[Cite as *Foos v. Foos*, 2012-Ohio-1234.]

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

Wendy A. Foos	Court of Appeals No. WD-11-005
Appellant	Trial Court No. 03DR113
v.	
Clarence T. Foos	**DECISION AND JUDGMENT**
Appellee	Decided: March 23, 2012

* * * * *

Michael R. Bassett, for appellant.

Bonnie R. Rankin, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the December 17, 2010 judgment of the Wood County Court of Common Pleas, Domestic Relations Division, which denied the motion of appellant, Wendy Foos, for an order modifying a prior custody decision. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

1. The trial court erred in ignoring the statutory requirements of ORC 3109.04(B)(1) when it denied Appellant's motion for an interview of the children.

2. The weight of evidence supported both a finding of a change of circumstances and the finding that a change of custody was in the children's best interest.

3. The trial court erred in not engaging in an analysis of the change of circumstances.

4. Even if Appellant was not granted custody, the trial court erred in not modifying the visitation schedule to give her first right of refusal when Appellee was at work.

5. The trial court erred in considering what took place at mediation, when no evidence was adduced at trial regarding same, nor would such have been appropriate.

{¶ 2} The parties in this case were divorced in 2004. In 2006, appellee moved to terminate the shared-parenting agreement and have him named as the residential parent and establish parenting time for appellant. At that time, the children born of the marriage (one born in 1997 and the other in 2000) were approximately 9 and 6 years of age. Following a hearing on the matter, the trial court terminated the shared-parenting agreement and named appellee the residential parent and legal custodian of the children

in 2008. Appellee was also ordered to make all educational and medical decisions for the children.

{¶ 3} In April 2009, appellant moved for a modification of custody on the ground that there had been a significant change in the mental and physical health of the children and the attitude of appellee and his wife. Also pending at this time was a motion to show cause and a Child Support Enforcement Agency action to determine whether appellant was in arrears for failing to pay her child support obligation. The two matters were first referred to mediation, but were not resolved.

{¶ 4} On February 11, 2010, appellant moved for an emergency temporary custody of the children. Appellant argued that appellee's wife had accused appellant's daughter of domestic abuse and had called the police to intervene, which was also very traumatic for appellant's son. This was the third time the police had been called to intervene since appellee had gained residential custody of the daughter. Appellant further alleged that appellee admitted in court that his wife is unable to control his daughter. The magistrate denied the motion finding there was no emergency. The court then appointed a guardian ad litem for the children.

{¶ 5} Following a hearing on May 11, 2010, the magistrate denied the motion for a change of custody. The trial court overruled appellant's objections to the magistrate's decision and issued a final judgment entry adopting the magistrate's decision. Appellant sought an appeal from that order.

{¶ 6} The following evidence was admitted at the May 11, 2010 hearing. The children in this case live with appellee, his wife, and her three children. The daughter has ADHD and the son has cerebral palsy. Appellee testified that he communicates with appellant primarily by email but does not respond to all of appellant's emails because they are too numerous and repetitive. Appellee is a fire fighter, working a 24-hours-on-duty and 48-hours-off-duty schedule.

{¶ 7} Appellant is a former teacher and is now employed on a part-time basis and attending college to obtain a master's degree. She testifies that she has a language disability but is able to communicate well by email. She explained that she has to send numerous follow-up emails to appellee because she has questions and he does not respond. Appellant testified that when they had shared custody, she had the children most of the time and she always made sure that appellee had all the information concerning the children. However, since appellee has residential custody, appellee does not send appellant any information at all.

{¶ 8} Appellant testified that she sees a mental health therapist as often as the therapist requests. She has been diagnosed with situational depression and anxiety for which she takes several medications as needed.

{¶ 9} One dispute between the parties has been appellee's action of taking vacation time on the Thursday nights when he is scheduled to work and appellant would otherwise have parenting time. Appellee notified appellant by email shortly after the 2008 decree was entered that he would be taking vacation every Thursday on a regular

basis. Appellee admitted that he did not like the provision in the decree that entitled appellant to visitation on Thursdays when appellee was scheduled to work. He testified that he takes the time off to provide a more consistent schedule for the children. Appellee accused appellant of manipulating the decree by interpreting it as providing that she would have parenting time when he was scheduled to work whether he took vacation time or not. Appellant denied that he deliberately took Thursdays off to prevent appellant from having parenting time. When appellant continued to press the issue, appellee threatened in an email to bring contempt charges against appellant or have a sheriff interpret the decree for her. However, in October 2009, appellee stopped taking the scheduled Thursdays off at the advice of his attorney. Because appellee is a firefighter, appellant contends that the children are already alone with their stepmother approximately ten days each month. Appellant argued that she should at least have a right of first refusal to care for the children when appellee is working as had been done under the shared-parenting agreement.

{¶ 10} Another contention between the parties is the education of the children and the daughter's behavioral issues. Appellee testified that on September 5, 2008, he was notified by the school that his daughter was not turning in her homework and that she needed immediate help to get caught up with her homework. The daughter was crying at school and missing recess because of missed homework. Appellant testified that she spent a considerable amount of her parenting time helping her daughter. Appellant also testified that she has been unable to get any information about the children's education

from appellee and has had to consult with the teachers directly to help the children. She further testified that appellee had not informed her of the meetings with the school officials so that she could be a part of the review of the individual education plans for the children.

{¶ 11} Appellee also emailed appellant to inform her that she was not to make any educational decisions for the children after appellant contacted the daughter's teachers and suggested that voice recognition software would help their daughter. He admitted he does not supply her with information about school, but has not done anything to block her from obtaining such information. He believed that their daughter should be forced to write and told the school not to provide the software. Appellant testified that she had discussed the issue of their daughter's poor penmanship with the teachers during conferences and they suggested a dictation program, which appellant recalled purchasing a few years earlier. She offered to allow the school to use her program to investigate the possibility of using such a program. Likewise, when appellant inquired about their son being assigned a scribe due to his fatigue, she learned that his homework was not being completed.

{¶ 12} Appellant testified that her daughter's grades had suffered since appellee became the residential parent. However, while the grade cards did reflect poor grades at the beginning of the 2008-2009 school year, by the fourth quarter of that year, a teacher had written on the daughter's grade cards that she had an awesome year and was ready for middle school. Appellant attributed the change to the fact that she had been working

with the child and the child was now medicated for ADHD. The daughter's grades declined again in the following year when she was in fifth grade, but there was no evidence regarding the reason for the change.

{¶ 13} Appellant recalled on one occasion in September 2008 of asking to pick up the children from school in order to help with homework and spend some time with the children and for five hours on Saturday, but appellee would not allow her to have extra parenting time. He indicated that he had already had problems with the daughter's behavior that week, which resulted in a need to call the police to intervene. He believed that her behavior was the result of spending time with appellant. He had already called the police on a prior incident in June 2008 when the daughter spit in appellee's face when he tried to get her to do her chores, and he had slapped her face as discipline. The daughter called the police, but no charges were filed.

{¶ 14} The daughter is enrolled in a counseling program that occurs during school time. On February 9, 2010, the daughter again had a conflict with a stepsister and when the stepmother asked the daughter to do a chore or go to her room, she either pushed or hit her stepmother. The stepmother described the event as happening very quickly. The stepmother called the police and requested that the child be taken to the "CRC," but that agency refused to accept her and the police decided to take her to the juvenile detention center instead because of the physical violence. The stepmother had also called the police on her oldest daughter in the past as well. The child's counselor had created a safety plan for the child when her anger escalated or she had an emotional outburst. The

plan provided for the child to go to her room, go for a walk, listen to music, or take a time out. If she became physically aggressive, the parents were to contact law enforcement. Appellee did not know if his wife tried the other options prior to calling the police. The daughter attempted to call appellant, but the stepmother intervened because she had grounded the daughter. After this event, appellee blocked appellant's phone calls to their daughter's cell phone because he believed that appellant was undermining his authority. He believed that the daughter's behavior was more limited in his presence.

{¶ 15} Appellant testified that she was very upset appellee allowed this incident to escalate to this level and he allowed the child to spend the night in the detention center when she has mental health issues. Appellant testified that when her daughter had called, appellant tried to talk her through the episode and calm her down, but the stepmother intervened and hung up the phone. Appellant was also concerned about the negative impact this event had on the son. Appellant sought emergency custody of the children after this event.

{¶ 16} Appellee and the stepmother both testified that the daughter's behavior has greatly improved since she came to live with appellee. The stepmother testified that the daughter no longer tells exaggerations, and her school behavior and grades have improved from the time when she first came to live with appellee and the stepmother. Although, she acknowledged the daughter's latest grade card shows that she is getting a D in math and is seldom prepared for class. The stepmother testified that both children now are able to get themselves up in the morning and ready for school. The son does

well in school and behaves well. They also have a home counselor who comes weekly to deal with the issues at home. Appellee generally helps the children with their homework, but the stepmother will help if appellee is working or the children ask her for help. Appellee testified that he relies upon his daughter to take responsibility for her own homework and does not double check that she has actually completed the work. He testified that he was not familiar with ADHD.

{¶ 17} Another issue raised by appellant was the fact that appellee scheduled after school activities during her parenting time. Appellee enrolled the children in a tutoring program in October 2008, which resulted in appellant losing her Wednesday afterschool time with the children. Appellee claimed that the children had been involved in a tutoring program in the prior school year, but appellant was unaware of it because it had never occurred on her night with the children. Appellee contended that after appellant contacted the tutor, the tutor did not want to be involved in the matter. Appellant testified, however, that the tutor had contacted appellant to ensure that the parties were in agreement. Appellant offered to substitute for the tutoring program, but appellee refused to allow her to do so because he did not believe it was in their children's best interest. After this conflict, appellee refused to allow appellant to pick up the children after school any longer. He asserted that the decree provides that appellant is to have parenting time from 5:00 p.m. onward and, therefore, is not entitled to parenting time after school.

{¶ 18} Appellee also enrolled the children in various activities after school. However, appellant acknowledged that she had repeatedly contacted appellee about

enrolling their son in soccer because he missed the prior season when appellee failed to register him. She had also been contacted by a former 4-H leader about the children remaining in the program. Both the son's soccer practices and the daughter's dance class were scheduled for Wednesdays. Appellant also accused appellee of enrolling the daughter in guitar lessons just prior to a Christmas visitation to circumvent her parenting time because appellee had failed to take their daughter to lessons which had been set up prior to the change in custody.

{¶ 19} Appellant also testified that she had difficulty getting contact information about coaches and leaders from appellee and he never gave her contact information to them. Despite the fact that these activities make it difficult for appellant to help the children with homework and get the children to bed timely, appellee will not allow appellant to pick the children up after school. While appellee did place the children in activities after school and scheduled medical appointments that occurred during appellant's parenting time, appellee denied deliberately selecting those days.

{¶ 20} Another issue between the parties is the religious education of the children. Appellant testified that appellee would not discuss the issue, but eventually the children were enrolled in two coordinating programs at two different churches. Appellant also contended that appellee would not ensure the children attended regularly or completed their workbooks. Appellee testified he preferred to switch appellant's overnight visit to Thursday so that the children would attend religious training at his church alone.

{¶ 21} Appellant was also concerned about an incident in December 2008 that negatively impacted the children. Appellee testified that he became aware that appellant's driver's license had been suspended for failure to pay child support. At that time, she had the children for the first half of Christmas break. The parties agreed to have appellant's parenting time end early so that appellee could take the children to church and a family party in exchange for appellant to have parenting time on Christmas Eve prior to 9:00 p.m. Appellant did not drive the children to their usual place for exchanging the children because appellee's wife had called the police to ensure that they went to appellant's home to inform her that if she was caught driving, she would be arrested. Appellee testified that his wife was concerned that appellant would drive the children without insurance coverage. While appellee denied telling his wife to call the police, he did send an email to appellant ahead of time to warn her that the police would be notified. The stepmother testified that she called the police to ensure that appellant was insured to drive and recalled specifically telling the police not to talk to appellant in front of the children, but the police did so anyway.

{¶ 22} Another issue was raised about medical information being shared with appellant. Appellee testified that he did not want appellant involved in medical appointments and has notified appellant that she is not to attend appointments. He indicated that he would inform appellant of significant medical issues, but not every doctor visit. Appellant testified that she is never informed of her children's health care, the names of the providers, or changes in medication. Appellant was concerned that their

son had never had a yearly well check since appellee became the residential parent. When their son was returned to her for a Christmas break visitation, she thought he seemed dehydrated and consulted appellee who agreed that he should be taken to the emergency room. When appellant arrived, she was unable to provide any information regarding insurance coverage and prescribed medicines. Appellee testified that it was not necessary for appellant to have that information, but agreed at the hearing to give her the information.

{¶ 23} Both appellee and the stepmother admitted that there may have been a few missed doctor appointments, but contended that the children were not deficient in their medical care. Appellee further admitted that his son had missed an occupational and speech therapy on the Monday before the hearing because appellee could not get him to the appointment.

{¶ 24} Appellant was concerned that she did not have enough information to determine whether the children were receiving the right medication. She recalled times when there was not enough medicine for one of the children during her parenting time. Appellee testified that he always fills the children's prescriptions at the beginning of the month and gives appellant the number of pills she needs for her parenting time in the prior month's bottle, which she could discard at the end of her month. Only once could he recall that the pharmacy could not completely fill a prescription and he had to take a few pills and wait for the remainder.

{¶ 25} Finally, appellant is dissatisfied with appellee's cooperation in communicating with her. She testified that when she sought information about the dates the children would be attending camp for the summer before determining her summer visitation, appellee did not respond. He contended that the prior year he requested that appellant not take the month of July for visitation because that was the only month his wife did not work, but appellant took three of the four weeks in July. Therefore, he refused to tell appellant of his plans the following year until after she selected her weeks for visitation.

{¶ 26} Appellant testified that she would always email appellee to plan visitations for school breaks but she would find out at the last minute appellee had scheduled doctor appointments during her parenting time or he would demand early exchanges of the children and threaten her with losing parenting time. Appellant also testified that there were issues with appellee notifying her at the last moment that he would not be home in time to exchange the children because they had an appointment or a meeting. Appellant testified that she tried to accommodate appellee's special events without asking for trade time, but he is not equally cooperative with her.

{¶ 27} The guardian ad litem testified that he consulted only the parents. He believed that appellee and the stepmother are providing a good environment for the children and are willing to work with appellant. However, he did find that some of appellant's concerns were legitimate, including appellee's slapping of the daughter and the placement of the daughter in the juvenile detention center. The guardian ad litem also

understood appellant feels that she is the better parent and resents the stepmother spending more time with the children than appellant is allowed. He did not find that appellant was interfering with appellee's control of the education of the children and had in fact been a positive influence. He concluded, however, there had not been a change in circumstances in this case.

{¶ 28} In her first assignment of error, appellant argues that the trial court erred as a matter of law when it denied appellant's request that the court conduct an in chambers interview with the children.

{¶ 29} R.C. 3109.04(B)(1) provides that:

> When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children. *In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for purposes of resolving any issues related to the making of that allocation, the court,* in its discretion, may and, *upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.* (Emphasis added.)

{¶ 30} The language of the statute clearly requires that the court conduct an interview of the children if a parent makes such a request. *Spine v. Spine*, 8th Dist. No. 89122, 2008-Ohio-47, ¶ 11 and *Terry L. v. Eva E.*, 12th Dist. No. CA2006-05-019, 2007-Ohio-916, ¶ 25. However, once the initial child custody determination has been made, the court need not conduct an in camera interview (even if requested by a party) until after the court determines that a change in circumstances has occurred, which would require the court to reconsider the best interests of the children. *Rice v. Rice*, 5th Dist. No. 10-CA-F-11-0091, 2011-Ohio-3099, ¶ 27; *Cravens v. Cravens*, 12th Dist. No. CA2008-02-033, 2009-Ohio-1733, ¶ 41; *Terry L.*, at ¶ 26 citing *Guess v. Springer*, 1st Dist. No. C010348, 2001 WL 1887710, *3; *Riggle v. Riggle*, 9th Dist. No. 01CA0012, 2001 WL 1133764, *3-4; and *Walsh v. Walsh*, 11th Dist. Nos. 2004-G-2587, 2005-LW-2774, 2005-Ohio-3264, ¶ 29.

{¶ 31} Since the trial court in this case did not find a change of circumstances had been proven, it was not required to conduct an interview of the children. Appellant's first assignment of error is not well-taken.

{¶ 32} In her second assignment of error, appellant argues that the trial court's judgment denying a modification of custody was contrary to the manifest weight of the evidence. Appellant argues that the prior custody award of June 2008 was premised on a factual finding that the children had a good relationship with their stepmother and that it would be better for their mental health to reside with appellee. There was evidence that the children were not calmer under their father's primary care and that the daughter was

now having severe emotional outbursts with both appellee and the stepmother resulting in the police intervening, which never occurred under appellant's care. Furthermore, the son was traumatized by these events and is now prevented from socializing with friends as he had in the past.

{¶ 33} Appellant also argues there was evidence proving appellee deliberately interfered with her parenting time by taking vacation on every Thursday night that appellant would have had additional parenting time while appellant worked. Furthermore, appellee prevented appellant from picking up the children after school on Wednesdays (when she could assist the children with their excessive amount of incomplete homework) as a punishment for talking to school officials about the children's tutoring and education. Appellant also contends that there was evidence that her daughter was having significant problems because she is not turning in her homework and appellee refuses to allow appellant to help the children.

{¶ 34} Appellant argued that even if the court would not allow her to serve as the residential parent, she should at least be given the right of first refusal to care for the children. She contended that it was clear since the original order that she allowed the father to have additional parenting time at her expense while he altered his schedule to prevent her from having her ordered parenting time. Furthermore, most of her parenting time has been spent catching the children up on missed homework because appellee does not attend to their education.

{¶ 35} Pursuant to R.C. 3109.04(E)(1)(a), once a final allocation of parental rights and responsibilities has been made, there is a presumption that a child should remain with the residential parent unless there has been a change of circumstances of the child or the residential parent since the prior decree or based on circumstances that were unknown to the court at the time of the prior decree. If the trial court finds that there has been a change of circumstances, the court must then determine that a modification is necessary to serve the best interest of the child. *Id*. Finally, the court must consider whether one of the circumstances set forth in R.C. 3109.04(E)(1)(a)(i)-(iii) applies, which in this case would be whether the "harm likely to be caused by a change of environment is outweighed by the advantages of the change in environment to the child." R.C. 3109.04(E)(1)(a)(iii).

{¶ 36} An appellate court reviews a trial court's decision regarding a motion for modification of a prior allocation of parental rights and responsibilities under an abuse of discretion standard. *Davis v. Flickinger*, 77 Ohio St.3d 415, 674 N.E.2d 1159 (1997), paragraphs one and two of the syllabus. Where the trial court's decision is supported by a substantial amount of credible and competent evidence, the award of custody will not be reversed by an appellate court as against the weight of evidence. *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 550 N.E.2d 178 (1990), syllabus.

{¶ 37} On appeal, appellant challenges that the trial court erred in not finding that there had been a change in circumstances in this case. It is clear, as the guardian ad litem concluded and the court noted in its judgment, that appellant has some legitimate

concerns in this case, but ultimately these concerns do not constitute a change in circumstances.

{¶ 38} While the prior decree clearly provided that appellant is to have parenting time on the Thursday appellee is scheduled to work, appellee took vacation days instead. The trial court found that this practice was not a violation of the order and as an appellate court we must defer to the trial court's interpretation of its own judgment. But, the court also found the practice did not encourage a mother-child relationship. Since appellee stopped the practice prior to the hearing, it no longer evidences a change of circumstances.

{¶ 39} The trial court did not find any evidence supporting the allegation appellee deliberately interrupted appellant's parenting time with medical appointments and activities after school. As an appellate court, we are bound to accept the factual findings of the trial court as the fact finder. We find the court did not address the other issues regarding parenting time, but conclude that these issues do not represent a change of circumstances in this case. The issues reflect the difficulties between the parties that must be worked out by the parties themselves as a court decree cannot address every issue that will arise in the parenting of children.

{¶ 40} The evidence does establish that appellee does not provide appellant with all medical and educational information she is entitled to receive as a parent of the children. While appellee was appointed to make all decisions regarding the medical and educational issues for the children, appellant is entitled to be informed of her children's

education and medical treatment. R.C. 3109.051(H)(1). However, there is no statutory requirement that the residential parent provide information available to the nonresidential parent from other sources. We find the one critical issue in this case was appellee's failure to share medical insurance coverage information, which the magistrate later ordered appellee to produce as he had agreed during the hearing.

{¶ 41} Like the trial court, we also find the daughter's educational and behavioral issues are not directly related to the custody order. The daughter had a difficult adjustment after the change in the residential parent, but she did improve her grades and her behavior over time. We note that her grades had declined again at the time of the hearing, but there was no further evidence as to a cause or evidence that a change of custody would alter the situation. The trial court had already noted the daughter's mental health was a concern at the time of the prior decree. The fact that her behavior and school performance have remained a delicate matter as she ages and progresses through school does not establish a change in circumstances under the facts of this case.

{¶ 42} Upon a review of all of the evidence presented in this case, we find that the trial court did not abuse its discretion when it concluded that there has not been a change in circumstances in this case. Appellant's second assignment of error is not well-taken.

{¶ 43} In her third assignment of error, appellant argues that while the trial court has discretion in custody matters, the finding that there had not been a change in circumstances was not supported by the evidence. She contends that the trial court did

not engage in a proper analysis by reviewing the evidence because it did not set forth any evidence to support its conclusion.

{¶ 44} The magistrate issued his findings of fact and conclusions of law in this case and appellant filed objections to the magistrate's decision. The trial court stated in its judgment that it independently reviewed all of the evidence presented in this case and the record. The court found appellant's objections to the magistrate's decision unfounded and agreed there was insufficient evidence of a change in circumstances. Therefore, the trial court approved and adopted the decision. The trial court was not required to include in its judgment any further analysis. *Hall v. Hall*, 6th Dist. No. H-07-006, 2007-Ohio-3952, ¶ 17-18. Appellant's third assignment of error is not well-taken.

{¶ 45} In her fourth assignment of error, appellant argues that the trial court erred by not giving her a first right of refusal to have visitation when appellant was unable to care for the children and was leaving them with their stepmother. Appellant contends that the majority of the conflicts between the children and their stepmother occurred when the stepmother was caring for the children. Even if the court found that there was insufficient evidence to warrant a change in the residential parent, appellant contends there was at least sufficient evidence to support an increase in visitation with appellant.

{¶ 46} Again, the trial court found that there had not been a change in circumstances to warrant a change in the prior custodial order. Appellant has failed to demonstrate the trial court abused its discretion in this case. Appellant's fourth assignment of error is not well-taken.

{¶ 47} In her fifth assignment of error, appellant argues that the trial court erred when it considered what took place at mediation when there was no evidence of the matter admitted at the change of custody hearing and could not have been because such evidence is privileged information. Appellee argues the trial court did not consider evidence disclosed during mediation, only that it occurred. We agree with appellee. The judgment merely states the events leading up to the motion for a change of custody. There were no references to any factual matters discussed in mediation. We find appellant's fifth assignment of error not well-taken.

{¶ 48} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Wood County Court of Common Pleas, Domestic Relations Division, is affirmed. Appellant is ordered to pay the court 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, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE