[Cite as *Dowell v. Dowell*, 2007-Ohio-6026.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Laura J. Dowell	Court of Appeals No. E-07-016
Appellee	Trial Court No. 93-DR-157
v.	
Gary J. Dowell, Jr.	**DECISION AND JUDGMENT ENTRY**
Appellant	Decided: November 9, 2007

* * * * *

Brian J. Seitz, for appellant.

* * * * *

SKOW, J.

{¶ 1} Appellant, Gary J. Dowell, appeals the judgment of the Erie County Court of Common Pleas' decision to deny his motion to modify custody and terminate child support. For the following reasons, the judgment is affirmed.

{¶ 2} Appellant and Laura J. Dowell, appellee, were divorced in 1996. Custody of the parties' son, D., was awarded to appellee at that time. In his motion to modify custody, appellant pointed to D.'s wishes in wanting to live with him as a "change in

circumstances." After a hearing, including an in camera examination of D., the magistrate found that D.'s wishes and adolescence did not constitute a change in circumstances and that a modification of the custody order was contrary to D.'s best interests.

{¶ 3} Upon appellant's objections, the trial court applied our decision in *Perz v. Perz* (1993), 85 Ohio App.3d 374, to find that D.'s wishes and maturity did constitute a change in circumstances. However, upon consideration, the trial court agreed with the magistrate that despite D.'s wishes, a grant of custody to appellant was contrary to D.'s best interests.

{¶ 4} From that judgment, appellant raises one assignment of error for review:

{¶ 5} "THE TRIAL COURT ERRED, ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION TO MODIFY CUSTODY."

{¶ 6} Before a motion to modify custody in a post-divorce proceeding can be granted, the trial court must find (1) that a "change of circumstances" has occurred which warrants a change of custody and (2) the change in custody must be in the minor child's best interests. R.C. 3109.04(B). Whether a change of circumstances exists is initially determined prior to proceeding to consider the child's best interests. *Perz v. Perz* (1993), 85 Ohio App.3d 374, 376. A determination of whether a "change of circumstances" has occurred should not be disturbed on appeal absent abuse of discretion. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415. Even if a change in circumstances exists,

however, the change must be demonstrably in the child's best interests. *Pryer v. Pryer* (1984), 20 Ohio App.3d 170. In order to find an abuse of discretion, the reviewing court must conclude that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 219.

{¶ 7} Appellee has not filed a brief on appeal. However, upon review of the record, we do find that the evidence supports a finding that a change in circumstances exists. Specifically, D. expressed his wishes to live with appellant to appellant, the magistrate, two home-study evaluators, and his paternal grandparents. He was nearly 14 years old at the time of the in camera examination, and the trial court found he exhibited sufficient maturity to express his wishes. The finding that a change in circumstances exists, therefore, must remain undisturbed.

{¶ 8} The child's best interest remains paramount, however, despite a change in circumstances. *Davis v. Flickinger*, 77 Ohio St.3d at 420. In considering whether a modification of custody serves the child's best interests, the court examines factors pursuant to R.C. 3109.04(F)(1), which provides in relevant part:

{¶ 9} "* * * the court shall consider all relevant factors, including, but not limited to:

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

{¶ 11} "(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;

{¶ 12} "(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;

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

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

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

{¶ 16} "(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;

{¶ 17} "(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 * * *;

{¶ 18} "(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;

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

{¶ 20} The trial court, considering these factors, found that appellant failed to show that the harm likely to be caused by the change is outweighed by the advantages of

the change in environment. Its judgment entry methodically analyzed the applicability of each factor and each finding is supported by the record.

{¶ 21} Pursuant to subsection (a), both appellant and appellee desired to be named residential parent.

{¶ 22} Pursuant to subsection (b), D. wishes to live with appellant. His main reason was to reduce the conflict he feels in appellee's home between him and his mother and brother.

{¶ 23} Pursuant to subsection (c) and (d), the trial court found that D. has lived with appellee since the parties' divorce in 1996. He has an established relationship with both maternal and paternal grandparents, and all have regular contact with him. D. has stepsiblings in both his father's and mother's home. D. experiences conflict with his 12 year-old maternal stepsibling, R.; D. reported an incident where R. "pulled a knife" on him. The trial court's judgment entry states: "D. described that they argue a lot and that at one point shortly before trial R. pulled a knife on him. He went on to describe that Mom told R. to put down the knife but never physically intervened much to D.'s chagrin. This is a troubling event for D. to have experienced. The Court notes that while Mother should have intervened more appropriately but except for this incident the problems between D. and R. seem to be normal sibling rivalry. * * * All of this being considered, D. shows no significant problems emotionally, socially or academically." The court also found that D. has average school grades, is involved in extracurricular activities, and is well liked by teachers and students.

{¶ 24} Pursuant to subsection (e), the trial court found that "[a]ll parties appear relatively healthy with the exception of Mother." The evidence showed that appellee became addicted to prescription pain killers after several surgeries. This resulted in the loss of her job and criminal charges. The court found that appellee "has engaged in treatment and the treatment and her sobriety are being supervised by the criminal justice system."

{¶ 25} Pursuant to subsections (f) and (i), appellant repeatedly alleged that appellee denied him court-scheduled visitation. The trial court found that appellant "only started regular visits since his child support increased in December of 2005. * * * Father appears to have had numerous opportunities to spend time with his son but for some unexplained reason has not put much effort into doing so." While appellant argued that appellee denied him visitation because she did not want to drive to the county of his residence, the court noted that the visitation order makes appellant responsible for transportation, nullifying his argument that appellee is responsible.

{¶ 26} Pursuant to subsection (g), it was noted that appellee has never had a child support obligation, but that, in 1997, appellant was found in contempt for failure to pay child and spousal support. In May 1998, appellant was ordered to jail for 30 days to purge the contempt, but has been current since that time.

{¶ 27} Pursuant to subsection (h), neither party has been convicted of or has pled guilty to a criminal offense involving child abuse or neglect. However, the trial court's

entry proceeded to note, with some detail, the parties' prior alcohol use and its contribution to their "rocky" divorce.

{¶ 28} Pursuant to subsection (j), the court found neither party planned to relocate from their current residences.

{¶ 29} Appellant argues that application of these factors inexorably leads to a conclusion that a change in custody is in D.'s best interests, contrary to the trial court's finding. Appellant grounds his arguments in four factors weighing most negatively against appellee.

{¶ 30} First, appellant argues that D.'s conflict with his maternal stepsibling, R., was mischaracterized by the trial court as "normal sibling rivalry." Since D. reported that R. "pulled a knife" on him, appellant argues, the trial court underestimated the negative impact that appellee's household environment has on D. While the incident is disturbing, the trial court found that appellee intervened – although D. wished his mother had intervened physically and not merely verbally, we are not in the position, as is the trial court, to judge whether appellee's intervention was appropriate in context.

{¶ 31} Second, appellant reiterates his allegations that appellee has refused to comply with the court-ordered visitation schedule. The trial court's entry found otherwise.

{¶ 32} Third, appellant argues that appellee's substance abuse issues have a significant negative effect on D. The trial court's entry found, however, that appellee's substance abuse issues were offset by appellant's frequent alcohol use which was "well

documented" and which "resulted in law enforcement reports." Nothing indicates that appellant currently has problems with alcohol use or abuse. By the same token, however, the trial court found that appellee's substance abuse problems were being "addressed and monitored."

{¶ 33} Fourth, appellant makes much of the home studies commissioned by the court. Specifically, he points to the testimony of Cindy Franketti, who performed the home study at appellant's home. She recommended that D. be allowed to live with appellant, especially if D. expressed the same wish to the court. The home study conducted of appellant's home found it suitable, noted that appellant's spouse does not work outside the home, and his spouse and both of D.'s paternal step-siblings desire D. to live with them.

{¶ 34} Although these factors weigh somewhat negatively against appellee, the trial court carefully balanced those considerations with the negative impact that a change in custody would have on D. R.C. 3109.04(E)(1)(a)(iii). Each finding in the trial court's methodical judgment entry is supported by the record. Those impacts include the change in D.'s established school and sports activities, the potential damage to his close relationship with his maternal grandparents, and his placement into a home with which he has previously only had "sporadic experience."

{¶ 35} Much of the fact-finding process in child custody matters depends upon the credibility and demeanor of the witnesses. Those are matters for the trier of facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A review of this

record on appeal, including the home studies, shows the trial court's conclusions supported by the testimony. Therefore, we conclude that the trial court did not abuse its discretion in ruling that a modification of custody would be contrary to D.'s best interests.

{¶ 36} Appellant's assignment of error is not well-taken. The judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Erie County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, P.J. _____
JUDGE

William J. Skow, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE