home, children "more relaxed and cheerful after living" with their father, and children received more supervision and stability in father's home, as daughter's drop in school grades and sexual tryst in mother's home revealed);

Sheard v. Sheard, 12th Dist. Butler No. CA99-06-115 (Dec. 20, 1999) (concluding change in circumstance occurred when child wished to live with mother, child's relationship with stepmother became strained, child's grades dropped, child had increasing behavioral problems, and father remarried and had two new children); Foltz v. Foltz, 12th Dist. Warren No. CA98-08-099 (Apr. 12, 1999) (finding change of circumstance when residential parent convicted of felony drug offense and driving under the influence, residential parent failed to recognize and treat child's learning disability, the nonresidential parent provided a tutor for the child and the child's grades improved, the child had excessive school absences and was often tardy, and the child was a fourth-grader with a second-grade reading level); Paparodis v. Paparodis, 7th Dist. Mahoning No. 88CA119 (Mar. 23, 1989) (noting that child had excessive school absences, poor academic progress, and mother failed to have child evaluated and treated for learning disability); McGraw v. McLaughlin, 4th Dist. Meigs No. 305 (Dec. 18, 1981) (concluding that custody modification warranted when children's school grades dropped following residential parent's remarriage, residential parent did not provide homework help, residential parent did not attend son's sixth grade graduation, residential parent left children home alone on days they were too sick for school, children wanted to live with nonresidential parent, children had problems adjusting to residential parent's new spouse, and children had been seeing a psychologist).

{¶ 57} We believe that the facts in Vent are similar to those in the case at bar and aptly illustrate when a change in academic performance does not constitute a change in circumstances under R.C. 3109.04(E)(1)(a). In Vent, the court determined that the trial court did not abuse its discretion by concluding that the mother failed to establish a change in

circumstances. The mother alleged, like appellee in the case sub judice, that the children "regressed" while in the father's custody, that their grades "dropped considerably," that their father did not provide appropriate homework help, and that the children displayed behavioral problems. Id. at ¶¶4-5. The mother, again similarly to appellee in the instant case, claimed that she could provide more stability and educational support for the children. The trial court determined that the foregoing facts failed to demonstrate a change in circumstances.

{¶ 58} The mother appealed, and the appellate court upheld the trial court's decision. The court rejected the mother's argument that the children's declining grades, behavioral issues, and lack of stability constituted a significant change in circumstance and explained: "Mother's arguments are a classic example of the situation [referred to in Davis] wherein she believes that she can provide the children with a 'better environment' by providing more competent help with the children's homework and establishing what she considers to be a better schedule and a more structured environment." Id. at ¶22.

{¶ 59} The court further noted that even though the mother "provided numerous excerpts from the record indicating that the children's grades were poor and that the children had disciplinary problems at school and on the bus," all of the mother's examples "were taken out of context, or they were specifically picked to support her position." Id. at ¶23. The court observed that the father "cited just as many, if not more, examples from the record where the teachers and others testified that the children were doing well, that their problems were somewhat typical for boys of their age, and that their issues were not nearly as problematic as Mother depicted them to be." Id. at ¶23. More specifically, the appellate court stated:

> "* * * Mother's issues regarding the children's grades only tell one side of the situation. While we can understand Mother's concerns with some of the poor grades that the boys received in some subjects and their unsatisfactory homework history, there was also evidence in the record indicating that they had demonstrated improvement in some areas and that their academic performance when they were with Mother may not have been significantly different than when they were with Father. Although it was problematic that the testimony indicated that the boys were not always working up to their potential, their school performance did not rise to a level of major concern to the educators who testified or to the trial court. In fact, [one of the child's] current teacher[s] read from her notes, stating that, '[the child] is a real pleasure to have in class' and that he has really improved in his reading fluency and in doing his assignments."

Id. at ¶26 (citation omitted).

The court further noted that the evidence failed to show that the father did "anything improper or that he failed to appropriately discipline the boys, even though his parenting style and priorities may be different than Mother's." Id. at ¶25. The court additionally observed that "the record certainly does not indicate that the children are heading down the path to juvenile delinquency." Id.

{¶ 60} The appellate court also recognized that the same trial court judge had been involved with the parties since 2003, when the divorce proceedings began. The court thus gave great deference to the trial court's decision and concluded that the trial court did not abuse its discretion by determining that the mother failed to demonstrate a change in circumstances sufficient to reallocate parental rights and responsibilities. Id. at ¶29.

{¶ 61} In Williams v. Evans, supra, the court likewise determined that the trial court did not abuse its discretion by rejecting the mother's argument that a change in circumstances had occurred. In Williams, the mother alleged that the child's excessive school absences and tardiness, coupled with the possibility that the child may need to repeat kindergarten,

constituted a change in circumstance. In upholding the trial court's decision, the appellate court explained:

> "In this case, although [the child] missed 16 days and was late 73 times during his first year of kindergarten, these facts, alone, do not rise to the level of a material and adverse effect upon the child without a clear showing that these absences were harmful. Although the child's continuous late arrival at school affected his daily kindergarten routine, [the child] was still able to move up to the first grade and there is no evidence in the record that the absences and tardiness have continued. Further, [the child]'s behavioral problems appear to stem from his diagnosis of attention deficit hyperactivity disorder rather than his absences from kindergarten."

Id. at ¶13 (citation omitted).

{¶ 62} Likewise, in Rowe the court concluded that the trial court did not abuse its discretion by determining that the father failed to establish that a reallocation of parental rights was warranted based upon an allegation of poor academic performance. The father asserted that the child could be a better student if the father was the residential parent. The appellate court disagreed and noted that the evidence showed that the child's "academic performance was lackluster from the start." The court further observed that the evidence suggested that the child "simply did not have the innate intellectual ability to be a B student and, therefore, was performing as well in school as could reasonably be expected."

{¶ 63} In Harter, the court upheld the trial court's finding that the father failed to establish a change in circumstance. In Harter, the father alleged that the children's erratic grades and school attendance, along with his daughter's pregnancy, established that a change in circumstance had occurred. The court disagreed and explained:

> "The record indicates that [the daughter's] grades have generally been inconsistent since the parties were divorced in 1991. [The father] argues that during one grading period, while [the daughter] stayed with him for six weeks,

> [her] grades overall improved. However, [the father] conceded he promised [the daughter] he would purchase her a car if she improved her grades while residing with him. Upon returning to her mother's new home, [the daughter] received no such enticements and her grades began to fluctuate once again."

{¶ 64} Courts have, however, found a change in circumstances due to a child's academic performance when the child's overall academic progress was "dismal" and when other changes occurred in the child's life. In C.D., 7th Dist. Harrison No. 11HA5, 2012-Ohio-4494, for instance, the court determined that the trial court did not abuse its discretion by finding that the father demonstrated that a change in circumstances occurred when the evidence showed, among other things, that the child had repeated kindergarten and was in danger of failing first grade. In C.D., the father claimed that a change in circumstance had occurred because the mother had numerous men moving in and out of her home, the child's grades were dismal, and the child lacked proper hygiene. The evidence showed that during the child's second year of kindergarten, she was absent twenty times and had been tardy twice. During first grade, the child's received 2 Fs, 4 Ds, and one B. The child's first grade teacher stated that the child is in danger of failing and that the mother has been unresponsive to the school's expressed concerns. The teacher explained that she recommended that the mother take the child to be evaluated for Attention Deficit Disorder, but the mother did not. The teacher stated that both the father and his wife have been responsive to the child's needs and have shown an interest in helping the child. The evidence further revealed that the child received multiple write-ups for behavioral issues. The trial court determined that the foregoing facts established a change in circumstance that warranted a reallocation of parental rights and responsibilities.

{¶ 65} On appeal, the court affirmed the trial court's decision. The court noted that the evidence showed that the child had extensive educational issues that the mother failed to address. The court additionally recognized that the father and his wife assisted the child with her homework, purchased study aids, and volunteered at the school. The court thus determined that the trial court did not abuse its discretion by finding that a change in circumstance had occurred.

{¶ 66} In Kurfess, the court likewise determined that the trial court did not abuse its discretion by reallocating parental rights and responsibilities. In Kurfess, the father alleged that the mother had not complied with the parties' parenting agreement and had interfered with his ability to have a relationship with the child by not facilitating telephone calls, shutting off the phone until one minute before 8:00 p.m., refusing to provide educational information regarding the child, and speaking ill of the father in front of the child. The father further alleged that when he finally accessed the child's educational information, he discovered that the child had an excessive truancy and absenteeism rate. The father later asserted that the mother withdrew the child from the child's current school and enrolled the child in a new school without notifying the father, despite the child's ongoing attendance and socialization issues. The appellate court concluded that the trial court did not abuse its discretion by determining that the foregoing circumstances demonstrated a change in circumstance.

{¶ 67} In Wallace, the court similarly determined that the trial court did not abuse its discretion by finding that the father established that a change in circumstances occurred. The court observed that the following facts supported the trial court's finding of a change in circumstances: (1) the mother moved thirty miles away from the only place where the parties'

eleven- and twelve-year-old children had resided and where their father and most of the extended family lived, (2) the mother started having difficulty controlling the eleven-year-old child, (3) the eleven-year-old child stated his desire to live with his father, and (4) the mother enrolled the children in three different schools within a span of nine months.

{¶ 68} In Harley, we held that the trial court did not abuse its discretion by determining that a change in circumstance had occurred when the evidence showed that the child fell behind in her academic skills, the mother moved and changed care-providers frequently, and the mother failed to promote the father's involvement in the child's life. More specifically, we explained:

> "[The evidence] indicate[s] that [the child] has fallen behind in her academic skills, and that the stable environment provided by [the father] is likely to help her overcome those delays. The record further reveals that [the mother's] frequent changes of residence and of care providers for [the child] has resulted in abruptly discontinued relationships with caregivers and friends in [the child's] life."

Id. at ¶21.

{¶ 69} As all of the foregoing cases make clear, to show that a change in a child's school performance constitutes a change in circumstances under R.C. 3109.04(E)(1)(a), the evidence must show that the school performance has a consequence upon the child's overall educational development and is not simply an inconsequential or temporary fluctuation. Additionally, the child's school performance must actually have changed since the prior allocation.

{¶ 70} We believe that the facts in the case sub judice more closely mirror the facts in Vent, Williams, Rowe, and Harter, than those in C.D., Wallace, and Harley. Appellee, like the

mother in Vent, asserted that the children's grades dropped while in the father's custody, that the father failed to provide appropriate homework help, that the son displayed behavioral problems at school, and that she could provide more structure and educational support for the children. We, like the court in Vent, believe that appellee's latter argument is an example of one parent attempting to modify a prior parental rights and responsibilities allocation based upon the nonresidential parent's belief that he or she can provide a better environment for the children. As the Davis court clearly indicated, a court may not modify parental rights and responsibilities based upon a parent's claim that he or she can provide a better environment for a child.

{¶ 71} Furthermore, appellee's concerns over the children's first-quarter grades are similar to the mother's concerns in Vent. Appellee apparently became concerned when she saw the children's first-quarter report cards. She analyzed the children's homework, test, classwork, and quiz scores–with a special emphasis on B.H.'s scores–and believed the children received higher homework scores when staying with her. Appellee's evidence regarding the children's individual grade reports, however, provides only a snapshot of the children's academic progress, and she obviously selected the reports that place her in the best light. We understand appellee's concerns that the children may not always perform to their potential and have no doubt that appellee wants only the best for her children. The evidence shows, however, that the children's overall academic performance was not of concern to the children's principal. The principal testified that the children's academic performance does not place them in any danger of failing and does not carry any negative consequences.

{¶ 72} Additionally, just as in Vent, the evidence in the case at bar fails to show that appellant did "anything improper or that he failed to appropriately [discipline] the [children], even though his parenting style and priorities may be different than [appellee]'s." Id. at ¶25. Moreover, the evidence "certainly does not indicate that the children are heading down the path to juvenile delinquency."[4] Id.

{¶ 73} Unlike C.D., Kurfess, and Wallace, where the courts determined a change in circumstances occurred, the evidence in the case sub judice does not show that (1) the children are in danger of failing their current grade level, (3) the children lack proper hygiene, (4) they have poor school attendance, (5) the children's educators expressed any concerns to appellant that he failed to address, (6) appellant withdrew the children from their current school and enrolled them in a new school without notifying appellee, (7) appellant frequently changed residences, (8) appellant began having difficulties controlling the children, or (9) appellant had a strained relationship with either child.

{¶ 74} Moreover, the evidence in the case sub judice shows that the children's overall academic progress has remained relatively unchanged since the parties' divorce. The 2012 guardian ad litem report states: "Throughout [E.H.'s] school years, school work has not come easily * * *. She has struggled with school work and especially homework." To the extent the trial court believed E.H.'s grades were "not stellar," the evidence reveals that her grades were "not stellar" from the start. See Rowe, supra (observing child's "academic performance

[4] This is not to suggest that a change in circumstances exists only if the evidence shows that a child is headed down the path to juvenile delinquency. Rather, it is meant to show that a change in circumstances ordinarily requires something more than an initial or temporary drop in grades.

was lackluster from the start"). Nothing in the record shows that E.H.'s grades have changed in a consequential manner since the parties' divorce. Even the trial court found that her grades have remained "stagnant" to slightly improved.

{¶ 75} B.H.'s overall academic progress also is relatively unchanged. His May 2013 and October 2013 "Life Skills Reports" both indicate that he needed to improve his skills in the following areas: (1) obeying school and classroom rules; (2) showing self-control; (3) displaying a positive attitude; and (4) working without disturbing others. The only difference between the May 2013 and October 2013 reports is that the October report deleted taking ownership of actions and added two new areas in which B.H. needed to improve: (1) listening attentively; and (2) respecting others.

{¶ 76} During the 2012-2013 school year when B.H. was in third grade, he did not receive letter grades on his progress report. Instead, his academic progress was evaluated using pluses, checkmarks, Is, and Ns. The final progress report shows that he received mostly checkmarks, which indicated that he met the standards, along with some pluses and Is.

{¶ 77} B.H.'s first quarter 2013-2014 progress report used letter grades and plus-checkmark-I-N evaluations. He received a combination of checkmarks and Is with a few Ns. For his letter grades, B.H. received two Fs and three Cs. Certainly, most reasonable parents would be distressed to see two Fs on a child's report card and would want to take immediate action to improve those grades. A parent's immediate action should not, however, be to file a motion to modify parental rights and responsibilities the first time a child brings home a report card with an F, unless other consequential changes have occurred. Two Fs on a fourth-grader's first quarter report card are indeed cause for concern. Nevertheless, instead of

running to court to file a motion to reallocate parental rights and responsibilities the first time a child brings home a report card with one or more Fs, a parent should ordinarily address the child's educational issues outside the courtroom. Otherwise, the trial court acts not only as a "supernumerary third parent" but also as a supernumerary educator. See Averill, supra. Although cases may exist when a child's first F justifies a finding of a change in circumstances, the case at bar is not one of those cases.

{¶ 78} In sum, we are unable to find any evidence in the record that leads to a logical conclusion that the children's academic performance changed in a consequential manner since the parties' divorce. Indeed, the trial court found that the children's academic progress had been "stagnant," until the 2013-2014 second quarter progress reports, which the court found showed "slight improvement and/or maintenance." Thus, by the court's own factual findings, the children's academic progress has remained relatively unchanged, except for some slight improvement.

{¶ 79} Furthermore, to the extent that the children's academic progress declined during the first quarter of the school year, the decline does not appear to be of any consequence whatsoever, as the children's principal stated. Neither children is in danger of failing, and the children's second quarter progress reports–which were issued before the court designated appellee the residential parent–show that the children's grades improved from the first quarter of the school year.

{¶ 80} Although appellee presented evidence that the children receive higher grades on individual homework assignments when they are staying with her, we do not believe that the legislature intended the change in circumstances standard to focus upon an examination of a

child's performance on individual homework assignments. An individual assignment may have absolutely no consequence upon a child's overall academic performance. Collectively, however, they may. Thus, a court should evaluate a child's overall academic performance and should not conduct a microscopic examination of individual assignments when ascertaining whether a child's academic standing constitutes a change in circumstances. We again note that in the case at bar, the children's principal expressed no concerns regarding either child's overall academic performance.

{¶ 81} While we recognize that courts must not make the change in circumstances standard so high as to prevent a trial court from reallocating parental rights when clearly necessary for the child's best interest, the standard cannot be so low that parents are encouraged to file a motion to modify every time a child brings home a failing grade or report card. We believe that reallocating parental rights and responsibilities every time a child experiences a grade fluctuation carries "baleful implications." See Wholf v. Wholf, 11th Dist. Geauga No. 2003-G-2501, 2004-Ohio-3931, ¶38 (stating that modifying custody every time a child starts a new school carries "baleful implications").

> "'We doubt the legislature intended for any [academic grade] change to constitute a change of circumstances in the child warranting a change of custody. Were it so, any nonresidential parent would seek custody based solely upon [even the slightest change in a child's grades]. Granting a change of custody solely upon those grounds would foster rather than prevent a constant relitigation of the issues already determined by the trial court in its prior custody order.'"

Id., quoting Allgood v. Allgood, 12th Dist. No. CA98-12-156 (Oct. 25, 1999).

{¶ 82} We find it unlikely that the legislature intended every grade fluctuation to constitute a change in circumstances warranting a custody modification. Grade fluctuations

are not uncommon. Nor do they always denote that a child is experiencing difficulty due to a material change in the child's life. To find that a change in circumstance occurs any time a child experiences grade fluctuations would not promote stability in the child's life. Instead, it would encourage the nonresidential parent to file a motion to modify custody whenever a child's grades fluctuate and could result in a constant fractured existence for the child. A child's grades are not as likely to improve if the child is constantly under the stress of wondering whether the child's school performance will affect which parent will be the residential parent. It is also not beyond the imagination to think that a shrewd child may manipulate his or her grades so that the child lives with the parent the child desires. Additionally, it allows parents to manipulate their children, as demonstrated by the father in Harter who told his daughter that he would buy her a new car if she improved her grades. A parent with means could certainly entice a child to improve his or her grades to the detriment of the residential parent. A parent could obtain a tutor or counselor, much as appellee did in the case sub judice, to attempt to improve a child's grades and then argue that the child's grade improvement constitutes a change in circumstance. We do not believe that courts should encourage this sort of gamesmanship by finding a change in circumstance with every fluctuating grade or report card. Consequently, we believe that trial courts should exercise caution when evaluating whether a child's grade fluctuations constitute a change in circumstance. For grade fluctuations to constitute a change in circumstances, the grade fluctuations should be more than temporary and they should actually be of consequence to the child's overall academic performance. A drop in grades demonstrated in the first grading period of a school year should not necessarily lead to a finding of a change in circumstance.

The decline could be due to multiple factors resulting from the start of a new school year and may have absolutely nothing to do with a material change in the child's or the residential parent's circumstances as R.C. 3109.04(E)(1)(a) contemplates.

{¶ 83} We recognize that the trial court indicated that it did not rely upon the children's grades to find a change in circumstance but instead relied upon the father's failure to provide an environment that encourages the children's academic progress. The court did, however, give much thought to the children's academic progress or lack thereof. Moreover, to the extent the court relied upon the father's "inactions" and "lackadaisical" parenting style, nothing in the record shows that appellant's actions, inactions, or parenting style have changed since the prior allocation. As R.C. 3109.04(E)(1)(a) makes abundantly clear, the changed circumstances must be based upon facts that were unknown or not in existence at the time of the prior allocation.

{¶ 84} The evidence in the case sub judice fails to show that appellant's "lackadaisical" parenting style was unknown or not in existence at the time of the prior allocation. The filings from the divorce proceedings show that the trial court, at the time of the prior allocation, viewed appellant as "the less strict parent."[5] Nothing in the record shows that appellant became even less strict or wholly uninvolved in the children's lives since the prior decree.

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[5] We observe that the trial judge and the magistrate who considered appellee's motion to modify were not the same trial judge and magistrate who presided over the divorce proceedings and prior allocation. Thus, while we typically afford great deference in a reallocation of parental rights proceeding to the trial judge due to the judge's extensive interactions with the parties throughout the divorce and initial parental allocation proceeding, that rationale is absent in the case at bar. Compare Vent, supra.

{¶ 85} Moreover, the court found that appellant "has been lackadaisical in shoring up the academic progress of the children" and "failed to provide an environment in which academic improvement is highlighted." The court did not explain, however, how these circumstances have changed since the prior allocation, and nothing in the record supports such a finding. By all indications, appellant's behavior has not changed since the prior allocation. If appellant does indeed have a "lackadaisical" parenting style and "failed to provide an environment in which academic improvement is highlighted," these same circumstances appeared to have existed at the time of the divorce decree. No evidence shows that appellant's environment has become less structured than it was at the time of the prior allocation. Appellee may indeed provide a more structured environment, but as we noted, a change in circumstances does not exist simply because the nonresidential parent may prove that he or she can provide a better environment. Davis, supra. Consequently, even if the "slight improvement/maintenance" in the children's grades resulted from appellee's allegedly more disciplined parenting style/better environment, the change in circumstances standard does not permit a court to reallocate parental rights and responsibilities simply because it finds one parenting style better than the other. See Davis, supra. Instead, for parenting style to constitute a change in circumstance sufficient to reallocate parental rights and responsibilities, there must be, first and foremost, a change in parenting style and, second, the parenting style change must be of consequence to the child's welfare. Thus, the question when determining if a change in circumstances occurred is not which parent can provide a better educational environment, which parenting style the court prefers, or whether one parent is more

lackadaisical than the other.[6] Instead, the question when considering the R.C. 3109.04(E)(1)(a) change in circumstances requirement is whether there has been some change in either the child's or the residential parent's circumstances that has significantly affected the child, which may include a change in the residential parent's personality or parenting style. In the case sub judice, we again note that there is absolutely no evidence that appellant's parenting style or personality has changed whatsoever since the prior allocation.

{¶ 86} In the case at bar, we do not believe that the trial court appropriately focused upon whether a change actually occurred. Instead, the court appears to have primarily evaluated whether the children's academic performances coupled with the appellant's parenting style significantly affected them. The trial court stated that "the children's lack of academic potential, coupled with [appellant]'s lackadaisical approach to structured parenting are, indeed, substantial–not slight or inconsequential." Even if we agree with the court that these circumstances are "substantial" and significantly affected the children, the court's decision fails to specify how these circumstances are any different from the circumstances that existed at the time of the prior allocation. We have thoroughly reviewed the record in an attempt to uphold the trial court's judgment, but we are unable to find any evidence in the record to show that the children's overall academic performance or appellant's parenting style materially changed since the prior allocation.

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[6] These may be appropriate considerations under the best interest factors outlined in R.C. 3109.04(F). Before considering those factors, however, the court must answer the threshold question whether a change in circumstances has even occurred.

{¶ 87} The trial court also cited appellant's recent contempt as evidence supporting a change in circumstances. When a "parent begins to cut out another parent," a "child is materially affected." Davis, 77 Ohio St.3d at 419. "[P]reventing a child from spending time with a caring and loving parent, as well as the hostility and friction generated by the disputes that arise over such issues," may affect a child's welfare. Thus, a residential parent's interference with the nonresidential parent's relationship and parenting time with a child may "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). For the residential parent's interference to constitute a change in circumstances, however, the interference must be "systematic" or "continuous and willful." Hinton v. Hinton, 4th Dist. Washington No. 02CA54, 2003–Ohio–2785, ¶29. Thus, "frequent conflicts, misunderstandings, defects and defaults in literal visitation compliance [are not] sufficient prima facie grounds to demonstrate a sufficient change of circumstances as to allow modification." Venuto v. Pochiro, 7th Dist. Mahoning No. 02CA225, 2004–Ohio–2631, ¶49.

{¶ 88} In the case at bar, the evidence fails to show continuous, willful, or systemic interference with appellee's relationship or parenting time with the children. Since the divorce, appellee filed seven contempt motions. The trial court expressly overruled two, granted one, and the parties mutually resolved the others.[7] None of the motions indicate that appellant continuously, willfully, or systemically interfered with appellee's parenting time so as to significantly affect her relationship with the children, and the trial court made no such

[7] It does not appear that the trial court ruled on appellee's December 2013 motion for contempt.

finding. Instead, the evidence shows that appellant and appellee, like many parties who have divorced, have frequent arguments and conflicts regarding parenting time, phone calls, exchanging the children, etc. Nothing in the record shows that these frequent conflicts have materially affected appellee's relationship with the children. Thus, the evidence fails to support the court's finding that appellant's one contempt finding and appellee's allegations of frequent misunderstandings constitute a change in circumstances.

{¶ 89} Although we are hesitant to find that the trial court abused its discretion by finding a change in circumstances and while we recognize that our decision will once again uproot the children,[8] we are unable to find evidence to support the court's decision that the children's alleged drop in grades during the first quarter of the year, coupled with appellant's unchanged parenting style and the parties' frequent conflicts, constitute a change in circumstances sufficient to reallocate parental rights and responsibilities. Again, we note that the trial court indicated it did not rely upon the supposed first quarter decline in grades. The children's academic performance, however, was the primary focus of the hearing. Moreover, there is absolutely no evidence that appellant's parenting style has changed. Simply stated, the children's supposed temporary decline in grades, appellant's unchanged parenting style, and the parties' frequent arguments do not add up to a significant change in circumstances.

{¶ 90} Additionally, little else has significantly changed in the children's or appellant's circumstances. Appellee remarried, but she lived with this same person at the time of the prior

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[8] We observe that the children were placed in appellee's custody, despite appellant's filing of objections to the magistrate's decision. The trial court extended that order and from all appearances, the children have remained in appellee's custody throughout these proceedings.

allocation. The children's relationship with appellee's new husband has remained unchanged from the time of the prior allocation through the modification hearing. During the modification proceedings, E.H. expressed a desire to spend more time with appellee, but she expressed this same desire at the time of the prior allocation. B.H.'s wishes remained unchanged.

{¶ 91} Furthermore, at the time of the prior allocation, appellee and appellant did not "cooperate in school matters and each blame[d] the other for [E.H.'s] academic struggles and issues with homework." They "placed the best light on their own behavior while placing the worst light on the other." These are essentially the same arguments the parties raised during the modification hearing.

{¶ 92} We can find nothing in the record to show a change of substance in either the children's or appellant's lives. The record does not contain substantial competent and credible evidence to show that a change in circumstances occurred. Consequently, we believe that the trial court abused its discretion by determining that appellee established a change in circumstances sufficient to warrant a reallocation of the parental rights and responsibilities set forth in the prior decree.

{¶ 93} Accordingly, based upon the foregoing reasons, we hereby sustain appellant's fourth assignment of error and reverse the trial court's judgment.

JUDGMENT REVERSED.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and that appellant shall recover of appellee 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 Scioto County Common Pleas Court, Domestic Relations Division, to carry this judgment into execution.

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

Hoover, P.J.: Concurs in Judgment & Opinion
Harsha, J.: Dissents

For the Court

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.