

[Cite as *Frame v. Frame*, 2010-Ohio-2440.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARY E. FRAME (WATSON)	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Petitioner-Appellant	:	Hon. W. Scott Gwin, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
DOUGLAS G. FRAME	:	Case No. 09CA000036
	:	
Petitioner-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 03DS640

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 28, 2010

APPEARANCES:

For Appellant

DANIEL G. PADDEN
139 West 8th Street
P.O. Box 640
Cambridge, OH 43725

For Appellee

RICHARD A. BAKER
819 Steubenville Avenue
Cambridge, OH 43725

Farmer, J.

{¶1} On July 1, 1989, appellant, Mary Frame, and appellee, Douglas Frame, were married. Three children were born of the marriage, Casey born March 29, 1990, Courtney born January 11, 1992, and Connor born June 6, 1997. The parties received a decree of dissolution on January 28, 2004. Pursuant to an attached separation agreement, appellant was named the residential parent of the three children.

{¶2} On July 16, 2007, appellee filed a motion for change of residential parent, adjustment of child support, and determination of medical support. Appellee sought a change of custody of Connor because circumstances had changed since the prior court orders. Hearings were held before a magistrate on October 16, November 19, and December 11, 2007. Pursuant to a decision filed December 21, 2007, the magistrate recommended that appellee be named residential parent of Connor. The trial court approved and adopted the decision on the same date.

{¶3} Thereafter, both appellant and appellee timely filed objections to the magistrate's decision. By entry filed March 12, 2008, the trial court denied the objections, but ordered the magistrate to take additional evidence on the issue of the cost of medical insurance.

{¶4} Appellant filed an appeal, but this court dismissed the appeal for lack of a final appealable order as the trial court never vacated, modified or adhered to its December 21, 2007 judgment entry which had approved and adopted the magistrate's decision prior to the objections. See, *Frame v. Frame*, Guernsey App. No. 08 CA 16, 2009-Ohio-2668.

{¶5} On August 13, 2009, the magistrate filed a supplemental decision, addressing the cost of medical insurance as instructed by the trial court and other issues. By entry filed same date, the trial court approved and adopted the magistrate's decision. On August 26, 2009, appellant filed objections, restating her prior objections to the magistrate's December 21, 2007 decision. By entry filed August 29, 2009, the trial court denied the objections.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶7} "THE TRIAL COURT ERRED IN DETERMINING THAT A CHANGE IN CIRCUMSTANCES HAD OCCURRED."

II

{¶8} "THE TRIAL COURT ERRED IN NOT CONSIDERING THE EFFECTS OF THE 'SPLIT SIBLING CUSTODY' AWARD ISSUE IN DETERMINING CUSTODY."

III

{¶9} "THE TRIAL COURT ERRED IN IMPROPERLY APPLYING THE BEST INTEREST OF THE CHILD TEST IN THIS CASE."

IV

{¶10} "THE TRIAL COURT HAD NO FACTUAL BASIS FOR FINDING THAT THE MODIFICATION IS NECESSARY TO SERVE THE BEST INTEREST AND THAT THE HARM LIKELY TO BE CAUSED BY A CHANGE IS OUTWEIGHED BY THE ADVANTAGES OF A CHANGE IN CUSTODY."

V

{¶11} "THE TRIAL COURT HAD NO FACTUAL BASIS FOR FINDING THAT APPELLEE HAD COSTS FOR INSURANCE EQUAL TO \$10,710.00 PER YEAR."

VI

{¶12} "THE TRIAL COURT ERRED IN FAILING TO CALCULATE THE AMOUNT THAT APPELLEE OWED APPELLANT."

I

{¶13} Appellant claims the trial court erred in finding a change of circumstances had occurred pursuant to R.C. 3109.04(E)(1)(a) regarding custody of Connor. We disagree.

{¶14} The standard of review for a determination of whether there has been a change of circumstances is abuse of discretion. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217. When applying this standard, we are not free to substitute our judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135.

{¶15} R.C. 3109.04(E)(1) mandates the following in finding a change of circumstances:

{¶16} "(E)(1)(a) 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:

{¶17} "(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.

{¶18} "(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.

{¶19} "(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."

{¶20} Appellant argues the trial court failed to apply the proper standard as set forth in R.C. 3109.04(E) and in the holding of the Supreme Court of Ohio in *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, ¶37:

{¶21} "In conclusion, we hold that a modification of the designation of residential parent and legal custodian of a child requires a determination that a 'change in circumstances' has occurred, as well as a finding that the modification is in the best interest of the child, pursuant to R.C. 3109.04(E)(1)(a)."

{¶22} The *Fisher* court explained the following at ¶33-34:

{¶23} "Modification of a prior decree, pursuant to R.C. 3109.04(E)(1)(a), may only be made '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 shared parenting decree, and that the modification is necessary to serve the best interest of the child.' This is a high standard, as a 'change' must have occurred in the life of the child or the parent before the court will consider whether the current designation of residential parent and legal custodian should be altered. Conversely, R.C. 3109.04(E)(2)(b) requires only that the modification of the shared-parenting plan be in the best interest of the child.

{¶24} "The requirement that a parent seeking modification of a prior decree allocating parental rights and responsibilities show a change of circumstances is purposeful: ' "The clear intent of [R.C. 3109.04(E)(1)(a)] is to spare children from a constant tug of war between their parents who would file a motion for change of custody each time the parent out of custody thought he or she could provide the child a 'better' environment. The statute is an attempt to provide some stability to the custodial status of the children, even though the parent out of custody may be able to prove that he or she can provide a better environment." ' *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159, quoting *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416, 3 OBR 479, 445 N.E.2d 1153."

{¶25} The trial court's March 12, 2008 and August 29, 2009 entries denied appellant's objections to the magistrate's change of circumstances finding. In her Findings of Fact Nos. 3-4, the magistrate pointed to three factors in recommending a change of custody: first, appellant and the children no longer resided in the marital residence; two, appellant remarried and moved with the children to the home of her new

husband and his son (appellant's stepchild was fourteen years old and Connor was ten years old at the time of the decision); and three, appellant changed her employment and her work hours no longer coincided with the school day hours.

{¶26} Also factored in was an in-camera interview with Connor. Findings of Fact No. 1. We have no way to determine the impact of this interview on the magistrate's decision because no transcript of the interview has been provided.

{¶27} Other factors listed by the magistrate included appellant "thwarting" interaction between appellee and Connor during school events, not consulting appellee on issues regarding education, health and other problems as set forth in the parties' separation agreement, and setting appellee up as the "bad guy" when he did not agree with her decisions.

{¶28} Appellant filed objections and an affidavit in support on January 3, 2008. The only transcript filed between the magistrate's decision and the trial court's final ruling on March 12, 2008 was a partial transcript of a hearing held on November 19, 2007. See, February 8, 2008 Docket Entry. A subsequent transcript was filed on the August 11, 2009 hearing regarding the issues of child support and the cost of medical insurance. We note pursuant to Civ.R. 53(D)(3)(b)(iii), "[a]n objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available."

{¶29} Appellant's affidavit raised certain factual issues. Appellant's move to the new husband's home was made after appellee's motion to modify custody was filed,

and her new job began in the spring of 2005, prior to the date of the parties' dissolution on January 28, 2004. See, ¶3-4. Appellant also disputed the fact that she kept appellee away from Connor during sporting events. See, ¶8.

{¶30} In response, appellee argues he was granted leave to amend his motion to modify during the November 19, 2007 hearing and filed a partial transcript of that hearing, thereby including in the change of circumstances issue the events transpiring prior to the magistrate's final hearing.

{¶31} In its March 12, 2008 entry, the trial court specifically found "no error of law or other defect on the face of the Decision, and incorporates by reference the findings and decision of the Magistrate."

{¶32} As to factual issues raised by the affidavit, we find the change of address was not pivotal to the finding, but ancillary. As for the job change in the spring of 2005, the parties' dissolution was entered on January 28, 2004 and therefore within the consideration of post-decree changes.

{¶33} As noted supra, a determination on change of circumstances is subjective and not subject to any bright-line test. Cases cited by appellant in her brief are single-issue changes. In this case, there are numerous issues cited by the trial court. Whereas one single issue alone i.e., remarriage, is not enough, the totality of all the facts is what is to be considered. Additionally, we are hampered by no transcript of Connor's in camera interview. Connor was the only child the magistrate interviewed in camera. We can only presume it factored into the analysis.

{¶34} Given the facts that there was a change of residence into a stepparent home, the addition of a stepbrother to the sibling mix, appellant's change in work hours,

and the negative implications of appellant's view of visitation, we cannot find the trial court abused its discretion in finding a change of circumstances in light of the collective impact of the new family dynamics.

{¶35} Assignment of Error I is denied.

II, III, IV

{¶36} These assignments challenge the trial court's decision on best interests and in balancing the harm likely to be caused by the change versus the advantages of the change. We disagree with appellant's arguments.

{¶37} Pursuant to R.C. 3109.04(B)(1), a trial court shall consider the best interests of the child in determining a modification of custody. R.C. 3109.04(F)(1) sets out the factors relevant to determining the best interests of the child. Said section states relevant factors include, but are not limited to, the following:

{¶38} "(a) The wishes of the child's parents regarding the child's care;

{¶39} "(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

{¶40} "(c) 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;

{¶41} "(d) The child's adjustment to the child's home, school, and community;

{¶42} "(e) The mental and physical health of all persons involved in the situation;

{¶43} "(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶44} ****

{¶45} "(i) 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;

{¶46} "(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

{¶47} First, appellant argues the trial court failed to address the "split sibling" custody caused by the change. In Conclusion of Law No. 4, adopted by the trial court, the magistrate specifically recommended that weekend parenting time coincide for all three children:

{¶48} "All holidays and vacations periods will be pursuant to the standard order of parenting time and continue as though Father was the nonresidential parent so that the children are together."

{¶49} This decision gives tacit consideration to split sibling custody. Further, there is a seven year difference between Connor and his oldest sibling. At the time of the trial court's decision, Connor was ten and his two older sisters were seventeen and fifteen. We find the trial court addressed the issue.

{¶50} Second, appellant argues the trial court erred in applying the best interests of the child test. The trial court based its decision in part on the following reasons:

{¶51} "9. Mother's decision making as it relates to the issues of the children not only have excluded Father from important parenting aspects reserved for him in the separation agreement, but also set him up as the 'bad guy' when he did not agree.

{¶52} "10. There was credible testimony that Connor's interest are more attune to his Father's interest, such as flying and science. Mother's home revolves around the girl's basketball and other curricular activities. Stepfather and stepbrother are also actively involved in basketball. Both homes are active in 4-H."

{¶53} The trial court addressed as a factor the negative impact from the visitation issues. Although there were no violations of any orders, the visitation disputes were clearly contra to the spirit of the separation agreement.

{¶54} One cannot help but note that the trial court's decision centers around gender issues i.e., mother with the girls, father with the boy. However, one cannot reject the decision as an abuse of discretion.

{¶55} Based upon the reasons given and the lack of any information regarding the in camera interview, we cannot find the trial court abused its discretion on the issue of best interests.

{¶56} Assignments of Error II, III, and IV are denied.

V

{¶57} Appellant claims the trial court had no factual basis for finding appellee had medical insurance costs equal to \$10,700.00 per year. We disagree.

{¶58} As adopted by the trial court, the magistrate found, "Father's annual income is \$48,210. Father pays \$1,190 per month for insurance for himself and the minor children which equals \$10,710 per year for the children which the Magistrate finds to be unreasonable." Findings of Fact No. 12.

{¶59} Appellant argues this fact was not in evidence. We note appellant raised this issue in her objections to the magistrate's decision. Appellee rebutted the argument as follows:

{¶60} "5. The fifth objection of Mary E. Watson relates to the medical expenses of the Douglas G. Frame seems to rely upon Douglas Frame's payroll stub alone. There is no citation to the record. There was ample evidence that Mr. Frame is an officer and employee of a small family owned construction business and his brother – similarly an employee of the business – had a very serious health problem which affected the business and the health insurance available to the small company. The family owned business was able to secure insurance and to have the cost of the premiums paid by the small company. Mr. Frame and his family employees share the cost of the insurance coverage through the family corporation. Douglas G. Frame's testimony and evidence on the cost of the medical coverage was in evidence and not impeached on the record. He testified as to what it cost him." See, Response filed January 24, 2008.

{¶61} As noted supra, a transcript of the hearing relative to this issue was not filed between the time the trial court received the objections and the time it ruled on the objections, January 3, 2008 to March 12, 2008. In *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, the Supreme Court of Ohio held the following:

{¶62} "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St.2d 162. This principle is recognized in App.R. 9(B), which provides, in part, that "the

appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record.***.' When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." (Footnote omitted.)

{¶63} Appellant's January 3, 2008 affidavit at ¶10 averred, "Mr. Frame's pay stubs (Plaintiff's Exhibit 1) reveal that the health insurance is not paid by him but rather paid 100% by his employer, R. A. Frame & Sons Construction Co., Inc."

{¶64} It is clear that appellee is an employee of a family owned company. Upon review, we find the trial court did not abuse its discretion on the issue of medical insurance costs.

{¶65} Furthermore, the issue is moot given the parties' agreed entry on the issue filed April 24, 2008.

{¶66} Assignment of Error V is denied.

VI

{¶67} Appellant claims the trial court erred in failing to calculate the amount appellee owed appellant for reimbursement for expenses. We disagree.

{¶68} The magistrate found the following:

{¶69} "17. Further, Mother did not provide an accurate accounting to the court as to what she had been paid by her insurance company for medical costs, which prevents the Magistrate from determining who is owed what from the expenses set forth on Mother's Ex. H.

{¶70} "18. The Magistrate finds that Father does not owe Mother any money for the unpaid expenses set forth in Ex. H." Findings of Fact Nos. 17 and 18.

{¶71} Any arguments to these facts were unsupported by a transcript. Appellant's affidavit did not address this issue.

{¶72} Pursuant to Civ.R. 53(D)(4), the trial court was well within its province to accept the magistrate's findings and recommendation.

{¶73} Assignment of Error VI is denied.

{¶74} The judgment of the Court of Common Pleas of Guernsey County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Gwin, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ W. Scott Gwin

JUDGES

SGF/sg 0305

