[Cite as *Hall v. Hall*, 2017-Ohio-8968.]

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

ELISA M. HALL,	:	
Plaintiff-Appellant,	:	Case No. 16CA1030
v.	:	
JOSHUA R. HALL,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	Released: 11/30/2017

APPEARANCES:

Tyler E. Cantrell, Young & Caldwell, LLC, West Union, Ohio for Appellant.

Barbara A. Moore, West Union, Ohio for Appellee.

Hoover, J.

{¶ 1} Plaintiff-Appellant, Elisa Hall ("Elisa"), appeals the judgment of the Adams County Common Pleas Court modifying an agreed shared parenting plan between her and her ex-husband, Defendant-Appellee, Joshua Hall ("Joshua").

{¶ 2} Elisa contends that the trial court erred in giving Joshua more parenting time and establishing designated call times without evidence that there had been a change in circumstances or that the modifications were in the best interest of the children, as required under R.C. 3109.04(E)(1)(a). She also contends that the modifications are against the manifest weight of the evidence.

{¶ 3} However, R.C. 3109.04(E)(1)(a) governs the modification of parental rights and responsibilities; and the modifications at issue here do not constitute modifications of parental rights and responsibilities. Rather, provisions allocating parenting time and designating call

times constitute terms of a shared parenting plan; and a trial court may modify terms of a shared parenting plan without a showing of a change of circumstances so long as the modifications are in the best interest of the child. R.C. 3109.04(E)(2)(b). Thus, we need only decide whether the trial court abused its discretion in determining that it was in the children's best interest to modify the terms of the shared parenting plan and whether its determination was against the manifest weight of the evidence.

{¶ 4} Upon review of the record, we conclude that the trial court did not abuse its discretion in determining that it was in the best interests of the children to modify the terms of the agreed shared parenting plan; and its determination was not against the manifest weight of the evidence.

{¶ 5} Accordingly, we overrule Elisa's assignments of error and affirm the judgment of the trial court.

I. Facts and Procedural History

{¶ 6} Elisa and Joshua were married on August 5, 2011. Elisa filed a complaint for divorce on June 17, 2015, alleging incompatibility, gross neglect of duty, and extreme cruelty. Joshua filed an answer and a counterclaim for divorce on July 24, 2015.

{¶ 7} The record shows that a final hearing was held on December 9, 2015; however, the journal entry from that date only shows an agreement for "temporary orders. " The parties apparently agreed to the following:

> 1. The Plaintiff, Elisa M. Hall shall be the residential parent and custodian of the parties' minor children Brody J. Hall, DOB 04-02-2011 and Brennan J. Hall DOB 06-03-2013.

> 2. The Defendant, Joshua R. Hall shall have visitation with the parties' minor children Brody J. Hall, DOB 04-02-2011 and Brennan J. Hall DOB 06-03-2013, every other weekend from Friday at 6:00 P.M. until Saturday at 6:00 P.M. and every Wednesday from 5:30 P.M. until 8:30 P.M.
>
> 3. The Defendant, Joshua R. Hall shall have the right of first refusal on Saturday mornings if the Plaintiff is working.
>
> 4. The Defendant, Joshua R. Hall shall pay child support to the Plaintiff, Elisa M. Hall per the attached child support worksheet.
>
> 5. The matter is set for mediation on December 18, 2015 at 9:00 A.M.
>
> 6. Neither party shall say or allow anyone else to say anything negative about the other party while in the presence of the parties' minor children Brody J. Hall, DOB 04-02-2011 and Brennan J. Hall DOB 06-03-2013.[1]

{¶ 8} Although the parties had entered into the above listed agreements in December 2015, the divorce decree did not get filed until July 20, 2016. Prior to the divorce decree being filed, Elisa moved from West Union to the Eastgate area in May 2016. In June 2016, Joshua filed a "Motion Objecting to Plaintiff's Relocation." Joshua claimed that Elisa's relocation was not in the best interests of the children.[2] A motion hearing was scheduled for August 12, 2016.

{¶ 9} The trial court issued the final decree of divorce on July 20, 2016. The decree allocated parental rights and responsibilities designating Mother as the residential parent for school purposes for the children and granting Father parenting time. The decree also set forth an

[1] The record suggests that these orders actually went into effect in August 2015 at a temporary–orders hearing.
[2] Apparently, Elisa filed a "Notice of Intent to Relocate" in May 2016 informing the trial court that she and the children were moving from West Union to the Eastgate area. However, her notice was filed in the wrong case number and is therefore not a part of our record.

agreed shared parenting plan concerning the care and custody of the children. Part of the agreement provided:

> A. Mother shall be the residential parent for school purposes for their minor children.
>
> B. Mother and Father agree to a parenting schedule to increase and enhance parenting time for each parent.
>
> C. Father shall exercise parenting time alternating weekends from Friday at 6:00 p.m. to Sunday at 6:00 p.m. During the summer, Father shall exercise parenting time every Tuesday from 5:00 p.m. overnight to Wednesday morning when Father shall transport the children to daycare or Mother's residence., and every Thursday evening from 5:00 p.m. to 8:00 p.m. At all other times other than the summer, Father shall exercise parenting time every Tuesday and Thursday evening from 5:00 p.m. to 8:00 p.m.
>
> D. Mother shall exercise routine parenting time at all other times not stated above.

{¶ 10} On August 12, 2016, the hearing was held on Joshua's Motion Objecting to Relocation; and the following evidence was presented, in relevant part:

{¶ 11} Joshua testified that Elisa moved from West Union to the Eastgate area in May 2016. He explained that since then, he had not seen his children according to the terms of the shared parenting plan. He stated that he had only been seeing his children from approximately 8:00 p.m. Thursday to 8:00 p.m. Friday and every other weekend (Thursday evening through Sunday evening). He testified, however, that before the move, he would see the children even more than provided for in their shared parenting plan. For instance, he stated that he would often pick the children up from day care and help bathe and feed them. He explained that he wanted to

remain involved in his children's lives but it was going to be harder because he worked from 7:00 a.m. to 5:00 p.m. in Butler, Kentucky and did not get back home to West Union until 6:00 p.m.

{¶ 12} Joshua's mother testified that she had a wonderful relationship with her grandchildren. She stated that prior to the move, she would see the children a lot. For instance, she stated that she would pick them up from daycare and watch them until Elisa got home from work. She stated that since the move, however, she had not seen them as much. She stated that she could still help with the children but it would be more difficult since she lived in West Union. She also stated that the children had a lot of extended family in West Union that they enjoyed being around.

{¶ 13} Elisa testified that she moved from West Union to the Eastgate area because she got a much better job. She stated that she talked with Joshua about the move prior to filing her notice; and although he was not happy about it, she believed that the move was in the best interest of the children. For instance, she stated that she was going to be able to provide more for the children because she was making more money and that there were more extracurricular activities available in the Eastgate area. She also stated that the school system was good and that she had family in the area.

{¶ 14} In closing, Joshua requested that the parenting schedule be changed such that he had the children during the week and Elisa had them on the weekend. Alternatively, he asked that the parenting schedule be modified so that he had the children one extra weekend each month and eight weeks in the summer. In response, Elisa clarified that they were not here on the issue of residential parent status but whether her move warranted a modification of parenting time. She requested that the trial court approve her move and modify Joshua's weekend

parenting time to make up for any missed time during the school year. Joshua reiterated that the quality time he was missing with his children could not be made up on the weekends.

{¶ 15} Upon consideration, the trial court concluded that it could neither force Elisa to move back to West Union nor change the residential parent status based upon the pleadings before it. However, it recognized the reality that Joshua was not going to be able to be as involved in the day-to-day upbringing of his children because the children lived roughly an hour away from him. It noted that Joshua and Elisa seemed like loving parents and that their children needed to have as much time with them as possible. Accordingly, the trial court approved Elisa's motion to relocate but modified the shared parenting plan as follows:

> 1. [Joshua] shall have parenting time of the minor children on three weekends a month beginning on Friday at 4:30 P.M. and ending on Sunday at 6:00 P.M. beginning with the weekend of 8-19-16.
>
> * * *
>
> 4. [Joshua] shall have eight weeks of visitation during the summer with two visits being three weeks each and one visit being two weeks. During this summer visitation, [Elisa] shall have parenting time according to what [Joshua] would have.
>
> 5. [Joshua] shall be able to call the children while in [Elisa's] care on Tuesdays and Thursdays at 7:00 P.M.
>
> * * *

{¶ 16} Elisa timely appealed.

II. Assignments of Error

{¶ 17} Elisa presents the following assignments of error for our review.

Assignment of Error #1:

The trial court abused its discretion in modifying the custody of the minor children in that the evidence failed to establish any change of circumstances to justify the change of custody.

Assignment of Error #2:

The trial court abused its discretion in modifying the custody of the minor children as the modification is not in the children's best interest.

Assignment of Error #3:

The decision of the trial court is against the manifest weight of the evidence and contrary to law.

III. Law and Analysis

{¶ 18} In her three assignments of error, Elisa argues that the trial court abused its discretion in modifying the shared parenting plan because there was no evidence presented that there had been a change in circumstances or that the modifications were in the best interest of the children, as required under R.C. 3109.04(E)(1)(a). She argues that the modifications are against the manifest weight of the evidence for similar reasons. We disagree.

A. Standard of Review

{¶ 19} Modifications to a shared parenting plan are reviewed under an abuse of discretion standard. *Bishop*, 2009-Ohio-4537, at ¶ 36, citing *Picciano*, 2009-Ohio-3780, at ¶ 25. An abuse of discretion implies that the trial court acted unreasonably, unconscionably, or arbitrarily. *Lauer v. Positron Energy Resources, Inc.,* 4th Dist. Washington No. 13CA39, 2014-Ohio-4850, ¶ 9. "[I]n applying the abuse of discretion standard, we may not substitute our judgment for that of the trial court." *Id.*

{¶ 20} "Further, * * * the judgment of a trial court should not be overturned as being against the manifest weight of the evidence if some competent and credible evidence supports

that judgment." *Yannitell v. Oaks*, 4th Dist. Washington No. 07CA63, 2008-Ohio-6371, ¶ 9, citing *C.E. Morris Co. v. Foley Construction Co*., 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. "Factual findings of the trial court are to be given great deference on review because the trial court is in a better position 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id*., quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

B. R.C. 3109.04(E)(1)(a) is Inapplicable Because the Trial Court Only Modified Terms of the Shared Parenting Plan and Did Not Modify the Allocation of Parental Rights and Responsibilities

{¶ 21} 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.

(Emphasis added.)

{¶ 22} Thus, "before a modification can be made pursuant to R.C. 3109.04(E)(1)(a), the trial court must make a threshold determination that a change in circumstances has occurred." *Gunderman v. Gunderman*, 9th Dist. Medina No. 08CA0067, 2009-Ohio-3787, ¶ 9, citing *Fisher v. Hasenjager,* 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, syllabus. "If a change of

circumstances is demonstrated, the trial court must then determine whether the modification is in the best interest of the child." *Id. Accord* R.C. 3109.04 (E)(1)(a).

{¶ 23} Conversely, R.C. 3109.04(E)(2)(b) provides:

> The court may modify *the terms of the plan for shared parenting* approved by the court and incorporated by it into the shared parenting decree upon its own motion at any time if the court determines that the modifications are in the best interest of the children or upon the request of one or both of the parents under the decree. Modifications under this division may be made at any time. The court shall not make any modification to the plan under this division, unless the modification is in the best interest of the children.

(Emphasis added.)

{¶ 24} "Division (E)(2)(b) does not require that the threshold determination of a change in circumstances be met." *Gunderman* at ¶ 11. "Rather, the trial court need only find that the modification of a term in the shared parenting plan is in the best interest of the child." *Id.*, citing R.C. 3109.04(E)(2)(b).

{¶ 25} In other words, "when a court modifies a prior decree allocating parental rights and responsibilities, which includes a change in the designation of the residential parent or legal custodian, the court must find that a change in circumstance has occurred." *Picciano v. Lowers*, 4th Dist. Washington No. 08CA38, 2009-Ohio-3780, ¶ 20, citing *Fisher,* 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, at ¶ 26. But "when the modification concerns only the terms of a shared parenting plan, the court need not find that a change in circumstance has occurred but simply that the modification serves the child's best interests." *Id.,* citing *Fisher* at ¶ 33.

{¶ 26} This court has held that the allocation of parenting time is a term of a shared parenting plan. *Bishop v. Bishop*, 4th Dist. Washington No. 08CA44, 2009-Ohio-4537, ¶ 35 ("The allocation of parenting time is a 'term' of a shared parenting plan."). *See also Picciano* at ¶ 24 (holding that the trial court modified shared parenting plan—as opposed to allocation of parental rights and responsibilities—where it modified who child would live with during the school year and how much time child would spend with each parent if mother moved out of state.)

{¶ 27} Several other appellate districts have reached the same conclusion. *E.g., Ramsey v. Ramsey*, 10th Dist. Franklin No. 13AP-840, 2014-Ohio-1921, ¶¶ 37-40 (concluding that a reduction in parenting time under a shared parenting plan is governed by R.C. 3109.04(E)(2)(b)); *Kovach v. Lewis*, 5th Dist. Ashland No. 11-COA-018, 2012-Ohio-1513, ¶ 26 ("The allocation of parenting time is a 'term' of a shared parenting plan."); *Lake v. Lake*, 11th Dist. Portage No. 2009-Ohio-0015, 2010-Ohio-588, ¶ 70 ("The allocation of parenting time is a 'term' of a shared parenting plan, which is modifiable if the change is in the children's best interests."); *Herdman v. Herdman,* 3d. Dist. Marion No. 9-08-32, 2009-Ohio-303, ¶ 6 ("The allocation of parenting time is a "term" of a shared parenting plan, which is modifiable if the change is in the children's best interests."); *contra Pikrel v. Pikrel,* 9th Dist. Lorain No. 13CA010436, 2014-Ohio-4327, ¶ 6 ("When a shared parenting plan is in place, a modification of parenting time is a request to modify the allocation of parental rights and responsibilities.)

{¶ 28} Likewise, provisions establishing designated call times constitute terms of a shared parenting plan. *See Fisher,* 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, at ¶ 36 (noting that terms of a shared parenting plan are generally less critical to the life of a child and may change over time); *see generally* R.C. 3109.04(G) ("A plan for shared parenting shall

include provisions covering all factors that are relevant to the care of the children, including, but not limited to, provisions covering factors such as physical living arrangements * * *.)

{¶ 29} Elisa argues that the trial court erred in giving Joshua more parenting time and establishing designated call times without evidence that there had been a change in circumstances or that the modifications were in the best interest of the children, as required under R.C. 3109.04(E)(1)(a). However, R.C. 3109.04(E)(1)(a) is inapplicable because the trial court did not modify parental rights and responsibilities. The trial court did not modify the designation of the residential parent. Rather, it modified terms of their shared parenting plan; and this type of modification is governed by the best-interest standard contained in R.C. 3109.04(E)(2)(b).

{¶ 30} Thus, we need only decide whether the trial court abused its discretion in determining that it was in the children's best interests to modify the terms of the shared parenting plan and whether its determination was against the manifest weight of the evidence.

{¶ 31} Elisa's Assignment of Error #1 is overruled.

C. The Trial Court Did Not Abuse its Discretion in Determining That It Was in the Children's Best Interests to Modify the Terms of the Shared Parenting Plan and Its Determination Was Not Against the Manifest Weight of the Evidence

{¶ 32} A trial court may modify terms of a shared parenting plan if the modification is in the best interest of the child. R.C. 3109.04(E)(2)(b). In determining the best interest of a child, the court shall consider all relevant factors, including, but not limited to: (1) the wishes of the child's parents regarding the child's care; (2) the child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest; (3) the child's adjustment to the child's home, school, and community; (4) the mental and physical health of all persons involved in the situation; (5) the parent more likely to honor

and facilitate court-approved parenting time rights or visitation and companionship rights; (6) whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor; and (7) whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court. R.C. 3109.04(F)(1). *See also Bishop*, 2009-Ohio-4537, at ¶ 37 (applying best-interest factors in R.C. 3109.04(F)(1) to a R.C. 3109.04(E)(2)(b) modification); *Picciano*, 2009-Ohio-3780, at ¶ 27 (also applying best-interest factors in R.C. 3109.04(F)(1) to a R.C. 3109.04(E)(2)(b) modification).

{¶ 33} A trial court is not required to provide a detailed analysis of the child's best interest before modifying the terms of a shared parenting plan. *Bishop* at ¶ 38. Rather, "a trial court substantially complies with R.C. 3109.04(E)(2)(b) if its reasons for modifying the terms of a shared parenting plan are apparent from the record; i.e., if it is apparent from the record that the modification is in the child's best interest." *Id*.

{¶ 34} The record shows that the children had a strong relationship with their father and saw him on a regular basis when they lived in West Union. Once they moved to the Eastgate area, however, Joshua and Elisa stopped following the shared parenting plan; and the children's quality time with their father decreased. [3] The trial court recognized that with Joshua living in West Union and working in Butler, Kentucky, it was impractical for him to have mid-week parenting time and be as involved in the children's school activities. To account for the lost quality time with their father, the trial court modified the allocation of parenting time so that the children had an extra weekend each month with him during the school year and eight weeks with

[3] The record also suggests that Joshua was behind on child support; but it is unclear to what extent. According to Joshua's attorney, however, extra child support was being taken out of his paycheck to make up for money owed.

him during summer. They also speak with him over the phone at designated times during the week. Importantly, when the children are with Joshua during the summer, Elisa has parenting time according to what Joshua would have (i.e., weekend visits).

{¶ 35} Elisa suggests that the trial court erred in failing to consider and address the best-interest factors in R.C. 3109.04(F)(1). While the trial court was not required to provide a detailed analysis of the children's best interest before modifying the terms of a shared parenting plan, Elisa also never made a request for findings of fact and conclusions of law. Civ.R. 52 provides that a "judgment may be general for the prevailing party unless one of the parties in writing requests otherwise." "[W]hen a party does not request that the trial court make findings of fact and conclusions of law under Civ.R. 52, the reviewing court will presume that the trial court considered all the factors and all other relevant facts." *Id.*, quoting *Fallang v. Fallang*, 109 Ohio App.3d 543, 549, 672 N.E.2d 730 (12th Dist.1996).

{¶ 36} "In the absence of findings of fact and conclusions of law, we must presume the trial court applied the law correctly and must affirm if there is some evidence in the record to support its judgment." *Id.*, citing *Bugg v. Fancher*, 4th Dist. Highland No. 06CA12, 2007-Ohio-2019, at ¶ 10. As we have stated:

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

> The message should be clear: If a party wishes to challenge the custodial judgment as being against the manifest weight of the evidence he had best secure separate findings of fact and conclusions of law. Otherwise his already "uphill" burden of demonstrating error becomes an almost insurmountable "mountain." "

McClead v. McClead, 4th Dist. Washington No. 06CA67, 2007-Ohio-4624, ¶ 25, quoting *Pettit v. Pettit*, 55 Ohio App.3d 128, 130, 562 N.E.2d 929 (5th Dist.1988).

{¶ 37} Since it is apparent from the record that the modifications were in the children's best interests and no findings of fact and conclusions of law exist to suggest otherwise, we conclude that the trial court did not err in modifying the terms of the shared parenting plan.

{¶ 38} Finally, Elisa suggests that the modifications are improper because it gives Joshua significantly more parenting time than they originally agreed upon. However, the trial court was permitted to increase Joshua's parenting time so long as the increase was in the best interests of the children; and the record supports the trial court's determination that it was in the children's best interests.

{¶ 39} Elisa's Assignments of Error #2 and #3 are overruled.

IV. Conclusion

{¶ 40} Having concluded that the trial court did not err in modifying the terms of the shared parenting plan, we overrule Elisa's assignments of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

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

The Court finds that reasonable grounds existed for this appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. and Abele, J: Concur in Judgment and Opinion.

For the Court

BY: ____________________________
Marie Hoover, 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.