[Cite as *Noe v. Noe*, 2015-Ohio-847.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JASON NOE

Plaintiff-Appellee

-vs-

GINA R. NOE, nka HUGHES

Defendant-Appellant

JUDGES:
Hon. John W. Wise, P. J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

Case No. 14 COA 026

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 04 DIV 072
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 6, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MATTHEW J. MALONE 10 East Main Street Ashland, Ohio 44805	VALERIE A. LANG 1149 East Main Street, P.O. Box 713 Ashland, Ohio 44805

Wise, P. J.

{¶1}. Appellant Gina R. Noe, nka Hughes, appeals the decision of the Ashland County Court of Common Pleas, Domestic Relations Division, which denied her motion to change custody and thus maintained residential parent status with Appellee Jason Noe, in regard to the parties' son, G.N. The relevant facts leading to this appeal are as follows.

Marriage and Divorce of the Parties

{¶2}. Appellant Gina and Appellee Jason were married on April 27, 2001. One child, G.N., was born as issue of the marriage in 2002.[1] In 2004, Jason filed for divorce in Ashland County. On March 28, 2005, the trial court issued a decree of divorce which, among other things, granted custody of G.N., then approximately three years old, to Jason.

Prior Post-Decree Litigation

{¶3}. On June 29, 2005, Gina filed a motion to modify custody. Gina argued *inter alia* that because Jason was working full-time in Wooster, Ohio, and because she did not work outside the home, it would be in the child's best interest to be cared for by her during the day. Following an evidentiary hearing, the magistrate issued a decision on July 25, 2007, determining that a change had occurred in the circumstances of the child and the child's residential parent and that a modification was necessary to serve the best interests of the child. The magistrate further determined that it was in the best interests of the child to be with Gina during the day, rather than in day care. *Id.*

---

[1] In order to avoid confusion as to the identity of the parties, particularly in light of the existence of a prior post-decree appeal stemming from their divorce, we will hereinafter refer to appellant and appellee as much as possible by their respective first names.

{¶4}. Jason filed objections to the magistrate's decision on August 13, 2007. Via a judgment entry filed on November 7, 2007, the trial court overruled Jason's objections to the magistrate's decision and affirmed the decision of the magistrate.

{¶5}. Jason thereupon filed a direct appeal to this Court. He first argued the trial court had abused its discretion when it denied his motion for a new hearing, filed as part of his objection to the decision of the magistrate. We sustained Jason's assigned error, noting that during the one year and nine months it took the magistrate to issue his decision and the further delay on the trial court's rulings, the circumstances upon which the magistrate's decision was based had ceased to exist, as the child had ceased attending day care and was instead enrolled in elementary school. *See Noe v. Noe nka Hughes*, 5th Dist. Ashland No. 07-COA-047, 2008-Ohio-1700, ¶ 20. We therefore sustained the first assigned error, found the remaining issues unripe, and reversed the trial court's decision. *Id.* at ¶ 22 - ¶ 24.

{¶6}. Following our remand, the trial court conducted a new hearing. However, on August 11, 2008, the trial court issued a judgment entry denying Gina's motion for custody.

Further Post-Decree Litigation

{¶7}. On March 22, 2013, Gina again filed a "motion for change of custody."[2] The matter proceeded to evidentiary hearings before a magistrate on November 21, 2013 and January 27, 2014. The magistrate also conducted an *in camera* interview with

---

[2] In Ohio, the General Assembly has indicated a preference in R.C. 3109.04 for the concept of the allocation of parental rights and responsibilities, in lieu of the term "custody." *See Litreal v. Litreal*, 4th Dist. Adams No. 93 CA 546, 1993 WL 415310, f.n. 2. However, in the interest of clarity in this opinion, we will adhere to the terminology used in Appellant Gina's motion.

G.N. on January 30, 2014. On April 28, 2014, the magistrate issued a twelve-page written decision ultimately denying Gina's motion for custody.

{¶8}. On May 12, 2014, Gina filed an objection to the decision of the magistrate. On May 13, 2014, Jason filed a response to the objection.

{¶9}. On August 21, 2014, the trial court issued a judgment entry adopting the decision of the magistrate, with the exception of one finding concerning the issue of child support.

{¶10}. On September 19, 2014, Appellant Gina filed a notice of appeal. She herein raises the following sole Assignment of Error:

{¶11}. "I. THE TRIAL COURT ERRED IN DECLINING TO CONSIDER THE BEST INTEREST OF THE CHILD."

I.

{¶12}. In her sole Assignment of Error, Appellant Gina argues the trial court, in considering her motion to change custody, erred by declining to reach the issue of the child's best interest, thereby denying said motion. We disagree.

{¶13}. 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.

{¶14}. 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. * * *.”

{¶15}. Thus, a trial court will not have to reach the best interest analysis if a change of circumstances is not found. *Kenney v. Kenney*, 12th Dist. Warren No. CA2003-07-078, 2004-Ohio-3912, ¶ 29. We note R.C. 3109.04 itself does not define the concept of "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.

{¶16}. In the case sub judice, the magistrate, after hearing the evidence, found appellant had failed to demonstrate a “change in circumstances" under R.C. 3109.04(E)(1)(a), *supra. See* Magistrate's Decision at 10-11. The trial court thereafter adopted the decision of the magistrate, with the exception of one finding pertaining to the import of non-payment of child support. *See* Judgment Entry, August 21, 2014, at 3. Appellant Gina presently directs us to evidence that indicates Appellee Jason had been evicted from his residences “several times” prior to the magistrate's hearing. Some of these instances were based on Jason's non-payment of rent, while in one instance, Jason kept pets in violation of his lease. Appellant also points out that Jason's

stepdaughter, A.A., was removed by Wayne County Children Services via an emergency court order based on the circumstances of one of these relocations. In August 2013, Jason lost his job, purportedly based on work performance and attendance issues. Gina asserts that G.N. is now dealing with academic issues, poor appetite, an attention deficit "problem", and that he has struggled socially and stopped attending counseling. She also charges that Jason has repeatedly failed to pick up the child at the end of her parenting time, making her responsible for transporting rather than sharing those costs as per local practice.[3]

{¶17}. In *Stein v. Anderson*, 5th Dist. Tuscarawas No. 2009 AP 08 0042, 2010-Ohio-18, this Court stated as follows regarding changes of residence by a parent: "[W]hether intrastate or out-of-state, we think the preferred general rule is that a relocation, by itself, is not sufficient to be considered a change of circumstances, but it is a factor in such a determination." *Id.* at ¶ 13, citing *Green v. Green* (Mar. 31, 1998), Lake App. No. 96-L-145, 1998 WL 258434. Furthermore, " ' * * * since a child is almost always going to be harmed to some extent by being moved, the non-custodial parent should not be able to satisfy his or her burden simply by showing that *some* harm will result; the amount of harm must transcend the normal and expected problems of adjustment.' " *Id.*, quoting *Schiavone v. Antonelli* (Dec. 10, 1993), Trumbull App.No. 92-T-4794, 1993 WL 548034, emphasis in original.[4]

---

[3] Appellant also directs us to certain recommendations by the guardian ad litem. *See* Appellant's Brief at 2-3. However, we reiterate that our present focus is on change in circumstances rather than best interests.

[4] It is worth noting that in *Schiavone,* the children had moved to California with the mother in 1990; the father, who continued to live in Ohio, filed a motion to modify custody about one year later.

{¶18}. In the case sub judice, Gina's argumentative position is somewhat inconsistent. Despite the aforementioned concerns and the allegations in her brief that G.N. suffers physically, emotionally and academically, Gina testified that the child is "healthy," that "he doesn't have too many [health] issues," that his eating habits are fine, and that he is academically "thriving," yet struggling in some academic areas. *See* Tr. at 22, 24, 25. Gina did not have a concern for the child's safety in Jason's home, although she did not believe the environment was "stable." *See* Tr. at 14. She also stated that his school grades were "much better" for the then-present school year. Tr. At 52. She also noted he had a girlfriend, and she opined that socially "he's doing okay right now." Tr. at 52.

{¶19}. Gina's brief does not elaborate on time frames, but the record indicates that while Jason has indeed lived in four different residences in Wayne County, Ohio, with his present wife, his wife's daughter, and G.N., these moves had taken place over a period between 2008 and 2013. In addition, Jason obtained employment in Wooster, Ohio, in November 2013, and was, at the time of the hearing, expecting a raise to $14.00 per hour in February 2014. *See* Magistrate's Decision at 6.

{¶20}. Finally, we must recognize that a domestic relations court is a court of equity. *See Phillips v. Phillips*, 5th Dist. Stark No. 2014-Ohio-5439, 2014CA00090, ¶ 44, citing *Saari v. Saari,* 195 Ohio App.3d 444, 2011-Ohio-4710, 960 N.E.2d 539, ¶ 8 (9th Dist.). Despite Gina's emphasis on Jason's housing changes and financial problems as grounds for her requested custody change, she effectively acknowledged at the hearing that Jason's non-payment of rent was exacerbated by her past failures to pay child support (*see* Tr. at 32), which have resulted in contempt findings against her.

She also conceded that G.N. probably could have had a "more stable living environment" if she had regularly kept up with her child support obligations. *See* Tr. at 49.

{¶21}. Upon review, we find it was within the trial court's discretion to determine that nothing rising to the level of a material and adverse occurrence impacting G.N. was demonstrated for purposes of finding a change in circumstances under R.C. 3109.04(E)(1)(a).

{¶22}. Appellant's sole Assignment of Error is therefore overruled.

{¶23}. For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, Ashland County, Ohio, is hereby affirmed.

By: Wise, P. J.

Delaney, J., and

Baldwin, J., concur.

JWW/d 0218