[Cite as *Martin v. Fuller*, 2016-Ohio-3158.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DEREK K. MARTIN	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 15-CA-88
	:	
RACHEL FULLER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Domestic Relations Division, Case No. 2008 DR 01064 DF
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	May 9, 2016

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
VICKY M. CHRISTIANSEN JULIA K. FIX 172 Hudson Ave. Newark, OH 43055-5750	GARY J. GOTTFRIED ERIC M. BROWN 608 Office Parkway, Suite B Westerville, OH 43082

Delaney, J.

{¶1} Defendant-Appellant Rachel Fuller appeals the November 3, 2015 judgment entry of the Licking County Court of Common Pleas, Domestic Relations Division.

FACTS AND PROCEDURAL HISTORY

{¶2} Defendant-Appellant Rachel Fuller and Plaintiff-Appellee Derek Martin are the parents of A.M., born August 11, 2007. Mother and Father were not married.

{¶3} Mother and Father shared jointly allocated parental rights and responsibilities pursuant to a Decree of Shared Parenting filed November 12, 2008. The parties amended their Shared Parenting Plan by agreement and pursuant to an Agreed Judgment Entry filed August 17, 2011. The amended Shared Parenting Plan named Father as the school placement parent.

{¶4} In July 2011, Mother moved from Ohio to West Virginia to be with her boyfriend. Mother left A.M. with Father. Mother has another child and when she moved to West Virginia, she left her other child with the father.

{¶5} In August or September 2011, Mother was visiting a friend in Florida for a two-week vacation. She was in an automobile accident while in Florida, which caused her to remain in Florida until her court date. Mother found employment and decided to relocate to Florida permanently.

{¶6} While Mother was residing in West Virginia and Florida, Mother had infrequent visitation with the child. A.M. did visit with Mother in Florida.

{¶7} On July 29, 2013, Father filed a motion to terminate the Shared Parenting Plan. Father sought to reallocate the parental rights so that he would be named the sole

residential parent and legal custodian. Mother filed a motion to reallocate parental rights and responsibilities on April 3, 2015. Mother stated a change of circumstances occurred since the Shared Parenting Plan was approved in that: "Mother/Defendant moved to the State of Florida; the language of the Plan is incorrect or not specific enough to be interpreted by the parties; the work schedules of the parties have changed; there are medical, mental and/or health concerns regarding the child; Father/Plaintiff is not communicating with Mother/Defendant or informing her of certain things as required by the Plan; * * *."

{¶8} A hearing was held before the magistrate on April 8, 2015. The magistrate conducted an in camera interview with A.M.

{¶9} A.M. resides with Father, stepmother, and her half-brother. A.M. is enrolled in elementary school and involved in different sports activities, such as volleyball and soccer. She participates in 4H.

{¶10} Mother testified she chose to stay in Florida because she wanted to establish herself and create a better environment for her children. She felt she struggled in Ohio and Florida offered her better opportunities. At the time of the hearing, she testified she had stable employment and was involved in her church. Mother acknowledged that in 2013, after Father filed the motion to terminate the Shared Parenting Plan, she was more consistent with her visitation of A.M.

{¶11} On April 30, 2015, the magistrate issued her decision. The magistrate determined there had been a change of circumstances and it was in the best interest of the child that the Shared Parenting Plan be terminated. The magistrate named Father as the residential parent and legal custodian of the child.

{¶12} Mother filed objections to the magistrate's decision. The trial court independently reviewed the record and overruled Mother's objections relevant to this appeal. On November 3, 2015, the trial court granted Father's motion to terminate the Shared Parenting Plan.

{¶13} It is from this judgment entry Mother now appeals.

ASSIGNMENTS OF ERROR

{¶14} Mother raises two Assignments of Error:

{¶15} "I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT CONCLUDED THAT THERE HAD BEEN A CHANGE IN CIRCUMSTANCES FOR PURPOSES OF SATISFYING R.C. 3109(E)(1) AND TERMINATING THE PARTIES' SHARED PARENTING PLAN.

{¶16} "II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ESTABLISHING THE PARENTING TIME SCHEDULE FOR APPELLANT."

ANALYSIS

I. CHANGE OF CIRCUMSTANCES

{¶17} Mother argues in her first Assignment of Error that the trial court abused its discretion when it found there was a change in circumstances and terminated the Shared Parenting Plan. 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 415,1997–Ohio–260, 674 N.E.2d 1159, paragraph one of the syllabus. 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: (i) The residential parent agrees to a change in the resident 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.

{¶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*, 130 Ohio App.3d 648, 653, 720 N.E.2d 973, 976 (3rd Dist.1998). The record must support each of these findings or the modification of child custody is contrary to law. *Davis v. Flickinger, supra* at 417.

{¶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.' " *Torch v. Criss*, 5th Dist. Tuscarawas No. 2015AP040020, 2015-Ohio-5328, ¶ 39 quoting *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, 2011–Ohio–2610, 955 N.E.2d 453, ¶ 17 (3rd Dist.), citing R.C. 3109.04(E)(1)(a).

{¶22} In the case sub judice, the magistrate determined Father established there was a change of circumstances. Mother argues the magistrate did not give specific reasons in her decision upon which to support the finding of a change of circumstances. In Father's appellate brief, he argues that Mother stated in her April 3, 2015 motion to reallocate parental rights that there were a change of circumstances. She provided

multiple examples in her motion, such as Mother's change of residence to Florida and the language of the Shared Parenting Plan was not specific enough to be interpreted by the parties.

{¶23} At the inception of the Shared Parenting Plan, Mother was residing in Ohio and participating in A.M.'s care. In 2011, Mother left Ohio to move to West Virginia and then to Florida. She left A.M. in Father's care. Stepmother testified that A.M. came to live with Father on a full-time basis starting in 2011. Father became the primary caregiver to A.M. when Mother left Ohio. Father testified he filed the motion to terminate the Shared Parenting Plan because the plan was no longer working because Mother moved out of state. (T. 89). Father testified Mother would text to tell him when she was coming to visit and Father did not have a choice, which he felt was in contravention of the terms of the Shared Parenting Plan. (T. 89). Mother acknowledged she was not consistent with her visitation of A.M. until 2013, which was after Father filed the motion to terminate the Shared Parenting Plan.

{¶24} We find Mother's change in residence after the amendment of the Shared Parenting Plan to be an event that had a material and adverse effect on the child. Mother left A.M. in the care of her Father in 2011 and did not visit with A.M. consistently until 2013. We find no abuse of discretion to determine a change of circumstances occurred. Mother did not argue on appeal that termination of the Shared Parenting Plan was not in the best interests of the child.

{¶25} Accordingly, we overrule Mother's first Assignment of Error.

II. PARENTING TIME

{¶26} Mother argues in her second Assignment of Error that the trial court abused its discretion when it established the parenting time for Mother. In her decision, the magistrate gave Mother parenting time with A.M. during the school year one time per month after school on Friday (or at 4:00 p.m. when the child is not in school) until Sunday at 8:00 p.m. Mother was to give Father 30 days' notice of the weekend she wished to exercise parenting time on any given month. Mother could also enjoy parenting time during holidays and days of special meaning pursuant to Licking County Local Rule 19, unless otherwise agreed in writing by the parties. Finally, Mother was given summer parenting as follows: during even-numbered years, Mother shall exercise parenting time beginning at 5:00 p.m. on July 8 through 5:00 p.m. on the last Friday before school resumes at the end of the summer. During odd-numbered years, Mother shall exercise parenting time between 5:00 p.m. on the first Monday following the first full weekend in June after school recesses for the summer and ending at 5:00 p.m. on July 22.

{¶27} The trial court utilized R.C. 3109.051(D) to determine what parenting time to provide to each parent. The factors in R.C. 3109.051(D) are:

> (1) The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity, and with the person who requested companionship or visitation if that person is not a parent, sibling, or relative of the child;
>
> (2) The geographical location of the residence of each parent and the distance between those residences, and if the person is not a parent, the

geographical location of that person's residence and the distance between that person's residence and the child's residence;

(3) The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;

(4) The age of the child;

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

(6) If the court has interviewed the child in chambers, pursuant to division (C) of this section, regarding the wishes and concerns of the child as to parenting time by the parent who is not the residential parent or companionship or visitation by the grandparent, relative, or other person who requested companionship or visitation, as to a specific parenting time or visitation schedule, or as to other parenting time or visitation matters, the wishes and concerns of the child, as expressed to the court;

(7) The health and safety of the child;

(8) The amount of time that will be available for the child to spend with siblings;

(9) The mental and physical health of all parties;

(10) Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights, and with respect to a person who requested companionship or visitation, the willingness of that person to reschedule missed visitation;

* * *

(13) 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;

(14) Whether either parent has established a residence or is planning to establish a residence outside this state;

(15) In relation to requested companionship or visitation by a person other than a parent, the wishes and concerns of the child's parents, as expressed by them to the court;

(16) Any other factor in the best interest of the child.

Holiday Parenting Time

{¶28} Mother contends the trial court erred in granting parenting time pursuant to Licking County Local Rule 19, as opposed to Coshocton County Local Rule 7. She states Coshocton County Local Rule 7 was used to establish parenting time for her other child. It would be more convenient for Mother if Coshocton County Local Rule 7 governed her parenting time for both children. She states Father testified at trial that he felt parenting time pursuant to Coshocton County Local Rule 7 was appropriate.

{¶29} At trial, when asked what visitation he felt Mother should have, Father testified, “I think she should get, you know, the normal visitation for, well like, what we had thought was maybe a culmination of both Rule 19 and Rule 7, with some variations for holidays, and things of that nature, but also, you know, once a month visits if she wants to keep that up or, you know, really what time she has to spend with her I guess.” (T. 94-95). Coshocton County Local Rule 7 was entered as Exhibit 10. (T. 95). Father was asked to look at the holiday section of Coshocton County Local Rule 7 and he testified that he

agreed to the schedule, with some modifications, so that A.M. and her half-sister could spend some time together. (T. 99). Father also testified that he would be happy with the holiday schedule in their current Shared Parenting Plan. (T. 100). The November 12, 2008 Decree of Shared Parenting stated all holidays and days of special meaning were to be according to Licking County Local Rule 19. The parties agreed to modify Easter, Thanksgiving, and Christmas Day.

{¶30} The trial court followed Licking County Local Rule 19 to establish the holiday parenting time. We find no abuse of discretion in its decision because Local Rule 19 was utilized in the original Shared Parenting Plan. The record does not support Mother's contention that Father conceded to the exclusive use of Coshocton County Local Rule 7 to establish Mother's holiday parenting time.

Monthly Visitation

{¶31} Mother further argues the trial court abused its discretion when it granted parenting time to Mother during the school year for one weekend per month from Friday to Sunday at 8:00 p.m. Mother argues her parenting time should conclude on Monday at the beginning of school or at 8:00 p.m.

{¶32} Mother filed objections to the magistrate's decision on September 15, 2015. In her objections, she argued she should be granted parenting time during the school year of no less than 10 to 12 days per month. The trial court overruled this objection to parenting time. Mother argues for the first time on appeal that her parenting time during the school year should be until Monday. Mother bases her argument on Father's testimony, which stated:

Q. * * * As we sit here today, you don't have a problem with mom having visitation one a month?

A. No, ma'am.

Q. In Ohio?

A. Yes.

Q. From when to when?

A. For the weekends, like she's been having her, Friday to Sunday, or, you know, even Monday night if necessary.

(T. 95).

{¶33} The record does not show that Father agreed to Mother's parenting time from Friday until Monday. Father stated he would be amenable to parenting time from Friday to Sunday, or Monday, if necessary. Mother did not present the trial court with the option of extending her parenting time to Monday in her objections to the magistrate's decision. Mother's parenting time with her other child is one time per month during the school year beginning after school on Friday until Sunday at 8:00 p.m. (T. 20). The record supports the trial court's determination that Mother's parenting time from Friday to Sunday was in the best interests of the child.

{¶34} Mother's second Assignment of Error is overruled.

CONCLUSION

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

By: Delaney, J.,

Wise, P.J. and

Baldwin, J., concur.