[Cite as *J.M. v. M.W.*, 2012-Ohio-4995.]

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

J.M.

Appellant

v.

M.W. fka M.M.

Appellee

Court of Appeals No. S-11-049

Trial Court No. 09 DR 91

DECISION AND JUDGMENT

Decided: October 26, 2012

* * * * *

Lisa M. Snyder, for appellant.

Christian R. Moore, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from the October 14, 2011 judgment of the Sandusky County Court of Common Pleas, Domestic Relations Division, in which the trial court denied plaintiff-appellant J.M.'s motion to reallocate parental rights and request for

custody of his minor daughter. Because we find that the trial court did not abuse its discretion, we affirm.

{¶ 2} J.M. (father) and M.W. (mother) were married in 2003 and their minor daughter, M.M., was born in 2004. The parties separated in 2005 and a dissolution agreement was finalized on February 24, 2009. The agreement provided that appellee, M.W., would be the residential parent and legal custodian and that appellant, J.M., would get scheduled parenting time and provide child support.

{¶ 3} On January 15, 2010, appellant filed a motion for a temporary restraining order after learning that appellee was planning a move to Colorado with M.M. The move was precipitated by M.W.'s husband's enlistment in the army. Thereafter, on February 5, 2010, appellant filed a motion for reallocation of parental rights/request for custody. In his motion, appellant argued that due to the change in circumstances (proposed move to Colorado) it was in M.M.'s best interests to reside with her father. A guardian ad litem ("GAL") was appointed for M.M.

{¶ 4} Appellee decided to not move to Colorado and on December 20, 2010, withdrew her notice to relocate. Following appellee's decision to remain in Sandusky County, appellant indicated a wish to pursue his motion for reallocation of parental rights.

{¶ 5} On October 14, 2011, following a hearing, the trial court denied appellant's motion for reallocation of parental rights. The court found that appellee's mental health issues have been addressed, M.M. was doing well in school, despite some glitches the

visitation schedule was working, and that appellant failed to overcome the presumption in maintaining appellee as the custodial parent. This appeal followed.

{¶ 6} Appellant now raises the following assignment of error:

> The trial court abused its discretion in finding that appellant is not entitled to a reallocation of parental rights under O.R.C. § 3109.04.

{¶ 7} In determining the allocation of parental rights and responsibilities for the care of minor children, the trial court has broad discretion. *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). Absent an abuse of that discretion, a trial court's decision regarding these issues will be upheld. *Masters v. Masters*, 69 Ohio St.3d 83, 85, 630 N.E.2d 665 (1994). An abuse of discretion implies that the court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). In applying an abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. *Davis v. Flickinger*, 77 Ohio St.3d 415, 416, 674 N.E.2d 1159 (1997).

> 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, 788 N.E.2d 696, 2003-Ohio-2045, ¶ 12 (8th Dist.).

{¶ 8} 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.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

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

> (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:
>
> (i) The residential parent agrees to a change in the residential parent * * *.
>
> (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.

(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.

{¶ 10} 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:

(a) The wishes of the child's parents regarding the child's care;

(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;

(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;

(d) The child's adjustment to the child's home, school, and community;

(e) The mental and physical health of all persons involved in the situation;

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

(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;

(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 * * *;

(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;

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

{¶ 11} Appellant's sole assignment of error disputes the trial court's finding that it was in M.M.'s best interests to deny his motion for custody. At the September 8, 2011 hearing, both parties testified as well as M.M.'s GAL and her first grade teacher.

{¶ 12} The GAL testified that her main concerns were appellee's failure to take her psychotropic medication and M.M.'s school absences and tardies. The GAL testified that since her April 2011 report appellee had been taking her medication and was "doing wonderful with the meds." The GAL also expressed concern regarding M.M.'s involvement with issues regarding the relationship between appellee and her husband. The GAL was also concerned about alleged promises made by appellee to M.M., which included buying a ranch and a horse if M.M. lived with her. The GAL described

appellee's home environment as "chaotic" but admitted that when she went for a later home visit things had improved. The GAL acknowledged that M.M.'s stepmother had also been making promises to her in relation to the custody issue.

{¶ 13} The GAL recommended that M.M. reside with appellant during the school year and with appellee during the summer. The GAL acknowledged that this would require M.M. to change school districts but that the change was not "contrary" to her best interests. The GAL stated that M.M. told her this is what she wants to do.

{¶ 14} M.M.'s first grade teacher testified that she is a "great student." The teacher stated that M.M. always looked well-groomed and dressed appropriately and never complained about missing breakfast. The teacher also stated that appellee appeared to be very involved in her daughter's education but that she had never met M.M.'s father. The teacher acknowledged that M.M. had multiple absences but that she had doctor excuses. She stated that M.M. tended to be tardy.

{¶ 15} Appellant testified regarding difficulties in getting his scheduled visitations due to M.M.'s extracurricular activities. Appellant stated that he has provided all the transportation in the past six years which is approximately 80 miles round-trip.

{¶ 16} Appellant testified that he shared the GAL's concern that M.M. was growing up too fast due to her exposure to "adult issues" in appellee's household. Appellant was also concerned about the lack of structure in appellee's home.

{¶ 17} Appellee testified regarding she and M.M.'s daily routine. Appellant admitted that it took a little while to get the morning routine established because M.M.

would intentionally "drag her feet" and not want to wear or eat what was presented to her. Sometimes M.M. grabbed what she wanted to eat and ate in the car. Regarding M.M.'s extracurricular activities, appellee stated that M.M. wants to participate and that appellant has not supported or attended the events.

{¶ 18} As to her mental health, appellee stated that after switching doctors and changing her medication her depression is much better and does not affect her day-to-day interactions with M.M. Appellee also discussed M.M.'s illnesses which caused her school absences. As to M.M. being late to school, appellee took responsibility for one of the incidents but stated that the others tardies were due to M.M. being obstinate or talking in the hall at school and not getting into the classroom on time.

{¶ 19} Reviewing the arguments of the parties, we note that they do not dispute that the court found a change in circumstances sufficient to establish the threshold factor under R.C. 3109.04(E). Despite the fact that appellee withdrew her notice of intent to relocate, a change of circumstances could be demonstrated by M.M.'s increase in age combined with involvement in multiple extracurricular activities and the hostility between the parents regarding visitation. *See Davis*, 77 Ohio St.3d 415, 674 N.E.2d 1159. Both parties have also remarried and moved and M.M. has an additional half-sibling (appellant had a child prior to M.M.'s birth.)

{¶ 20} Thus, this case turns on whether the evidence demonstrated that it was in M.M.'s best interest to live with appellant. Juxtaposing the evidence with the R.C. 3109.04(E) factors, we cannot find that the court abused its discretion when it determined

that it was in M.M.'s best interest to remain with her mother. Appellee has been the legal custodian of M.M. since her birth. The testimony showed that appellee is doing a better job following a schedule with M.M. and that M.M. is doing very well in school. The testimony also demonstrated that appellee is doing well with her medication and that her depression does not negatively affect M.M. Accordingly, appellant's assignment of error is not well-taken.

{¶ 21} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Sandusky County Court of Common Pleas, Domestic Relations Division, is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE