[Cite as *Combes v. Combes*, 2015-Ohio-584.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TARY J. COMBES

Plaintiff-Appellant

-vs-

CANDACE J. COMBES

Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. W. Scott Gwin, J.
Hon. John W. Wise, J.

Case No. 14CA007

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Morrow County Court of Common Pleas, Domestic Relations Division, Case No. 10DS0667

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: February 12, 2015

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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Hoffman, P.J.

{¶1} Plaintiff-appellant Tary J. Combes ("Father") appeals the May 7, 2014 Journal Entry entered by the Morrow County Court of Common Pleas, Domestic Relations Division, which overruled his objections to the magistrate's September 10, 2013 decision, and approved and adopted said decision with one exception as order of the court. Defendant-appellee is Candace J. Combes ("Mother").

STATEMENT OF THE CASE AND FACTS

{¶2} The trial court granted a Decree of Dissolution to the parties on April 29, 2011. Pursuant to the Shared Parenting Decree, the parties were awarded joint custody of their minor child, Katie, and Father was designated residential parent for school purposes.

{¶3} Mother filed a motion for reallocation of parental rights and responsibilities on April 24, 2012, and an amended motion on July 11, 2012. The matter came on for hearing before the magistrate on July 19, 2012.

{¶4} The following evidence was presented at the hearing.

{¶5} Initially, after the dissolution of the parties' marriage, the parties maintained an amicable relationship, even spending Christmas Eve, 2011, together along with Katie and Mother's partner, Velvet. The parties spoke with each other on the telephone "just to talk". However, after Father began dating his new wife, Liz, the situation change. After Liz informed Father she did not like him talking to Mother, Father instructed Mother to stop calling him. The parties have since communicated primarily through text messages.

{¶6} The evidence further revealed Liz, prior to her marriage to Father, signed Katie's interim report card as well as other school documents which required a parent's signature. Father authorized Liz, after their marriage, to sign "Liz and Tary Combes" on Katie's end of year report card. In addition, Liz failed to include Mother's information on the school's emergency medical contact form. The evidence also revealed Father took Katie to a counselor without advising Mother. Father explained he took Katie to counseling because the child was being self-abusive while she was in his home. Liz attended the counseling with Father and Katie.

{¶7} Mother testified regarding her concerns Katie was not being properly cared for when the girl was with Father. When Mother picked up Katie from Father, the child was "always filthy", often smelled, and her hair was unkept and matted. In addition, Katie would be starving and complained Father did not give her food or snacks. When Mother confronted Father, he responded Katie, who was seven years old, was old enough to bathe and feed herself. In addition, although Katie is on Father's insurance plan, Father has failed to provide Mother with the child's insurance card.

{¶8} Mother works as a security officer for Nationwide Insurance, earning $32,146.68/year. Her hours are 7 a.m. to 3 p.m. Mother works weekends. During Mother's shifts, Velvet watches Katie when the girl is not in school. Velvet and Katie have an excellent relationship. Father works as a lineman for American Electric Power. His total earning for the 2011 tax year were $89,676.56; and for the tax year 2012, $85,221.69. Father was on target to earn between $80,000 and $85,000 in 2013. Father works a significant amount of overtime.

{¶9} Father told the GAL he does not have a problem with Mother's sexual orientation, but is bothered by the fact their relationship was "10 years of lies". Father believes Mother should "suck up the child support for her 10 years of lying." Father also acknowledged the issue of sexual orientation is confusing to him as well as Katie, and his belief that homosexuality is sinful. Father expressed concerns Katie will be harassed in school due to Mother's sexual orientation.

{¶10} Katie attends Highland Elementary School's before and after child care program. On two occasions, Liz became aggressive with staff members as she was upset Katie was in the program. One of Liz's outbursts prompted Father to subsequently apologize to staff members for Liz's behavior.

{¶11} Jeanette Pelton, Katie's counselor, informed the guardian ad litem the therapy initially focused on the effects of the gay lifestyle on children. Pelton had a total of nine sessions with Katie. Pelton noted the behaviors which Katie exhibited and which Father expressed concerns were normal reactions to a child experiencing changes in her life. Pelton was concerned Mother had not been advised by Father that Katie was in counseling.

{¶12} Stephanie Kreisher, the guardian ad litem, testified regarding her report and recommendations. Kreisher noted her concerns about the intrusiveness of Father's new wife, Liz. Kreisher believed Liz had overstepped her bounds on some occasions. Kreisher recommended Mother be given custody and Father have parenting time pursuant to Local Rule 2. She acknowledged Father's love for Katie, but noted he was not able to stand up to Liz's intrusive and controlling behavior.

{¶13} The magistrate issued her decision on September 10, 2013, terminating the parties' shared parenting agreement, and designating Mother as the residential parent and legal custodian of Katie. The magistrate found a change in circumstances and modification was in Katie's best interest. Father filed timely objections to the magistrate's decision. Via Journal Entry dated May 7, 2014, the trial court overruled Father's objections, and approved and adopted the magistrate's decision as order of the court with one exception relating to the tax exemption.

{¶14} It is from this judgment entry Father appeals, assigning as error:

{¶15} "I. THE TRIAL COURT ERRED TO TARY'S PREJUDICE BY FINDING A CHANGE IN CIRCUMSTANCES SUFFICIENT TO TERMINATE THE PARTIES' SHARED PARENTING PLAN UNDER R.C. 3109.04(E).

{¶16} "II. THE TRIAL COURT ERRED TO TARY'S PREJUDICE BY DETERMINING IT WAS IN KATIE'S BEST INTERESTS THAT CUSTODY BE GRANTED TO CANDY."

I, II

{¶17} Because Father's assignments of error are interrelated, we shall address them together. In his first assignment of error, Father contends the trial court erred by finding a change in circumstances sufficient to terminate the parties' shared parenting plan. In his second assignment of error, Father asserts the trial court erred in finding the change in custody was in Katie's best interest. We disagree.

{¶18} A trial court enjoys broad discretion in custody proceedings. *Cossin v. Holley,* 5th Dist. Morrow No.2006 CA 0014, 2007–Ohio–5258, ¶ 28 citing *Davis v. Flickinger,* 77 Ohio St.3d 415, 674 N.E.2d 1159 (1997), paragraph one of the syllabus.

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. 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, 450 N.E.2d 1140 (1983).

{¶19} R.C. 3109.04(E)(1)(a) governs the modification of a prior decree allocating parental rights and provides, in relevant part:

> 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 * * * unless the modification is in the best interest of the child * * *and one of the following applies: * * * (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} Thus, before a court may modify a prior allocation of parental rights and responsibilities, it must consider: (1) whether a change in circumstances occurred, (2) whether modification is in the child's best interest, and (3) whether the benefits that result from the change outweigh any harm. *Clark v. Smith* (1998), 130 Ohio App.3d

648, 653, 720 N.E.2d 973, 976. The record must support each of these findings or the modification of child custody is contrary to law. *Davis v. Flickinger*, supra at 417. Additionally, R.C. 3109.04(E)(1)(a) creates a rebuttable presumption that retaining the residential parent designated by the prior decree is in the child's best interest. *Meyer v. Anderson* (April 18, 1997), Miami Co.App. No. 96CA32, unreported, 1997 WL 189383.

CHANGE IN CIRCUMSTANCES

{¶21} "Although R.C. 3109.04 does not provide a definition of the phrase '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." ' *Lewis v. Lewis,* 12th Dist. Butler No. CA2001–09–209, 2002 WL 517991 (April 8, 2002), citing *Rohrbaugh v. Rohrbaugh,* 136 Ohio App.3d 599, 604–05, 737 N.E.2d 551 (7th Dist.2000). In order to warrant the abrupt disruption of the child's home life, the change in circumstances must be one "of substance, not a slight or inconsequential change." *Flickinger,* supra at 418. "The purpose of requiring a finding of a change in circumstances is to prevent a constant re-litigation of issues that have already been determined by the trial court. * * * Therefore, the modification must be based upon some fact that has arisen since the prior order or was unknown at the time of the prior order." *Brammer v. Brammer,* 194 Ohio App.3d 240, 955 N.E.2d 453, 2011–Ohio–2610, ¶ 17 (3rd Dist.), citing R.C. 3109.04(E)(1)(a).

{¶22} Herein, the magistrate found Mother had established there had been a change in circumstances. The magistrate specifically noted, "The change has to do with [Father's] marriage to Liz and the resultant inability to communicate with [Father]. Because the parents do not speak to each other about what is going on with their

daughter, instead of a balanced parental approach, the child is subjected to a complete change in environment on a week-to-week basis." September 10, 2013 Magistrate's Decision at 28. The magistrate added Liz takes a lead role in parenting Katie when such should be left to Father and Mother.

{¶23} We find sufficient evidence was presented to find the trial court did not abuse its discretion in finding a change in circumstances warranting a reallocation of parental rights. Father's first assignment of error is overruled.

BEST INTEREST

{¶24} If a change of circumstances is established, the trial court must weigh the best interest of the children before modifying a residential-parent designation. R.C. 3109.04(F), which sets forth the factors a trial court must consider in determining the best interest of the child, provides:

> 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;
>
> (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;

(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;

(g) 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;

(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child * * *;

(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;

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

{¶25} We find no abuse of discretion in the trial court's conclusion it was in Katie’s best interests to name Mother the residential parent and legal custodian. The

magistrate decision thoroughly analyzed the factors and the findings were supported by the record. The most significant factor in this case was the parents' inability to communicate effectively due to Liz overstepping her role as step-parent. The Guardian ad Litem recommended Mother be given custody based upon her interviews with all involved individuals.

{¶26} Father's second assignment of error is overruled.

{¶27} The judgment of the Morrow County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Hoffman, P.J.

Gwin, J. and

Wise, J. concur