

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

Jason Green

Court of Appeals No. WD-12-039

Appellee

Trial Court No. 09DS0044

v.

Jennifer Richards

DECISION AND JUDGMENT

Appellant

Decided: February 8, 2013

* * * * *

Albert L. Potter, II, for appellee.

Robert E. Searfoss, III, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Jennifer Richards, appeals the judgment of the Wood County Court of Common Pleas, Domestic Relations Division, which terminated the shared parenting plan under which she was named a residential parent of her two minor children,

and named appellee, Jason Green, as the sole residential parent. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} The parties were initially married on April 12, 1997. While married, the parties had two sons, Co. and Ca. On April 1, 2009, Green filed a petition for dissolution of marriage. That petition was granted on May 12, 2009. Both Richards and Green have since remarried.

{¶ 3} With respect to the children, the decree of dissolution provided that each parent would be named residential parent while they were in possession of the children.

{¶ 4} Not satisfied with this arrangement, Green filed a motion for reallocation of parental rights and responsibilities on July 30, 2009. In response to Green's motion, the court appointed Matthew Reger as guardian ad litem for the children. After conducting his investigation, Reger recommended a custody schedule in which the parents would receive equal time with the children by virtue of a "seven day on / seven day off" arrangement. The parties ultimately agreed to adopt Reger's recommendation, and the trial court granted Green's motion for reallocation on August 26, 2010.

{¶ 5} In addition to ordering equal parenting time for the parties, the court also named Green the residential parent for school purposes and to make medical decisions for the children. In so doing, the court noted Reger's testimony that Richards was "controlling, strong-willed, determined, difficult, manipulative, not always truthful, not flexible, an[d] not cooperative when dealing with [Green] on issues involving the minor

children.” Further, the court cited Reger’s belief that neither Green nor Richards has been able to effectively communicate with one another. The court also noted that the parties could not reach an agreement as to the children’s participation in extracurricular activities.

{¶ 6} The parties operated under the shared parenting plan for several months until, on April 21, 2011, Green filed another motion for reallocation of parental rights and responsibilities. In his second motion, Green requested to be designated as the custodial parent, subject to reasonable visitation rights for Richards. In support of his motion, Green indicated that there had been a change in circumstances with regard to Richards and the children, and that a reallocation of parental rights designating him as the custodial parent would be in the children’s best interest. Once again, Reger was appointed as guardian ad litem for the children.

{¶ 7} On September 15, 2011, an evidentiary hearing was held before the magistrate. During the hearing, extensive evidence was presented concerning the current state of affairs with the children, with a particular emphasis on the changes that had occurred since the prior shared parenting arrangement had been ordered.

{¶ 8} First, Reger testified concerning the difficulties that had arisen as a result of Richards’ unwillingness to administer medication for Ca., which had been prescribed by a doctor in order to treat his attention deficit hyperactive disorder (ADHD). Reger stated that “[Green] was providing medication prescribed by the doctor and [Richards] was engaging in an alternative method of dealing with this situation.” Basically, Richards

attempted to treat the ADHD using a strict dietary regimen. After consulting with Ca.'s teachers, Reger learned that Ca. performed well in school during the weeks he was taking the medication. However, he lost his ability to focus during weeks where he was not on his medication.

{¶ 9} Second, Reger testified that the lack of consistency produced by the shared parenting arrangement was causing control issues for Co. Speaking about the inconsistency issue, Reger stated that “there [are] different sets of rules, different sets of issues” at each household. That inconsistency was determined to be a contributing factor in an incident in which Co. threatened to bring a gun to school and was subsequently expelled from school for a short time.

{¶ 10} Third, evidence was presented at the hearing concerning the persistent disagreement between Richards and Green with regard to the children's extracurricular activities. In particular, Richards was resistant to the idea of Co. playing baseball. While Green supported Co.'s desire to play, Richards believed that baseball would interfere with the already limited amount of time she was able to spend with Co. In addition, Richards was concerned for the boys' safety, and wanted to be able to spend more “family time” with them. The parents' disagreement over baseball could not be resolved without court intervention. Ultimately, the court ordered Richards to take Co. to his baseball practices and games.

{¶ 11} Finally, a common theme among the witnesses that testified at the hearing centered on the parents' inability to communicate. While Reger had previously

recommended the initial shared parenting arrangement, he testified at the hearing that that recommendation was based upon the premise that the parents would be able to communicate. Indeed, he stated that such communication was essential to the success of any shared parenting plan. However, it had become clear to Reger at the time of the hearing that the communication between Richards and Green had completely broken down. Thus, Reger concluded:

My feeling is the best interest of the children is the termination of the shared parenting. * * * It seems for the consistency of the kids and for their best interest, that [Green] be the primary residential parent, and that there be a standard Wood County visitation; now, maybe a little more time with mom during the summer to equalize it. But during the school year when that consistency is so important, I really think that dad should be the primary residential parent.

{¶ 12} After considering the evidence presented at the hearing and the parties' proposed findings of fact and conclusions of law, the magistrate concluded that there had been a change of circumstances since the prior custody arrangement was ordered, and that termination of the shared parenting plan was in the best interests of the children. Therefore, the magistrate granted Green's motion. On November 15, 2011, the court issued a stay of the magistrate's decision pending Richards' filing of objections.

{¶ 13} On June 20, 2012, the court denied Richards' objections and adopted the magistrate's decision. In its judgment entry, the court found that the circumstances

giving rise to the initial shared parenting plan had changed. In particular, Richards had refused to cooperate with the administration of Ca.'s medication until forced to do so by court order. In addition, the court specifically found that Richards demonstrated an unwillingness to cooperate with Co.'s baseball activities until the court intervened. Finally, the court found that Richards had failed to respond to Green's phone calls or cooperate with Green's attempts to communicate using a folder that was designed to be passed between the parents when the children were exchanged.

{¶ 14} On July 12, 2012, the court granted Green's motion and ordered him to be named the sole residential parent. Richards' timely appeal followed.

B. Assignment of Error

{¶ 15} Richards assigns the following error for our review:

The trial court erred when it found that there was a change of circumstances and that a modification was necessary when it terminated the shared parenting plan.

II. Analysis

{¶ 16} In her sole assignment of error, Richards contends that the trial court erred when it found that a change of circumstances necessitated the termination of the shared parenting plan. We disagree.

{¶ 17} 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. To find abuse of discretion, an appellate court must find that the court's attitude was unreasonable, arbitrary, or unconscionable. *Miller v. Miller*, 37 Ohio St.3d 71, 73-74, 523 N.E.2d 846 (1988). An appellate court must give such discretion to the trial court in these cases because of the nature and significance of the proceeding, and because the trial court is in a unique position to weigh the credibility of witnesses and evidence. *Id.* at 74.

{¶ 18} To modify an allocation of parental rights, a trial court must determine that there has been a change in circumstances and that the modification is in the best interests of the child. *Neel v. Neel*, 113 Ohio App.3d 24, 35, 680 N.E.2d 207 (1996); R.C. 3109.04(E)(1)(a). R.C. 3109.04(E)(1)(a) further states that modification requires a determination of the best interests of the child, plus one of the following:

(1) 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; (2) 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; or (3) the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

{¶ 19} Richards does not take issue with the trial court's determination under R.C. 3109.04(E)(1)(a). Rather, Richards argues that the evidence put forth at the hearing

failed to establish a change of circumstances that would justify the termination of the shared parenting plan. Essentially, Richards argues that the evidence presented at the hearing was no different than the evidence that existed when the initial shared parenting plan was instituted.

{¶ 20} It is true that some of the specific changes Green cites in support of the termination of the shared parenting plan are not entirely new. While Richards has had issues in the past with respect to administering Ca.'s medication and taking Co. to baseball practices, those issues appear to have been resolved by prior court orders. The testimony at the hearing shows that Richards is currently abiding by those court orders. Nevertheless, we cannot say that the trial court acted unreasonably in concluding that the circumstances have changed.

{¶ 21} While some of the more specific issues that have arisen over time have now been resolved, it is clear that the court did not base its decision to terminate the shared parenting plan on those isolated issues. Rather, the court stated:

Although the immediate issues of medication, sports activities and school are resolved at this moment with the help of the Guardian Ad Litem and the court, there will be ongoing decisions and issues regarding the children as they grow up. A Shared Parenting Plan cannot work without communication and cooperation between the parents.

Ultimately, the court found a change of circumstances based on “the children’s behavior, the need for intervention in decision making and the lack of communication between the parties.”

{¶ 22} Based upon our review of the record, we conclude that there is substantial competent and credible evidence to support the trial court’s determination on the change of circumstances issue. The parties each testified at the hearing that the communication between the two of them was difficult, if not impossible. Further, the evidence indicates that Co.’s misbehavior at school is largely attributable to the lack of consistency in the children’s lives. This lack of consistency stems from the fact that they are shuffled between two different households. The guardian ad litem stated that consistency was a key component in any successful parenting plan for these children. Finally, since the trial court ordered the initial parenting plan, it has become apparent that the cooperative attitude essential to any such plan is lacking here. The fact that the court has had to intervene on several occasions in order to facilitate cooperation between the parents confirms that the foundation upon which the initial order rested has crumbled. Thus, the trial court did not abuse its discretion when it determined that there had been a change of circumstances.

{¶ 23} Additionally, we note that the trial did not abuse its discretion when it found that terminating the shared parenting plan and naming Green as the sole residential parent was in the best interests of the children.

{¶ 24} R.C. 3109.04(F)(1) requires a court to consider the following factors when determining the best interests of the child:

- (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 criminal

offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented 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; 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; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

(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.

{¶ 25} Here, the trial court’s determination of the best interests of the children based on these factors did not constitute an abuse of discretion. Reger testified that Green had “shown responsible decision making for the boys and put their best intentions first.” In addition, the evidence admitted at the hearing suggests that Richards has demonstrated a resistance to administering medically necessary treatment and has been reluctant to follow court orders with respect to the children.

{¶ 26} In light of the evidence establishing a change of circumstances in this case, we cannot say that the trial court abused its discretion when it granted Green’s motion and terminated the shared parenting plan.¹ Accordingly, Richards’ sole assignment of error is not well-taken.

¹ Although the parties do not raise this argument, we note that the trial court is not required to determine the existence of a change of circumstances prior to the *termination* of a shared parenting plan. *Kougher v. Kougher*, 194 Ohio App.3d 703, 2011-Ohio-3411, 957 N.E.2d 835, ¶ 18 (7th Dist.) (stating that “[t]he appellate courts that have dealt with this specific question have concluded that R.C. 3109.04(E)(2)(c), clearly labeled in the statute as a different procedure from that detailed in R.C. 3109.04(E)(1)(a), requires only that the termination of a shared-parenting decree be in the best interests of the child”). Rather, the change of circumstances determination is required when the court is *modifying* an existing shared parenting plan. Here, the trial court actually terminated the shared parenting plan and ordered that Green be the sole residential parent. Thus, while the trial court acted within its discretion in finding a change in circumstances, it was not required to do so in order to terminate the shared parenting plan. *Id.*

III. Conclusion

{¶ 27} Based on the foregoing, the judgment of the Wood County Court of Common Pleas, Domestic Relations Division, is hereby affirmed. Costs are hereby assessed to appellant in accordance with 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

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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| <p>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.</p> |
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