

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

A.P. Court of Appeals No. WD-09-063

Appellant Trial Court No. 04 JF 0174

v.

J.Z. **DECISION AND JUDGMENT**

Appellee Decided: November 12, 2010

* * * * *

Barry H. Wolinetz and Amanda C. Baker, for appellant.

Ann M. Baronas, for appellee.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, Juvenile Division, which denied appellant's motion for reallocation of parental rights and responsibilities and simultaneously denied appellee's motion to adopt the guardian ad litem's recommendations and establish a child support obligation against

appellant. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, A.P., father of the subject minor child, sets forth the following three assignments of error:

{¶ 3} "ASSIGNMENT OF ERROR ONE. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BECAUSE THE MANIFEST WEIGHT OF THE EVIDENCE ESTABLISHES THAT THERE WAS A CHANGE IN THE CIRCUMSTANCES OF MOTHER AND [K. THE MINOR CHILD].

{¶ 4} "ASSIGNMENT OF ERROR TWO. THE TRIAL COURT'S DECISION THAT A CHANGE OF CUSTODY WAS NOT IN [K.'S] BEST INTEREST CONSTITUTES AN ABUSE OF DISCRETION BECAUSE THIS DECISION IS NOT SUPPORTED BY SUBSTANTIAL AMOUNT OF CREDIBLE AND COMPETENT EVIDENCE AND THEREFORE IS UNREASONABLE, ARBITRARY AND UNCONSCIONABLE.

{¶ 5} "ASSIGNMENT OF ERROR THREE. THE TRIAL COURT'S DECISION CONCERNING PARENTING TIME IS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE AND FURTHER CONSTITUTES AN ABUSE OF DISCRETION."

{¶ 6} The following undisputed facts are relevant to the issues raised on appeal. This case has been the subject of recurrent litigation since its 2004 commencement. In

November 2006, the initial custody trial was conducted. This court ultimately remanded the matter to the trial court for further review and proceedings.

{¶ 7} On October 21, 2008, the trial court issued its judgment on remand. Appellee, the child's mother, was designated the residential parent of the parties' minor daughter. This outcome was in conformity with the stated positions of the guardian ad litem and the court-appointed psychologist.

{¶ 8} On October 3, 2008, several weeks prior to the court even announcing the above-referenced custody decision, appellant filed an additional motion to modify parental rights again seeking designation as the residential parent. On April 21, 2009, appellant withdrew the motion in the wake of discord with the anticipated recommendations of the guardian ad litem again favorable to appellee. On May 22, 2009, appellant filed the latest, subject motion to modify parental rights and be designated the residential parent of the parties' child. On June 23, 2009, appellee filed a motion to adopt the time allocation recommendations of the guardian ad litem and to set a child support order against appellant.

{¶ 9} On June 25, 2009, a two day trial pertaining to the pending motions was conducted. Following this thorough, contested hearing, the trial court determined that appellant failed to establish the requisite change of circumstances so as to potentially warrant a best interest modification of the existing residential parenting orders.

{¶ 10} Despite finding the threshold establishment of a change in circumstances was not met, the court nevertheless went so far as to engage in a full best interest analysis

on an arguendo basis. It consistently concluded that no best interest justification for modification had been demonstrated by appellant so as to justify residential parenting order modifications. Accordingly, the trial court denied appellant's motion to modify parental rights. It simultaneously denied appellee's motion to adopt time allocation recommendations of the guardian ad litem and establish child support. Timely notice of appeal was filed.

{¶ 11} Appellant's first two assignments of error are rooted in the identical premise that the trial court abused its discretion in denying appellant's motion to modify parental rights. As such, they will be considered simultaneously.

{¶ 12} R.C. 3109.04(E)(1)(a) establishes 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 interests of the child."

{¶ 13} In conjunction with the above-quoted controlling statutory provision, it is well-established that in order to be deemed a requisite change in circumstances so as to trigger best interest analysis, an asserted change must be demonstrated to be, "of substance, not slight or inconsequential." *Davis v. Flickinger* (1997), 77 Ohio St.3d 415. Lastly, appellate review of disputed change in circumstances determinations is conducted

on an abuse of discretion basis. As such, such decisions may not be reversed absent establishment that the disputed judgment was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 14} In support of appellant's motion to modify parental rights, appellant set forth eleven sets of allegations in an effort to demonstrate the requisite change in circumstances. The litany of allegations ranges from appellee's alleged deficiencies in her handling of the enrollment of the minor child in ballet classes to more inflammatory issues pertaining to appellee's hosting of overnight male guests in her apartment.

{¶ 15} We have carefully considered the record of proceedings from below to determine if there is any reflection that the trial court was unreasonable, arbitrary or unconscionable in its assessment and determination that appellant failed to demonstrate the requisite R.C. 3109.04 consequential change in circumstances in support of his motion to modify the existing allocation of parental rights and responsibilities.

{¶ 16} Contrary to appellant's abuse of discretion contention, we find that the record reflects that the trial court thoughtfully and methodically weighed and considered each of appellant's change in circumstance allegations and the competing evidence and testimony in connection to same.

{¶ 17} For example, with respect to the ballet class dispute, the court was presented with both testimony and documentation countering appellant's contention that appellee had violated the court ordered prohibition of the scheduling of activities for the minor child which impermissibly impact the time-sharing of the other party. With

respect to co-parenting class allegations, evidence was furnished to the court indicative that both parties were accountable for the failure to complete the counseling despite appellant's contention that appellee alone was culpable in this regard.

{¶ 18} Weighing against the various allegations against appellee in which the evidence presented was either insufficient against appellee or reflective of mutual culpability, appellee conceded violating the court ordered prohibition against overnight non-spousal guests in appellee's bedroom. However, the court significantly noted the context in which this order originated. At the time the order was put in place, appellee shared a bedroom with the minor child. Appellee subsequently relocated to a two-bedroom apartment. In addition, the court emphasized the lack of evidence demonstrating that the non-contested violation caused substantial impact to the minor child.

{¶ 19} Based upon the ample evidence and testimony before it, the trial court notably praised the overall health and well-being of the minor child. The evidence before the trial court reflected that the minor child loves both of her parents, desires that her parents get along, has had no consequential changes in health, and, "has remained an engaging, active young girl who enjoys being with both parents." The court further noted that appellee's circumstances have actually ameliorated, not deteriorated, since imposition of the disputed parental rights order. Appellee has secured full-time employment, relocated to a larger apartment, obtained appropriate babysitting services, and has exhibited proper efforts to be in compliance with court orders.

{¶ 20} Given these facts and circumstances, the trial court concluded that appellant had failed to establish the requisite consequential change in circumstances so as to potentially warrant a best interest of the child modification of parental rights and responsibilities. Nevertheless, the trial court indulged appellant on an arguendo basis with a thorough and complete best interest analysis. The court determined that the best interest of the minor child was not served by modifying the existing parental rights and responsibilities order. On the contrary, the court emphasized that the evidence reflected a healthy, happy, well-functioning child.

{¶ 21} We find nothing in the record indicative that the trial court was unreasonable, arbitrary or unconscionable in its determinations that appellant failed to establish a threshold change in circumstances and that, regardless, the best interest of the child was not served by modifications to the existing parental rights and responsibilities order. Ample evidence was presented counter to appellant's consequential change in circumstances allegations and counter to appellant's contention that the best interest of the minor would be served by a modification in parental rights and responsibilities. We find appellant's first and second assignments of error are not well-taken.

{¶ 22} In appellant's third assignment of error, he sets forth the position, substantively analogous to the import of his first two assignments of error, that the trial court abused its discretion in failing to establish equal parenting time between the parties. In support, appellant predominantly reiterates the arguments set forth in the first two assignments of error. We need not belabor our analysis on this point. Given our

determinations in response to appellant's first two assignments, appellant's third assignment fails as a matter of law. We find appellant's third assignment of error not well-taken.

{¶ 23} On consideration whereof, the judgment of the Wood County Court of Common Pleas, Juvenile Division, is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
