[Cite as *Devall v. Schooley*, 2009-Ohio-5915.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CRYSTAL MICHELLE DEVALL (FRISCO)

Plaintiff-Appellant

-vs-

MATTHEW SCHOOLEY

Defendant-Appellee

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. CT2009-0017

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. JV020040013
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 6, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
JACQUELINE L. KEMP KEMP, SCHAEFFER, & ROWE 88 West Mound Street Columbus, Ohio 43215	SUSAN CULTICE BROWN CULTICE & BROWN 121 West 4th Street, P. O. Box 490 Zanesville, Ohio 43702-0490

Wise, J.

{¶1} Appellant Crystal Michelle DeVall, nka Frisco appeals the decision of the Muskingum County Court of Common Pleas, Domestic Relations Division, which denied her motion to reallocate parental rights and responsibilities in regard to her daughter, Susan. Appellee Matthew Schooley is Susan's father and present residential parent. The relevant facts leading to this appeal are as follows.

{¶2} Appellant-mother and appellee-father are the parents of Susan Michelle Schooley, born in 1999. On May 31, 2000, pursuant to an agreed judgment entry, appellant was named the residential parent of Susan, while appellee was awarded designated parenting time. Appellant thereafter relocated from Muskingum County, Ohio to Morgantown, West Virginia. On April 8, 2002, the trial court issued a judgment entry maintaining appellant as the residential parent, but increasing appellee's parenting time.

{¶3} On April 18, 2006, appellant filed a motion to modify parenting time, due to her intended marriage to John Frisco and contemplated relocation from Morgantown, West Virginia to King George, Virginia. Appellee filed his own motion to modify parenting time on June 29, 2006.

{¶4} Pursuant to a judgment entry filed August 8, 2006, the court found the existence of a change of circumstances and concluded it was in Susan's best interest to designate appellee as the residential parent and legal custodian.

{¶5} Appellant thereupon appealed to this Court. On May 23, 2007, we affirmed the trial court's aforesaid decision. See *DeVall v. Schooley*, Muskingum App.No. CT2006-0062, 2007-Ohio-2582.

{¶6} On January 24, 2008, appellant filed a motion to reallocate parental rights and responsibilities. Appellant included therewith a motion for the appointment of a guardian ad litem.

{¶7} By the time of the pre-trial on February 22, 2008, the trial court had not yet ruled upon the request by appellant for a guardian ad litem appointment. Appellant renewed said request orally at the pre-trial. The court provided the parties an opportunity to brief the issue. Accordingly, appellant filed a memorandum on February 29, 2008 in support of her motion for a guardian ad litem. On that same date, appellant additionally filed a motion requesting that the trial court conduct an in camera interview of the child.

{¶8} On April 28, 2008, appellant filed a motion for contempt against appellee on the issue of compliance with the court's extant parenting orders.

{¶9} The matter came on for a hearing on May 8, 2008, both as to the issue of change of circumstances and appellant's contempt motion. The matter was taken under advisement; the court further ruled on June 2, 2008 that it would conduct an in camera interview with the child. That interview took place on June 5, 2008.

{¶10} On August 4, 2008, the court issued a judgment entry finding appellee to be in contempt of court for his failure to notify appellant of Susan's activities and health care matters as required by existing orders.

{¶11} On March 3, 2009, following the submission of proposed findings of fact and conclusions of law, the trial court issued a final judgment entry finding an insufficient change in circumstances to warrant further entertainment of appellant's motion to reallocate parental rights and responsibilities.

{¶12} On March 13, 2009, appellant filed a notice of appeal. She herein raises the following two Assignments of Error:

{¶13} "I. THE TRIAL [COURT] ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO APPOINT A GUARDIAN AD LITEM FOR THE MINOR CHILD PURSUANT TO APPELLANT'S REQUEST AND THEN CONDUCTING AN IN CAMERA INTERVIEW OF THE CHILD WITHOUT A GUARDIAN AD LITEM.

{¶14} "II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO FIND THAT A CHANGE IN CIRCUMSTANCES HAD OCCURRED SUCH THAT APPELLANT'S MOTION TO REALLOCATE PARENTAL RIGHTS AND RESPONSIBILITIES COULD BE CONSIDERED."

I.

{¶15} In her First Assignment of Error, appellant maintains the trial court erred by failing to appoint a guardian ad litem, particularly where the court conducted an in camera interview of the child. We disagree.

{¶16} R.C. 3109.04(B) states as follows in pertinent part:

{¶17} "(1) When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children. In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for purposes of resolving any issues related to the making of that allocation, the court, in its discretion, may and, upon

the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

{¶18} "(2) If the court interviews any child pursuant to division (B)(1) of this section, all of the following apply:

{¶19} "(a) The court, in its discretion, may and, upon the motion of either parent, shall appoint a guardian ad litem for the child.

{¶20} "***"

{¶21} Appellant essentially argues that because the trial court conducted an in camera interview of Susan, there is a statutory requirement for the appointment of a guardian ad litem where requested by a parent. However, in considering this argument, we must remain mindful that Ohio's statutory scheme for modifying parental rights and responsibilities requires a two-part determination: whether a change in circumstances has occurred and, if so, whether a modification is in the best interest of the child. *Neighbor v. Jones*, Summit App.No. 24032, 2008-Ohio-3637, ¶6.

{¶22} The statutory mandate concerning guardian ad litem appointments is set forth in the "best interest" portion of R.C. 3109.04. The cases cited by appellant in her brief are all in the context of a best interest analysis, which the trial court in the case sub judice never reached. In particular, the Ohio Supreme Court's decision in *State ex rel. Papp v. James* (1990), 69 Ohio St.3d 373, which appellant cites, does not address the "change in circumstances" stage; it refers in pertinent part to R.C. 3109.04(B)(2)(a). Furthermore, *Papp* involved a mother's attempt to obtain a writ of mandamus from the Ohio Supreme Court following the trial court's award of custody to the father. In the

case sub judice, no such custodial changes were accomplished in the most recent proceedings.

{¶23} Because the trial court went no further than the change of circumstances stage in this instance, we hold the court did not commit reversible error in denying appellant's request for the appointment of a guardian ad litem under the facts and circumstances of this case.

{¶24} Accordingly, appellant's First Assignment of Error is overruled.

II.

{¶25} In her Second Assignment of Error, appellant argues the trial court abused its discretion in finding no existence of a change of circumstances in this matter. We disagree.

{¶26} R.C. 3109.04(E)(1)(a) reads in pertinent part as follows: "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. * * *."

{¶27} R.C. 3109.04 does not define "change in circumstances." Ohio courts have held that the phrase is intended to denote "an event, occurrence, or situation which has a material and adverse effect upon a child." *Rohrbaugh v. Rohrbaugh* (2000), 136 Ohio App.3d 599, 604-605, 737 N.E.2d 551, citing *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416, 445 N.E.2d 1153.

{¶28} Our standard of review in assessing the disposition of child-custody matters is that of abuse of discretion. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 73-74. Furthermore, as an appellate court reviewing evidence in custody matters, we do not function as fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base his or her judgment. See *Dinger v. Dinger*, Stark App.No. 2001 CA00039, 2001-Ohio-1386.

{¶29} Appellant, in support of her argument, herein presents us with a list of purported changes in the lives of the parents and Susan. She maintains the record would show that appellee is now divorced, that he has a new girlfriend, that he has refused "most requests" for visits to occur in Morgantown (where many of Susan's extended relatives reside), that he has failed to properly communicate directly with appellant, that he has not honored all parenting time and telephone contact orders, that he has failed to keep appellant informed about Susan's activities and medical issues, and that he "has failed to maintain the child's Catholic religious involvement as he vowed to do." Appellant's Brief at 12-13.

{¶30} As we frequently emphasize in proceedings involving the custody and welfare of children, the power of the trial court to exercise discretion is peculiarly important. See *Thompson v. Thompson* (1987), 31 Ohio App.3d 254, 258, 511 N.E.2d 412, citing *Trickey v. Trickey* (1952), 158 Ohio St. 9, 13, 106 N.E.2d 772. Furthermore, the trier of fact is in a far better position to observe the witnesses' demeanor and weigh their credibility. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. Upon review of the record, we find appellant's portrayal of the above "changes" to be

overstated. For example, appellant has acknowledged that she has no concerns about appellee's new girlfriend, and appellant conceded on cross-examination that the major reason for the lack of visits in Morgantown is the basic fact that appellant now lives six to eight hours away in Virginia. Tr. at 105-106. Furthermore, it appears undisputed that appellant and appellant's mother telephone Susan a total of six times per week. Tr. at 97. Appellee also testified that he did take Susan to church "about once or twice a month," but that appellant failed to advise him about the importance of children in the Catholic faith participating in CCD classes. Tr. at 154, 156.

{¶31} Accordingly, while appellee's compliance with the court's parenting orders is far from flawless in this matter, we are not inclined to substitute our judgment for that of the trial court in its rejection of appellant's claim of a change in circumstances under R.C. 3109.04(E)(1)(a). Appellant's Second Assignment of Error is overruled.

{¶32} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Muskingum County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 928

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CRYSTAL MICHELLE DEVALL (FRISCO)	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
MATTHEW SCHOOLEY	:	
Defendant-Appellee	:	Case No. CT2009-0017

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES