

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

S.J. Court of Appeals No. L-11-1011

Appellant Trial Court No. 07173562

v.

J.T. **DECISION AND JUDGMENT**

Appellee Decided: December 9, 2011

* * * * *

Walter J. Skotynsky, for appellant.

Martha J. Riewaldt, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, Juvenile Division, which dismissed a motion to modify custody and parental rights. Because we conclude that the trial court properly dismissed appellant's motion, we affirm.

{¶ 2} Appellant, S.J., is the biological father ("father") and J.T. is the biological mother ("mother") of the parties' child, A.J., born in 1995. After reviewing May and April 2009 magistrate's decisions, the trial court designated mother as the residential parent and legal custodian of the child. In February 2010, father filed a motion to modify that custody designation and for "Rehearing on Evidence that was not Presented by prior counsel at Hearing" and for attorney fees and costs. Father also requested that a guardian ad litem ("GAL") be appointed.

{¶ 3} In May 2010, the court initially appointed the same GAL for the child that had served in the prior proceedings. Pursuant to the father withdrawing his request for a GAL, in July 2010 the court relieved that attorney of his GAL duties. A final pretrial was set for October 10, 2010. On October 8, 2010, mother filed a motion to dismiss, arguing that father's motion was not, in fact, based upon new evidence, but was just an attempt to rehear the initial custody issues. On October 29, 2010, father responded in opposition to the motion to dismiss.

{¶ 4} On the basis of the pleadings filed, the magistrate determined that the motion to dismiss should be granted, finding that father had failed to "set forth a change in circumstances of the child or that child's residential parent [as] required under ORC 3109.04(E)(1)(a)." No objections were filed by either party. On the basis of the motion to dismiss and the response in opposition, the juvenile court adopted the magistrate's decision and granted mother's motion to dismiss.

{¶ 5} Father now appeals from that judgment, arguing the following two assignments of error:

{¶ 6} "The trial court abused its discretion in granting the appellee's motion to dismiss by arbitrarily failing to hold an evidentiary hearing or hear testimony despite the appellant's request for a modification of custody.

{¶ 7} "The trial court abused its discretion by unreasonably determining that the appellant's motion for modification of parental rights failed to set forth a change in circumstances as required under R.C. §3109.04(E)(1)(c)."

{¶ 8} We will address father's assignments of error together, since they both relate to the trial court's determination of father's motion to modify custody. We initially note that father did not file any objections to the magistrate's decision. Such failure generally constitutes a waiver of any factual errors or conclusions of law which form the basis for the juvenile court's decision. See Juv.R. 40(D)(3)(b)(iv). As a result, the juvenile court was only required to independently review the decision to determine whether an error of law or other defect existed on the face of the magistrate's decision. See Juv.R. 40(D)(4)(c). In adopting the magistrate's decision, the juvenile court also determined that father's basis for the modification in custody did not sufficiently establish a change of circumstances as required under R.C. 3109.04(E)(1)(a). When a party has failed to file objections to a magistrate's decision, an appellate court's review is limited to review for plain error. See Juv.R. 40(D)(3)(b)(iv); *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, syllabus (plain error is not favored and is applicable in rare case where error "seriously

affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself"). With this standard in mind, we will now address father's assignments of error.

{¶ 9} A trial court has broad discretion in child custody proceedings. See, e.g., *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418. Because the trial court is to be afforded wide latitude in considering all the evidence, its custody decision will not be reversed absent an abuse of discretion. *Id.*

{¶ 10} R.C. 3109.04(E)(1)(a), which governs the modification of a previous order allocating parental rights and responsibilities, states in relevant part:

{¶ 11} "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 or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

{¶ 12} "(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

{¶ 13} "(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.

{¶ 14} "(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."

{¶ 15} In order for a trial court to make the threshold determination that there has been a change of circumstances, the movant need not prove that there had been a "substantial" change in circumstances, but "the change must be a change of substance, not a slight or inconsequential change." *Davis*, supra, at 417-418. The phrase, "change in circumstances," is generally "intended to denote an event occurrence, or situation which has had a material and adverse effect upon a child." *Rohrbaugh v. Rohrbaugh* (2000), 136 Ohio App.3d 599, 604-605. The trial court has the broad discretion to determine whether sufficient changed circumstances have occurred between the parents in order to proceed past this threshold question. *Davis*, supra, at 418.

{¶ 16} Ohio courts have considered a variety of factors that are relevant to the change-in-circumstances requirement of R.C. 3109.04(E)(1)(a). *In re Brayden James*, 113 Ohio St.3d 420, 2007-Ohio-2335, ¶ 18. See, for example, *Davis*, supra, at 419 (new marriage that creates hostility by the residential parent and spouse toward the nonresidential parent, frustrating attempts at visitation); *Dedic v. Dedic* (Jan. 27, 1999), 9th Dist. No. 98CA0008 (fights between residential parent and new spouse with police intervention, along with residential parent's moving six times in two years); *Butler v.*

Butler (1995), 107 Ohio App.3d 633 (unruly behavior of the residential parent involving the police); and *Perz v. Perz* (1993), 85 Ohio App.3d 374, 377 (the advancement of a child from infancy to adolescence).

{¶ 17} Where the same conditions existed at the time of the initial custody designation as those cited in support of a motion to change custody, a trial court does not abuse its discretion in determining no change of circumstances has been established. See *Burnip v. Nickerson*, 7th Dist. No. 07-CO-42, 2008-Ohio-5052. Furthermore, where a motion to modify custody is based upon issues which have already been addressed by the court, the failure to conduct a hearing as to those matters is not an abuse of discretion. See *In re Schwendeman*, 4th Dist. No. 06CA33, 2007-Ohio-815, ¶ 26; *Wysong v. Wysong* (Feb. 11, 2002), 12th Dist. No. CA2001-06-011; *Bebout v. Vittling* (Nov.19, 2001), 5th Dist. No. 2001CA00169.

{¶ 18} Upon review of the record, we can find no plain error by the trial court in its determination that the reasons set forth by father in his motion did not establish a change of circumstances. Although the brief time period of three months would not automatically preclude the review of a motion to modify custody, father's motion mainly includes those issues argued in the initial custody proceeding or are speculative. As a result, the juvenile court was also not required to conduct a hearing as to those issues. Thus, we cannot say that the trial court committed plain error or abused its discretion in determining that father failed to establish that a sufficient change in circumstance existed or in failing to conduct a full hearing as to father's motion. Therefore, the trial court did

not abuse its discretion in adopting the magistrate's decision or in dismissing father's motion to modify custody and for a rehearing on the evidence.

{¶ 19} Accordingly, appellant's two assignments of error are not well-taken.

{¶ 20} The judgment of the Lucas County Court of Common Pleas, Juvenile 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

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.
