[Cite as *Kurfess v. Gibbs*, 2011-Ohio-2698.]

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

Mark F. Kurfess	Court of Appeals No. L-09-1295
Appellee	Trial Court No. DR2001-1635
v.	
Jeanne M. Gibbs	**DECISION AND JUDGMENT**
Appellant	Decided: June 3, 2011

* * * * *

Michele Lynn Gregory, for appellee.

Rebecca L. West-Estell, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, in which the court granted the motion of plaintiff-appellee, Mark F. Kurfess, to reallocate the designation of residential parent and legal custodian. Defendant-appellant, Jeanne M. Gibbs, challenges that judgment through the following assignments of error:

{¶ 2} "I. The trial court erred in finding that it was in the best interest of the child, John F. K[.], to have Mark Kurfess as the residential parent and legal custodian by not complying with the mandates of 3109.04 O.R.C.

{¶ 3} "II. The trial court erred in finding that it was in the best interests of the child, John F. K[.], to have Mark Kurfess as the residential parent and legal custodian when there was unsufficient [sic] evidence to establish a change of circumstances.

{¶ 4} "III. The trial court's ruling was against the manifest weight of the evidence.

{¶ 5} "IV. The trial court erred in not giving due consideration to the mother's status as primary caregiver.

{¶ 6} "V. The trial court erred when it disqualified a key witness in appellant's case."

{¶ 7} Also pending in this appeal is a motion by Kurfess to strike various portions of Gibbs' reply brief and a request for attorney fees incurred by Kurfess' counsel to prepare the motion to strike.

{¶ 8} Gibbs and Kurfess were married on March 13, 1999. One child, John, was born of the marriage in 2000. On December 14, 2001, Kurfess filed a complaint for divorce in the court below. By that time, Gibbs had moved to Alabama with John. The parties eventually reached an agreement as to all matters and issues, and on June 3, 2003, filed a consent judgment entry to that effect. In relevant part, the consent judgment entry provided that Gibbs was to be designated the residential parent and legal custodian as to all issues pertaining to John, and that Kurfess was to be given visitation with John

pursuant to the court's "Long Distance Parental Visitation Schedule Option One." Under that visitation schedule, Kurfess was granted visitation with John on the third weekend of each month, for the entire summer from June 15 to August 15, and on various other holidays.

{¶ 9} On June 14, 2005, following a motion to show cause filed by Kurfess, the parties filed a second consent judgment entry that modified the prior order. Under the new order, Kurfess was again granted parenting time pursuant to the court's "Long Distance Parenting Time Schedule Option One," but the schedule was modified so that during periods when John did not have school on Fridays, parenting time was to commence at 7:00 p.m. on Thursdays and continue until 7:00 p.m. on Sundays, Central Time. In addition, Kurfess was to provide John with a telephone and was to call him on Mondays, Tuesdays and Thursdays, between 7:00 p.m. and 8:00 p.m., Central Time; Gibbs was required to make sure that the telephone was on, charged and answered during that time; and the phone calls were to last no longer than 20 minutes, with the calls completed by 8:00 p.m., Central Time. The consent order further provided that Gibbs was to provide Kurfess with the name and telephone number of John's day care and/or school and was required to instruct the staff at the day care and/or school to provide Kurfess with relevant information regarding John. The parties were further ordered not to speak negatively about each other in John's presence.

{¶ 10} On July 11, 2007, Kurfess filed a motion to show cause and to reallocate parental rights and responsibilities in the court below. Kurfess alleged that Gibbs had not

complied with a number of aspects of the consent order and had interfered with his ability to have a relationship with John by not facilitating telephone calls, shutting off the phone until one minute before 8:00 p.m., refusing to provide educational information regarding John, and speaking ill of Kurfess in front of John. Kurfess further alleged that when he finally accessed John's educational information, he discovered that John had an excessive truancy and absenteeism rate. Based on John's actions and reactions during Kurfess' weekend and summer visitation with him, Kurfess asserted he was concerned that John was being subjected to emotional and educational neglect while in the custody of Gibbs. Kurfess therefore asserted that it was in John's best interest that custody be granted to Kurfess and for Gibbs to be granted visitation. He also requested that Gibbs be held in contempt for violating the prior court orders. In light of this motion, the lower court appointed a guardian ad litem to protect John's interests during the proceedings.

{¶ 11} Subsequently, on February 29, 2008, Kurfess filed a motion requesting that he be granted temporary custody of John while the motion to reallocate parental rights and responsibilities was pending. He further requested an expedited hearing on the matter. In support of his motion, Kurfess asserted that an ongoing problem for John had been his attendance at school and socialization problems. Despite these problems, Gibbs withdrew John from the school he had been attending and enrolled him in another school without notifying Kurfess. Following an expedited hearing, the lower court granted Kurfess immediate possession of John, commencing February 29, 2008, permitting him to bring John to Ohio and enroll him in school.

{¶ 12} A three-day hearing was held on Kurfess' motion, at which Kurfess, Gibbs, Heather Fournier (the guardian ad litem), and others testified. In addition, Dr. Eric Nicely, a licensed clinical psychologist who had conducted forensic custody evaluations of Kurfess, Gibbs, John, and Pattie Hamblin (Kurfess' girlfriend who, at the time of the hearing, no longer lived with Kurfess) at the request of the guardian ad litem, testified regarding those evaluations.

{¶ 13} On October 31, 2008, the lower court magistrate issued a decision which granted Kurfess' motion and designated him the residential parent and legal custodian of John, effective July 11, 2007. The magistrate made extensive findings of fact in support of her determination, pursuant to R.C. 3109.04(E), that a modification was in the best interest of John. In response, Gibbs filed objections to the magistrate's decision which read in their entirety as follows:

{¶ 14} "1. The court's findings of fact are contrary to the actual evidence presented.

{¶ 15} "2. The court's findings regarding defendant's mental state are also not supported by the evidence.

{¶ 16} "3. The court failed to give the proper weight to defendant's expert witness."

{¶ 17} The objections, therefore, failed to comply with Civ.R. 53(D)(3)(b)(ii), which reads: "An objection to a magistrate's decision shall be specific and state with particularity all grounds for the objection." Nevertheless, the lower court, in ruling on the

objections, did review the transcript of the hearing and determined that the magistrate's decision was well founded in both fact and law. More specifically, the court held that there was ample credible evidence to support the magistrate's decision and that there was nothing in the record to indicate that the magistrate did not consider the testimony of Gibbs' expert. The magistrate simply did not agree with the expert or find her testimony persuasive. Accordingly, the lower court overruled Gibbs' objections and adopted the magistrate's decision as the permanent order of the court. It is from that judgment that Gibbs appeals.

{¶ 18} Because the first, second, third and fourth assignments of error are related, we will discuss them together. Under these combined assignments of error, Gibbs asserts that the trial court erred in its application of R.C. 3109.04(E) in that the court's findings were not supported by the record.

{¶ 19} In determining the allocation of parental rights and responsibilities for the care of minor children, the trial court is vested with broad discretion. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Absent an abuse of that discretion, a trial court's decision regarding these issues will be upheld. *Masters v. Masters* (1994), 69 Ohio St.3d 83, 85. An abuse of discretion implies that the court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In applying an abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. See *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 416. "This highly deferential standard of review rests on the premise that the

trial judge is in the best position to determine the credibility of witnesses because he or she is able to observe their demeanor, gestures, and attitude. * * * This is especially true in a child custody case, since there may be much that is evident in the parties' demeanor and attitude that does not transfer well to the record." *In re LS*, 152 Ohio App.3d 500, 2003-Ohio-2045, ¶ 12.

{¶ 20} R.C. 3109.04(E) sets forth the standards for modifying a custody order and reads in relevant part:

{¶ 21} "(1)(a) 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, [or] the child's residential parent * * *, 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 a modification is in the best interest of the child and one of the following applies:

{¶ 22} "(i) The residential parent agrees to a change in the residential parent * * *.

{¶ 23} "(ii) The child, with the consent of the residential parent * * *, has been integrated into the family of the person seeking to become the residential parent.

{¶ 24} "(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."

{¶ 25} R.C. 3109.04(F)(1) then provides that in determining the best interest of the child, the court is to consider all relevant factors, including, but not limited to:

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

{¶ 27} "(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;

{¶ 28} "(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;

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

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

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

{¶ 32} "(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;

{¶ 33} "(h) * * * whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense * * *;

{¶ 34} "(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;

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

{¶ 36} While the trial court has broad discretion in matters regarding the custody of children, its exercise of that discretion "is not unlimited, but must always be rooted in the facts of the case." *Beekman v. Beekman* (1994), 96 Ohio App.3d 783, 787. As such, the court's determination to grant a change of custody must be supported by sufficient factual evidence regarding the change in circumstances, the child's best interest, and that the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child. Id. See, also, *Kimbler v. Kimbler*, 4th Dist. No. 05CA2994, 2006-Ohio-2695, ¶ 31. We will not reverse a judgment as being against the manifest weight of the evidence when the record contains some competent, credible evidence going to all the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶ 37} In its decision, the lower court quoted the relevant provisions of R.C. 3109.04(E) and (F) and then set forth the following facts in support of its decision that custody of John should be reallocated from Gibbs to Kurfess.

{¶ 38} Relevant to R.C. 3109.04(F)(1)(c) and (d), the court found that John had appropriate relationships with Gibbs, Kurfess and extended family members but that he

had experienced social interaction problems while in the care of Gibbs. While in Gibbs' custody, John was absent or tardy from school on numerous occasions. The school records admitted into evidence at the hearing below revealed that during the 2005-2006 school year, when John was in kindergarten, he was absent or tardy 16 times. Because of John's attendance issues, the truancy officer from the school contacted Gibbs. Then, during John's first grade year of school, 2006-2007, he was absent or tardy 36 times. Gibbs explained at the hearing below that John is slow to wake up in the morning and she had been unaware of the number of times he had been absent or tardy until she saw his school records. In second grade, John's attendance improved, but in February 2008, Gibbs withdrew him from the school he had been attending since kindergarten and enrolled him in a church school in which there were four children in his class. Gibbs explained that she changed John's school because he requested the change, he likes to be the new kid and receive lots of attention, and she believed that he would be safer at the new school. She had been concerned that John was being bullied at school, however she did not bring her concerns to the attention of school officials before removing John from the school. She also did not notify Kurfess regarding the change in schools.

{¶ 39} The court further found, relevant to R.C. 3109.04(F)(1)(e), that although there was no testimony relating to any diagnosed mental or physical health issues regarding either parent, in the court's view Gibbs has an unusual thought process. As the court stated: "She may not outright fabricate stories but she certainly only discloses the facts that are favorable to her. She was not concerned or even aware of the number of

times their child was tardy or absent from school. She encouraged their child to 'snoop' around the Plaintiff's residence to locate a telephone she had given to their child. She was not aware and then not concerned about their child not being friends with children his age."

{¶ 40} The court next made findings relevant to R.C. 3109.04(F)(1)(f) and (i). Specifically, the court determined that Gibbs was not a parent who honored or facilitated parenting time between John and Kurfess. When she completed school forms for John, she failed to list Kurfess as John's father, listing her own father instead. In an earlier portion of its decision, the court noted that at the hearing Gibbs stated that she did not list Kurfess on the forms because he is "controlling, manipulative, and lying and I feared he would take the child without my permission." Regarding telephone contact between John and Kurfess, the court determined that although Kurfess provided John with a cellular telephone for regular conversations, Gibbs had been uncooperative regarding that contact. The court noted that Gibbs described Kurfess' telephone calls to John as interrupting their lives, despite the court order that Kurfess is to have telephone contact with John three nights a week between the hours of 7:00 p.m. and 8:00 p.m.

{¶ 41} On the issue of domestic violence between the parties, R.C. 3109.04(F)(1)(h), the court determined that there had been no evidence or testimony presented that either party has a criminal record. Nevertheless, the court did recognize an earlier incident of domestic violence between the parties, to which Kurfess admitted. Although Gibbs states in her brief that this occurred during the marriage and that Kurfess

was convicted of domestic violence, the record contains no evidence of a criminal conviction. Moreover, the incident to which the court and Dr. Nicely referred, in which Kurfess was drunk and kicked out Gibbs' front teeth, occurred in 1995. Following that incident, the parties did not see or speak to each other for three years. They later became reacquainted and married in 1999.

{¶ 42} On the issue of residency, R.C. 3109.04(F)(1)(j), the court noted that Gibbs had established her residence in the state of Alabama, then in the state of Florida, then back to the state of Alabama.

{¶ 43} In addition to the specific findings that the court made pursuant to R.C. 3109.04(F)(1), the court noted that both the court appointed psychologist, Dr. Eric Nicely, and the guardian ad litem, Heather Fournier, recommended that Kurfess be designated the residential parent and legal custodian. Dr. Nicely's recommendation was based on interviews with Kurfess, Gibbs and John and on his administration of the MMPI-2, an objective personality inventory. In his report, Dr. Nicely opined that there was sufficient cause to be concerned that under Gibbs' care, John had not been getting the attention he needed in terms of his academic and social development. Heather Fournier's recommendation was also based on interviews with Kurfess, Gibbs and John.

{¶ 44} Upon a thorough review of the record, we find competent, credible evidence to support the trial court's judgment and find that the trial court did not abuse its discretion in reallocating custody of John. In particular, we note that when Gibbs first obtained custody of John, he was only three years old. When the original order was

modified in 2005, John was still young and not yet in school. Upon John's entering kindergarten, however, he began to suffer academically and socially, to the concern of both his school and his father. Accordingly, a change in circumstances had occurred. Moreover, in light of all of the court's express findings pursuant to R.C. 3109.04(F)(1), findings that a change in custody was in John's best interest and that the harm likely to be caused by a change of environment was outweighed by the advantages of the change of environment were similarly supported by the record. Pursuant to R.C. 3109.04(E)(1)(a), the court was not required to retain the residential parent designated by the prior decree. The first, second, third and fourth assignments of error are not well-taken.

{¶ 45} In her fifth assignment of error, Gibbs asserts that the lower court erred in disqualifying a key witness in her case. Gibbs refers to the court's disqualification of Jeffrey J. Rosinski, whom Gibbs called purportedly to testify on the issue of whether Kurfess would ever harm John. When questioned by the court, however, Rosinski revealed that he had not seen Kurfess with John since John was approximately one year old. The court disqualified Rosinski for the reason that only testimony regarding the time frame from the 2005 order forward was relevant to the issues before the court.

{¶ 46} The issue of whether evidence is relevant is a matter left to the sound discretion of the trial judge. *Renfro v. Black* (1990), 52 Ohio St.3d 27, 31. Accordingly, the court's exclusion of evidence will not be reversed on appeal absent an abuse of that discretion. As we set forth above, R.C. 3109.04(E)(1)(a) 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* * * *." Applied to the present case, only facts that have arisen since the 2005 consent order were relevant to the trial court's determination below. A review of the court's decision reveals that those were the facts on which the court relied in reaching its decision. We therefore cannot find that the court abused its discretion in disqualifying Rosinski as a witness in the proceedings below. The fifth assignment of error is not well-taken.

{¶ 47} Finally, we must address a motion to strike and for attorney fees filed by Kurfess. In his motion, Kurfess seeks an order from this court striking from Gibbs' reply brief four statements which Kurfess contends are unsupported by the record. He further requests an award of $1,000 in attorney fees incurred by his counsel to prepare and file the motion to strike. A determination of the merits of this case was resolved following this court's review of the record of the court below and not from either parties' presentation of the facts in their briefs. Accordingly, we find the motion to strike and for attorney fees not well-taken and the same is hereby denied.

{¶ 48} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is 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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE