[Cite as *Dillinger v. Bryslan*, 2015-Ohio-2364.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KYLE A. DILLINGER	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
CHRISTINA BRYSLAN (BURGESS)	:	Case No. CT2014-0048
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from Court of Common Pleas, Domestic Relations Division, Case No. DE2010-0370
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	June 15, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MARIA N. KALIZ P.O. Box 3320 Zanesville, OH 43702-3320	HANK F. MEYER 120 East Mill Street Quaker Square, Suite 405 Akron, OH 44308

Farmer, P.J.

{¶1} Appellant, Christina Bryslan (Burgess), and appellee, Kyle Dillinger, were never married and have one child together, born in March 2010. The relationship ended before the child was born. On April 28, 2010, appellee filed a complaint for the allocation of parental rights and responsibilities. On November 3, 2010, the parties filed a shared parenting plan approved by the trial court. The plan included a provision wherein if the parties could not agree on school placement, appellee would be named the residential parent for school placement purposes. When the child was just over one year old, appellant married and moved to Tuscarawas County. Father remained in Muskingum County.

{¶2} On July 28, 2014, appellant filed a motion for modification of the shared parenting plan, seeking to be named the residential parent for school placement purposes. On September 19, 2014, appellee filed a motion to modify parental rights and responsibilities, seeking to terminate the shared parenting plan and be named sole custodian, or in the alternative, modification of the plan. A hearing was held on October 9, 2014. By judgment entry filed November 10, 2014, the trial court did not find a change in circumstances to warrant termination of the shared parenting plan, found it was in the best interests of the child to not modify the plan relative to the designation of appellee as the residential parent for school placement purposes, and modified the terms of the shared parenting plan to accommodate the decision.

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

I

{¶4} "WHETHER IT WAS AN ABUSE OF DISCRETION AND CONTRARY TO THE WEIGHT OF THE EVIDENCE FOR THE TRIAL COURT TO RETAIN FATHER AS THE RESIDENTIAL PARENT FOR SCHOOL PURPOSES OF THE PARTIES' SON WHEN THE EVIDENCE CLEARLY INDICATES THAT HE WAIVED ANY RIGHT HE HAD TO ENFORCE HIS DESIGNATION AS RESIDENTIAL PARENT FOR SCHOOL PURPOSES."

II

{¶5} "WHETHER THE TRIAL COURT UPON DETERMINING THAT THE PARTIES SHARED PARENTING PLAN SHOULD NOT BE TERMINATED, ABUSED ITS DISCRETION, DECIDED AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND COMMITTED AN ERROR OF LAW BY FAILING TO FIND A CHANGE OF CIRCUMSTANCES OCCURRED, BEFORE APPLYING THE BEST INTEREST OF THE CHILD TEST WHEN IT DENIED MOTHER'S MOTION TO BE NAMED RESIDENTIAL PARENT FOR SCHOOL PURPOSES."

I, II

{¶6} Appellant claims the trial court erred in retaining appellee as the residential parent for school placement purposes. Appellant claims appellee had waived his right to enforce the designation, the trial court abused its discretion in determining not to terminate the shared parenting plan, the trial court's determination of no change in circumstances was against the manifest weight of the evidence, and retaining appellee as the residential parent for school placement purposes was not in the child's best interest. We disagree.

{¶7} A trial court's decision to terminate a shared parenting plan is reviewed under an abuse of discretion standard. *In re J.L.R.,* 4th Dist. Washington No. 08CA17, 2009-Ohio-5812; *Bechtol v. Bechtol,* 49 Ohio St.3d 21 (1990). 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,* 5 Ohio St.3d 217 (1983). Furthermore, a judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.,* 54 Ohio St.2d 279 (1978). A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson,* 66 Ohio St.3d 610, 1993-Ohio-9. "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." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418 (1997).

{¶8} R.C. 3109.04 governs parental rights and responsibilities and shared parenting. Subsections (E) and (F) state the following in pertinent part:

> (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:

(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.

(2) In addition to a modification authorized under division (E)(1) of this section:

(b) 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.

(c) The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children. If modification of the terms of the plan for shared parenting approved by the court and incorporated by it into the final shared parenting decree is attempted under division (E)(2)(a) of this section and the court rejects the modifications, it may terminate the final shared parenting decree if it determines that shared parenting is not in the best interest of the children.

(F)(1) In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

(a) The wishes of the child's parents regarding the child's care;

(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;

(d) The child's adjustment to the child's home, school, and community;

(e) The mental and physical health of all persons involved in the situation;

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

(2) In determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors, including, but not limited to, the factors enumerated in division (F)(1) of this section, the factors enumerated in section 3119.23 of the Revised Code, and all of the following factors:

(a) The ability of the parents to cooperate and make decisions jointly, with respect to the children;

(b) The ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent;

(c) Any history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping by either parent;

(d) The geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting;

(e) The recommendation of the guardian ad litem of the child, if the child has a guardian ad litem.

{¶9} On November 3, 2010, the parties filed a shared parenting plan approved by the trial court. The residential parent was the parent the child was residing with at the time. The plan included the following provision:

> (F) Child Care Providers and Education. KYLE A. DILLINGER and CHRISTINA BRYSLAN shall consult with each other in advance regarding child care providers, preschool placement, and educational decisions for the child, including but not limited to school placement. If KYLE A. DILLINGER and CHRISTINA BRYSLAN do not agree on the course of action that should be taken or if either parent believes that additional information is needed, the parents shall jointly or individually consult with educational specialists, psychologists or other appropriate professionals to obtain additional information and assistance. If the parties can not otherwise agree, KYLE A. DILLINGER shall be the residential parent for school placement purposes.

{¶10} When the child was just over one year old, appellant married and moved to Tuscarawas County. Father remained in Muskingum County. As the child neared preschool/school-aged, a dispute arose as to school placement.

{¶11} On July 28, 2014, appellant filed a motion for modification of the shared parenting plan, seeking to be named the residential parent for school placement purposes. Mediation was conducted, but failed. *See* Mediation Status Report filed August 27, 2014.

{¶12} On September 19, 2014, appellee filed a motion to modify parental rights and responsibilities, seeking to terminate the shared parenting plan and be named sole custodian, or in the alternative, modification of the plan. A hearing was held on October 9, 2014. By judgment entry filed November 10, 2014, the trial court determined the following:

> In the present case, the Court finds that first of all the move by Defendant was a matter that was anticipated at the time of the adoption of the parties' Shared Parenting Plan. Thus, Defendant's ultimate move to Mineral City, Ohio cannot be the basis upon which the Court may consider reallocation of parental rights and responsibilities. In examining the record, the Court finds no other change in either of the residential parents or of the minor child that are of substance and that are more than slight or inconsequential. The Court therefore DENIES Plaintiff's request that the parties' Shared Parenting Plan be terminated and that he be designated residential parent and legal custodian of [C.A.D.].
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> ***
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> The Court finds the parties were able to cooperate and communicate in a manner that was in [C.D.]'s best interest, avoiding being locked strictly into the terms of the Shared Parenting Plan and compromising often to accommodate Plaintiff's work schedule. The realities are, however, with [C.D.] about to enter school the parties can no longer be as flexible in scheduling each of their parenting times.

In considering the evidence presented, the Court does not find any basis that the Shared Parenting Plan as it is now constituted is no longer in [C.D.['s best interest. While there are some benefits that may be present by modifying the Plan and designating Defendant as the school placement parent the Court cannot say those benefits are significant enough to make a finding that continuing Plaintiff as the school placement is no longer in [C.D.]'s best interest. The Court cannot determine that this modification is necessary to serve the best interest of [C.D.].

The Court having denied Defendant's Motion to Modify the parties' Shared Parenting Plan, the Court nevertheless believes that some modification would be in [C.D.]'s best interest. The Court finds the parties have modified their parenting schedule from what is in the Shared Parenting Plan. The Court finds that the parties' ability to do such a modification without resorting to court intervention speaks well of both of them. The Court can conclude, then, that the parenting schedule which became effective in early 2014 is the schedule the parties believed to be in [C.D.]'s best interest. The Court also finds that while Plaintiff claims he was not consulted and did not consent to Defendant enrolling [C.D.] in preschool that he took no action to the contrary and [C.D.], therefore, has been attending preschool since August 2014. The Court therefore Orders unless the parties agree otherwise, that the current parenting schedule shall continue until June 2015 at which time it shall be modified that [C.D.] shall alternate weeks with each parent until the commencement of school

> in August 2015. [C.D.] can remain in the preschool program in which he is currently enrolled.
>
> Upon the commencement of school in August 2015, the parenting schedule will provide that [C.D.] shall reside primarily with Plaintiff during the week and on the second full weekend of each month. [C.D.] shall reside with Defendant all other weekends during the school year. Each summer the parenting schedule shall revert to the alternating week schedule. The Court makes no provisions for holidays as the parties appear to have been able to address that issue on their own.

{¶13} Both parties testified during the hearing. As the trial court noted, the parties adjusted parenting time in a conciliatory fashion, taking into consideration appellee's job situation and appellant's relocation to Tuscarawas County. T. at 5-7, 19. They voluntarily chose a halfway point for the exchange of custody, and have conducted themselves in an exemplary manner in consideration of the child's best interest. T. at 7. However, a dispute arose as to school placement. T. at 11-12, 38, 142-143. Appellant admitted to placing the child in preschool without an agreement from appellee, and to not sharing with him the packet of information from the preschool. T. at 42-43.

{¶14} Although the parties operated under a shared parenting plan, appellant assumed healthcare duties for the child. T. at 19-23, 49. Appellant explained she is a stay-at-home mom and is able to be with the child "a hundred percent." T. at 26. She stated she is the primary caregiver and appellee is a non-involved father regarding

"appointments or activities or stuff like that," although he texts regularly to see how the child is doing and is a "concerning dad." T. at 31-32. Appellant wants the child to attend school in Tuscarawas County; therefore, she wants the child Monday through Friday and one whole weekend a month. T. at 33. She explained the child would be in school with his younger half-brother. T. at 26.

{¶15} Appellee is a business owner and has a flexible schedule so he will be able to be with the child before and after school. T. at 126-127. He has sought medical treatment for the child when the child has been sick while in his care, but does not attend every medical appointment as the child's doctors and dentist are in Tuscarawas County. T. at 137-138. Appellee would like to see appellee move closer to Muskingum County so the child could do "a week with me, a week with her, and still be able***to go to school," but the distance between the parties precludes that; therefore, appellee wants the child to reside with him for school placement purposes and spend three weekends a month plus additional time (evening visits, birthdays, special events, holidays) with appellee. T. at 139-141. The child has a strong relationship with each set of grandparents and extended family members. T. at 24-25, 66-67, 129-130.

{¶16} During oral argument, much was made about the seventy-six miles (over one hour of travel time) between the parties' homes. However, appellant admitted the move was contemplated and discussed at the time of the filing of the shared parenting plan. T. at 55, 95-96. She acknowledged shared parenting was in the best interest of the child. T. at 32.

{¶17} In her brief at 10, appellant argues appellee waived his right to contest the child's school placement in Tuscarawas County because he "agreed to and consented

to" her moving to Tuscarawas County "as far back as the time of the signing of the original shared parenting plan." Therefore, "[a]t the time of the move he knew or should have known that he would be relinquishing his right to be residential parent for school purposes." This argument completely disregards provision (F) of the shared parenting plan as cited above. Nowhere in the record is there any agreement to waive provision (F) of the shared parenting plan. In fact, the parties have lived up to the letter and spirit of the plan and sought to adhere to the plan by entering into mediation on school placement. Appellant never raised this argument to the trial court. "It is axiomatic that a litigant's failure to raise an issue in the trial court waives the litigant's right to raise that issue on appeal.***" *Branden v. Branden,* 8th Dist. Cuyahoga No. 91453, 2009-Ohio-866, ¶ 30.

{¶18} Appellant admitted her move to Tuscarawas County was contemplated and known to the parties at the time of the filing of the shared parenting plan. T. at 55. Since the filing of the plan, the parties lived with significant others, and appellant was married just before the hearing. T. at 7-8, 53. Shared parenting continued uninterrupted and successfully for the following years. We fail to find any change of circumstance that was not contemplated at the time of the filing of the plan.

{¶19} As noted by the trial court, the parties have been very successful in parenting the child by each giving in and accommodating each other, and the child has lived successfully within that plan, although the child exhibits some separation anxiety. T. at 23-24, 36-37, 58-60, 75, 91, 117-118, 120-121, 141. It is unfortunate that the issue of school placement has become nonresolvable when cooperation has been the parties' key to successful parenting. The seventy-six mile difference between the

parties requires a school- aged child to be in one county during the school week. As a result, one party gets short-changed in custody during the school year.

{¶20} As stated during oral arguments, the trial court was forced to make a Solomon-like choice. The choice was not as drastic as King Solomon's choice, but it did rest upon the previous order and tacit agreement of the parties. There has been no showing of any adverse affects of either parties' home to find that the best interest of the child is not served and protected by the trial court's decision.

{¶21} Upon review, we find the trial court did not abuse its discretion and the decision was not against the manifest weight of the evidence.

{¶22} Assignments of Error I and II are denied.

{¶23} The judgment of the Court of Common Pleas of Muskingum County, Ohio, Domestic Relations Division, is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Baldwin, J. concur.

SGF/sg 5/12