[Cite as *In re M.B.*, 2016-Ohio-111.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102886

IN RE: M.B.
A Minor Child

[Appeal By D.B., Mother]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD-03-900906

BEFORE: Celebrezze, P.J., E.A. Gallagher, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: January 14, 2016

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FRANK D. CELEBREZZE, JR., P.J.

{¶1} D.B. ("appellant") brings this appeal challenging the dismissal of her motions for allocation/modification of parenting rights and/or visitation. Specifically, appellant argues that the trial court erred in finding that she failed to demonstrate a change in circumstances. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} M.B. was born on April 6, 2003. D.B. ("appellant") is the biological mother, and J.B. ("appellee") is the biological father.

{¶3} Prior to and during her pregnancy, appellant struggled with a drug problem and chemical dependency. When M.B. was born, both appellant and the child tested positive for drugs. The Cuyahoga County Department of Children and Family Services (CCDCFS) took possession of the child and appellant moved into the Hitchcock House for drug treatment. After roughly five weeks, CCDCFS returned M.B. to appellant, and M.B. stayed with appellant at the Hitchcock House for roughly five to six months.

{¶4} Appellant's status at the Hitchcock House changed from "residential" to "transitional," and she was given privileges to leave the treatment facility for certain occasions. During her transitional period, several disputes arose between appellant and appellee.

{¶5} In 2003, CCDCFS initiated a dependency action. Temporary custody was vested with CCDCFS. On August 17, 2004, a parenting order was issued naming appellee as M.B.'s legal custodian.

{¶6} Appellant did not have visitation rights and neither saw the child nor sought visitation rights until more recently. The parties dispute whether or not appellant communicated, or attempted to communicate, with M.B. over the years.

{¶7} Appellant has been able to maintain a drug-free lifestyle and desires to establish a relationship with M.B. Appellant filed two motions for allocation/modification of parenting rights and/or visitation: (1) April 14, 2014, acting pro se, and (2) February 18, 2015.

{¶8} A magistrate held a hearing on appellant's first motion on November 18, 2014. Appellant called one witness and informed the magistrate that her other witness was unable to make it into court. Appellant appeared to rest her case, but now disputes whether she knowingly rested. Appellee orally moved to dismiss appellant's motion, arguing that she failed to articulate a change of circumstances. The magistrate granted appellee's motion to dismiss. The magistrate's decision, dismissing appellant's motion, was filed on November 19, 2014.

{¶9} On November 24, 2014, appellant filed a motion requesting transcripts of the November 18, 2014 hearing. On December 2, 2014, appellant filed: (1) a notice of appearance of counsel, (2) a request for findings of fact and conclusions of law, and (3)

objections to the magistrate's decision. The trial court granted appellant's request for transcripts.

{¶10} On December 4, 2014, the trial court adopted the magistrate's November 19, 2014 decision. On December 23, 2014, appellant filed a motion for leave to supplement her objections to the magistrate's decision.

{¶11} On January 9, 2015, the trial court overruled appellant's December 2, 2014 objections to the magistrate's decision. The trial court granted appellant's motion for leave on January 12, 2015.

{¶12} Appellant filed supplemental objections to the magistrate's decision on January 12, 2015. Furthermore, appellant filed a motion to review the audio disc and correct the transcripts from the November 18, 2014 hearing on her motion.

{¶13} On February 18, 2015, appellant, through counsel, filed a second motion for modification of parenting rights and/or visitation. A magistrate summarily dismissed appellant's second motion on March 2, 2015, without holding a hearing, stating that the matter had been previously adjudicated. Appellant requested findings of fact and conclusions of law on March 11, 2015. Furthermore, appellant filed objections to the magistrate's decision on March 16, 2015.

{¶14} On March 13, 2015, the trial court overruled appellant's supplemental objections to the magistrate's decision. Furthermore, the trial court overruled appellant's motion to review the audio disc and correct the transcript of the hearing on her motion.

{¶15} On March 17, 2015, the trial court adopted the magistrate's March 2, 2015 decision dismissing appellant's second motion for modification of parenting rights and/or visitation.

{¶16} Appellant filed the instant appeal assigning 15 errors for review:

1. The trial court erred in overruling appellant's motion.

2. The trial court erred in holding that 'reading of the motion' was waived.

3. The trial court erred in holding that appellant "has failed to provide clear and convincing evidence that there is any change in circumstances with the child."

4. The trial court erred in that it failed to identify relevant time frames from whence the ostensible change of circumstances requirement arose.

5. The trial court erred in that appellant was not provided opportunity to complete her case or present all her evidence, prior to the premature ruling by the court.

6. The trial court erred in holding there was not any change in circumstances of the child.

7. The trial court erred in that its holding was unclear, incomplete and insufficient.

8. The magistrate failed to submit findings of fact and conclusions of law.
9. The trial court erred in finding that "having reviewed the record" [the court finds the motion is not well taken].

10. The trial court erred in the threshold conclusion that a movant must articulate a change of circumstances in the motion itself.

11. The trial court erred in holding that appellant "fails to articulate a change in circumstances" and "fails to meet the minimum burden of articulating a clear change of circumstances."

12. The trial court erred in that the ruling violates appellant's due process rights.

13. The trial court erred in stating that the matter was previously adjudicated.

14. The trial court erred in holding that "the child advised the court and the GAL that she does not wish to visit with or see appellant."

15. The trial court failed to submit findings of fact and conclusions of law.

{¶17} Assignments of error one through eight pertain to appellant's first motion to modify visitation and assignments of error nine through fifteen pertain to appellant's second motion. Accordingly, we will consider these assignments of error together.

II. Law and Analysis

{¶18} R.C. 3109.04(E)(1)(a) provides:

> 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*, his 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:
>
> (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.
>
> (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.
>
> (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*. (Emphasis added.)

{¶19} R.C. 3109.04(F)(1) provides:

> In determining the best interest of a child pursuant to this section, whether on an original decree *allocating parental rights and responsibilities* for the care of children or a modification of a decree allocating those *rights and responsibilities*, the court shall consider all relevant factors, including, but not limited to: [a list of factors to be considered]." (Emphasis added.)

{¶20} In *Davis v. Flickinger*, 77 Ohio St.3d 415, 674 N.E.2d 1159 (1997), the Ohio Supreme Court addressed the R.C.3109.04 "change in circumstances" requirement:

> In determining whether a "change" has occurred, we are mindful that custody issues are some of the most difficult and agonizing decisions a trial judge must make. Therefore, a trial judge must have wide latitude in considering all the evidence before him or her — including many of the factors in this case — and such a decision must not be reversed absent an abuse of discretion. *Miller v. Miller*, 37 Ohio St.3d 71, 523 N.E.2d 846, (1988).

Id. at 418.

A. April 14, 2014 Motion

{¶21} Appellant argues that the court erred in overruling her motion. Furthermore, appellant argues that the court's ruling denied her due process rights and was an abuse of discretion.

{¶22} In assignments of error one and five, appellant argues that appellee's motion to dismiss was granted before she rested her case.

{¶23} During the November 18, 2014 hearing on appellant's motion to modify visitation, appellant, acting pro se, waived her opening statement and informed the court that she wished to proceed. Appellee's counsel and counsel for M.B. both gave opening statements. M.B.'s counsel stated "on behalf of my client, your Honor, I would reiterate that she has no interest or any comfort level with having visitation with [appellant]."

Appellant called her one and only witness, a math tutor at Tri-C who knew appellant for three years. The witness had never met appellee before the hearing on appellant's motion, and the witness never met M.B.

{¶24} The magistrate sustained several objections to appellant's line of questioning. Appellant stated, "All right. I'm so sorry. I'm very tongue-tied over here. That may be all. Give me just a moment." Appellant attempted to question the witness further, but the magistrate sustained appellee's objections. The following exchange took place between appellant and the magistrate:

> The Court: I'm going to strike that. There's a witness. You're in direct examination of your witness. You have to ask him questions. He can answer you, but you can't carry on a conversation with him and you can't lead. You can't lead him to the answer —
>
> Appellant: Right.
>
> The Court: — because he's your witness.
>
> Appellant: Right. Okay. No further questions. I'm ready to testify.

{¶25} M.B.'s counsel briefly cross-examined appellant's witness. Appellant's witness stepped down and the magistrate asked appellant if she had any other witnesses. Appellant informed the magistrate that her other witness was not able to make it into court. The magistrate informed appellant that she would get a chance to argue her position.

{¶26} The magistrate asked appellee's counsel if he had any witnesses, and the following exchange took place:

> The Court: [appellee's counsel], do you have any witnesses?
>
> Appellee's Counsel: Well, [appellant's] rested?

The Court: Are you resting?

Appellant: Yeah, I am.

{¶27} Following this exchange, appellee moved to dismiss the case, arguing that appellant failed to present any evidence whatsoever demonstrating a change in either M.B.'s or appellee's circumstances. M.B.'s counsel concurred with the motion, acknowledging that although appellant's efforts to turn her life around are "admirable," she failed to demonstrate a change of circumstances regarding M.B. or appellee. Furthermore, M.B.'s counsel stated that appellant failed to demonstrate what would be in M.B.'s best interest. M.B.'s guardian ad litem "GAL" agreed with appellee's motion based on the evidence appellant presented.

{¶28} The magistrate gave appellant an opportunity to respond to appellee's motion to dismiss. Appellant attempted to call appellee to the stand, despite her previous statement that she did not have any other witnesses and her affirmative response when the magistrate asked her if she was resting. Furthermore, appellee's counsel opposed appellant's request, because: (1) appellant previously rested, (2) appellee rested, and (3) appellant did not put appellee on her witness list. Appellant also attempted to put herself on the stand. The magistrate advised appellant that she can make an argument, but that she cannot question herself on the stand.

{¶29} M.B.'s GAL addressed the court, stating, "I think that at some point in time the child's going to want to be with her — want to find out who her mother is, and I would support visitation with the mother. I think that would be in the child's best interest, and

certainly, on a very structured basis[.]" Despite his recommendation, the GAL acknowledged that the magistrate — in ruling on appellant's motion — is limited to the evidence presented during the hearing.

{¶30} M.B.'s counsel opined that at some point, the child is "going to develop a curiosity about where you come from," but confirmed that at this point in time, the child does not want to see her mother.

{¶31} Based on the evidence presented during the hearing, the magistrate denied appellant's motion to modify visitation:

> I have not seen any evidence presented to me that would make me inclined to order this child to have — I don't see it's in her best interest to order her to have visitation at this time. I think the better course of action is to wait until she's ready for that. I'm not going to — so the motion to modify visitation is denied.The magistrate's decision was memorialized in the November 19, 2014 journal entry. The journal entry provides, in relevant part:
>
> Whereupon, the Court heard evidence and testimony. Mother called [her only witness] to testify. The witness had no personal knowledge of the child. The witness had never even met the child. Mother did not call any other witnesses.
>
> Father through counsel made a motion for dismissal as mother had failed to make a prima facie case. Counsel for the child joined in the motion. The child does not wish to have visitation with the mother at this time.
>
> The Court further finds that D.B., mother, has failed to provide clear and convincing evidence that there is any change in circumstances with the child.
>
> The Motion to Modify Visitation filed by D.B., mother, is dismissed.

{¶32} After reviewing the record, we find no merit to appellant's argument that she did not knowingly rest her case. Appellant informed the magistrate that: (1) she had

"no further questions" for her first witness, and (2) her other witness was unable to make it to the hearing. Furthermore, when the magistrate asked appellant if she was resting, she replied "[y]eah, I am."

{¶33} "Pro se civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors." *Meyers v. First Natl. Bank of Cincinnati*, 3 Ohio App.3d 209, 444 N.E.2d 412 (1st Dist.1981), citing *Dawson v. Pauline Homes, Inc*., 107 Ohio App. 90, 72, 154 N.E.2d 164 (10th Dist.1958); *see Heller v. Ohio Dept. of Jobs & Family Servs.*, 8th Dist. Cuyahoga No. 92965, 2010-Ohio-517, ¶ 18.

{¶34} In the instant matter, appellant made two mistakes regarding her attempt to call appellee as a witness: (1) she rested after her first witness stepped down, and (2) she did not put appellee's name on her witness list. As such, we find no error in the magistrate's ruling that appellant could not call appellee as a witness. Furthermore, although appellant disputes whether she knowingly rested her case, we find no error in the magistrate's determination that appellant rested her case. Thus, appellee's motion to dismiss was not untimely. Assignments of error one and five are overruled.

{¶35} In her second assignment of error, appellant argues that the trial court erred in holding that a reading of the motion was waived.

{¶36} After reviewing the record, we do not find that appellant waived a reading of the motion during the hearing. The magistrate's November 19, 2014 decision states "[r]eading of the Motion was waived." The record reflects that appellant waived her

opening statement, rather than a reading of the motion, at the hearing. However, we find that this misstatement in the magistrate's decision was nothing more than harmless error. *See* Civ.R. 61 ("[N]o error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for * * * vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). Accordingly, appellant's second assignment of error is overruled.

{¶37} Assignments of error Nos. 3, 4, and 6 pertain to the magistrate's holding that appellant failed to demonstrate the R.C. 3109.04 "change in circumstances" requirement.

{¶38} Appellant argues that the trial court applied the wrong evidentiary standard in determining whether there was a change in circumstances.

{¶39} Clear and convincing evidence is not the appropriate evidentiary standard in child custody proceedings. *Meister v. Meister*, 11th Dist. Lake No. 92-L-137, 1994 Ohio App. LEXIS 4997, *4 (Nov. 4, 1994). Instead, the standard is whether the judgment is supported by a substantial amount of credible and competent evidence. *Id*.; *see Bechtol v. Bechtol*, 49 Ohio St.3d 21, 23, 550 N.E.2d 178 (1990).

{¶40} In *Locke v. Locke*, 7th Dist. Columbiana No. 00-CO-10, 2001 Ohio App. LEXIS 4436 (Sept. 26, 2001), the trial court held "there was no significant change in circumstances which would warrant a change in the prior parenting decree." *Id*. at *2. Furthermore, the trial court found that the best interests of the children would not be

served by a modification of the prior decree, and that the harm caused by the modification would outweigh any benefit. *Id*. at *9. On appeal, appellant argued that the trial court erred by requiring a significant — rather than a sufficient — change in circumstances. *Id*. at *5. The Seventh District Court of Appeals found that the trial court erred by establishing "an artificially high standard for finding a change in circumstances." *Id*. at *9. However, the court found this error to be harmless due to the trial court's alternative basis for its ruling. *Id*.

{¶41} In *Thomas v. Moothart*, 3d Dist. Hancock No. 5-02-56, 2003-Ohio-3724, ¶ 12, the trial court did not apply the R.C. 3109.04(E)(1)(a) three-part analysis. The trial court did not determine whether or not a change in circumstances had occurred. *Id*. The Third District Court of Appeals held that the failure to conduct the analysis was harmless error, because the trial court expressly found that "a change in custody would not be in the best interest of [the children]." *Id*.

{¶42} In the instant matter, the trial court's March 13, 2015 journal entry — adopting the magistrate's November 19, 2014 decision and overruling appellant's objections — provides, in relevant part:

> The Court heard evidence and testimony. Mother called [her only witness] to testify. The witness had no personal knowledge of the child. The witness had never even met the child. Mother did not call any other witnesses.
>
> Father through counsel made a motion for dismissal as mother had failed to make a prima facie case. Counsel for the child joined in the motion. The child does not wish to have visitation with the mother at this time.

> The court further finds that [mother] has failed to provide clear and convincing evidence that there is any change in circumstance with the child.
>
> The motion to modify visitation filed by [mother] is dismissed.

{¶43} In reviewing the record, we note that the trial court's journal entry references the wrong evidentiary standard. However, we cannot say that the trial court applied the "clear and convincing" standard in reviewing appellant's motion. During the hearing on appellant's motion, the magistrate advised her that she has to "show a change in circumstances of the child or the person who has custody." The magistrate further advised appellant "[y]ou have to make a prima facie case. You have to meet a bare-minimum burden and provide evidence of this change in circumstances." At no point during the hearing did the magistrate state that appellant must demonstrate a change in circumstances by clear and convincing evidence.

{¶44} Furthermore, like *Locke* and *Thomas*, the magistrate expressly found that visitation was not in the child's best interest. Due to the magistrate's alternative basis for its ruling, we find that the trial court's reference to the "clear and convincing" evidentiary standard is harmless error. *See* Civ.R. 61.

{¶45} Appellant further argues that there was sufficient evidence of a change in circumstances. Specifically, appellant contends that she demonstrated a change in circumstances through: (1) passage of time, and (2) the GAL's report. M.B., who was one and one-half years old at the time of the 2004 parenting order, is now 12-years old.

Appellant argues that the "passage of time and aging and development of the child," alone, constitute a change of the child's circumstances. Appellant's argument is misplaced.

{¶46} In *Davis v. Flickinger*, the Ohio Supreme Court explained that a child's maturing may constitute a change in circumstances. *Davis v. Flickinger*, 77 Ohio St.3d 415, 420, 674 N.E.2d 1159. However, the court held that age alone is not a sufficient factor. *Id*.

{¶47} Appellant argues that the trial court disregarded the GAL's report and granted appellee's motion to dismiss before hearing from the GAL. There is no support for this argument in the record.

{¶48} During the hearing on appellant's motion, the magistrate asked M.B.'s GAL what he thought was in the child's best interest. The GAL stated:

> I think that at some point in time the child's going to want to be with her — want to find out who her mother is, and I would support visitation with the mother. I think that would be in the child's best interest, and certainly, on a very structured basis[.]

{¶49} Despite his recommendation, the GAL acknowledged that the magistrate, in ruling on appellant's motion, is limited to the evidence presented during the hearing. Furthermore, before ruling on appellee's motion to dismiss, the magistrate confirmed with M.B.'s counsel that the child did not want to see her mother. M.B.'s counsel opined that at some point, the child is "going to develop a curiosity about where you come from," but confirmed that at this point in time, the child does not want to see her mother.

{¶50} After reviewing the record, we cannot say that the trial court erred in holding that appellant failed to demonstrate a change in circumstances. The changes that

appellant made in her own circumstances, including the drug treatment that she received, were addressed and commended during the November 18, 2014 hearing. However, appellant neither demonstrated a change in the circumstances of M.B. or appellee nor demonstrated that a modification or visitation would be in M.B.'s best interest. Accordingly, appellant's third, fourth, and sixth assignments of error are overruled.

{¶51} In her seventh assignment of error, appellant argues that the trial court's holding was "unclear, incomplete, vague, and insufficient." Appellant contends that the court erred by finding that visitation was not in the child's best interests when appellee moved to dismiss on the basis that she failed to articulate a change of circumstances. We disagree.

{¶52} In *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, 867 N.E.2d 546, the Ohio Supreme Court identified the "high standard" for modifying a prior parenting decree under R.C. 3109.04(E)(1)(a):

> Modification of a prior decree, pursuant to R.C. 3109.04(E)(1)(a), may only be made "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 shared parenting decree, and that the modification is necessary to serve the best interest of the child." This is a high standard, as a "change" must have occurred in the life of the child or the parent before the court will consider whether the current designation of residential parent and legal custodian should be altered.

Id. at ¶ 33.

{¶53} In denying appellant's motion, the magistrate stated, in relevant part:

> I have not seen any evidence presented to me that would make me inclined to order this child to have — I don't see it's in her best interest to order her

> to have visitation at this time. I think the better course of action is to wait until she's ready for that. I'm not going to — so the motion to modify visitation is denied.

The magistrate's ruling was based in part on the statement from M.B.'s counsel that the child "has no interest or any comfort level with having visitation with [appellant]." Furthermore, the opening statement by appellee's counsel addressed M.B.'s best interests:

> It is certainly not in the child's best interest [for appellant] to see this child. She states that she wants a visitation order that's in the child's best interest. The child's desire is not to see her.

{¶54} Appellant failed to present any evidence during the hearing to show either a change in circumstances or that visitation was in the child's best interests. Thus, appellant's failure to demonstrate either of the R.C. 3109.04(E)(1)(a) requirements was a sufficient basis for the trial court to overrule appellant's motion. Appellant's seventh assignment of error is overruled.

{¶55} In her eighth assignment of error, appellant argues that the magistrate failed to submit findings of fact and conclusions of law. We disagree. Civ.R. 53(D)(3)(a)(ii) provides:

> Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

{¶56} The purpose of separate conclusions of law and facts is to "aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's

judgment." *Werden v. Crawford*, 70 Ohio St.2d 122, 124, 435 N.E.2d 424 (1982). A magistrate's failure to issue findings of fact and conclusions of law *when timely requested* can constitute reversible error. *Larson v. Larson*, 3d Dist. Seneca No. 13-11-25, 2011-Ohio-6013, ¶ 16.

{¶57} In the instant matter, appellant's request for findings of fact and conclusions of law was untimely. The magistrate filed her decision on November 19, 2014. Appellant requested findings of fact and conclusions of law on December 2, 2014 — outside of the seven-day period outlined in Civ.R. 53(D)(3)(a)(ii). Appellant argues that the failure to timely request findings of fact and conclusions of law was excusable neglect, under Ohio Juv.R. 18, based on: (1) the fact that she was acting pro se, and (2) the close proximity of the Thanksgiving holiday.

{¶58} Appellant's deadline to submit her request for findings of fact and conclusions of law fell on Thanksgiving, November 27, 2014. Although appellant would not have been able to submit her request on Thanksgiving, with the clerk's office closed for the holiday, she neither filed the request before the 27th, nor on the two business days following the 27th. Under these circumstances, we cannot say that appellant's failure to file her request for findings of fact and conclusions of law within seven days of the magistrate's decision was the result of excusable neglect. Thus, the magistrate's failure to issue findings of fact and conclusions of law was not an abuse of discretion given appellant's failure to file a timely request.

{¶59} Appellant's eighth assignment of error is overruled.

B. February 17, 2015 Motion

{¶60} Appellant filed a second motion for allocation/modification of parenting rights and/or visitation on February 17, 2015.

{¶61} On March 2, 2015, a magistrate issued her decision on appellant's motion. The magistrate's decision provides, in relevant part:

> The Court having reviewed the motion and the record finds the motion is not well taken.
>
> The Court further finds that motion fails to articulate a change in the circumstances of the child or the party that was granted legal custody as required to support a modification. This matter was adjudicated on November 14, 2015, the child advised the Court and the GAL that she does not wish to visit with or see her mother at this time. Mother failed to produce any credible evidence to support a modification of visitation resulting in the current order remaining unchanged. The current motion fails to meet the minimum burden of articulating a clear change in the circumstances.

{¶62} On March 17, 2015, the trial court adopted the magistrate's March 2, 2015 decision. The trial court's journal entry provides, in relevant part:

> The Court further finds that [appellant's] motion fails to articulate a change in the circumstances of the child or the party that was granted legal custody as required to support a modification. This matter was adjudicated on November 14, 2015, the child advised the Court and the GAL that she does not wish to visit with or see her mother at this time. Mother failed to produce any credible evidence to support a modification of visitation resulting in the current order remaining unchanged. The current motion fails to meet the minimum burden of articulating a clear change in circumstances.

{¶63} Assignments of error Nos. 9, 10, 11, 12, and 13, pertain to the trial court's dismissal of her second motion to modify parenting rights/visitation. As such, we will consider these assignments of error together.

{¶64} Appellant argues that: (1) the second motion was a newly filed motion and that there was no record for the court to review, (2) the court erred in dismissing her motion without allowing the parties to exchange discovery or holding a hearing, and (3) court erred in holding that the matter was previously adjudicated. Furthermore, appellant argues that the trial court erred in holding that she failed to demonstrate a change of circumstances.

{¶65} Where a motion to modify custody is based upon issues that have already been addressed by the court, the court's failure to conduct a hearing as to those matters is not an abuse of discretion. *See In re Schwendeman*, 4th Dist. Washington No. 06CA33, 2007-Ohio-815, ¶ 26; *Wysong v. Wysong*, 12th Dist. Preble No. CA2001-06-011, 2002-Ohio-562; *Bebout v. Vittling*, 5th Dist. Stark No. 2001CA00169, 2001-Ohio-1790.

{¶66} In the instant matter, appellant's second motion raises arguments that she already presented in her objections to the magistrate's November 19, 2014 decision.

{¶67} Appellant alleges that there have been changes in circumstances since the August 17, 2004 decree. An affidavit attached to the motion purportedly shows a change of circumstances (although the affidavit is not in our record). Appellant argues that the motion and the affidavit taken together show changes of circumstances. Specifically, appellant argues she is "out of the loop" and "has been denied knowledge of her daughter and daughter's father." Furthermore, appellant argues that: (1) an order of visitation will allow appellant and M.B. to develop a relationship, and (2) an order of visitation is in the best interest of M.B.

{¶68} In the instant matter, pursuant to Civ.R. 53(D)(4)(d), the trial court considered and overruled appellant's objections to the magistrate's November 19, 2014 decision. On January 9, 2015, the trial court's journal entry, overruling appellant's objections, provides, in relevant part:

> This matter came on for consideration this 19th day of December, 2014 * * * pursuant to the Objections filed by [appellant's counsel], to the magistrate's decision of November 19, 2014.
>
> Upon review of the Court file, the Magistrate's Decision and the Objections, the Court finds the Objections are not well-taken. The Court affirms, approves and adopts said Decision and overrules said Objections.

Furthermore, on March 13, 2015, the trial court overruled appellant's supplemental objections to the magistrate's November 19, 2014 decision. The trial court's journal entry provides, in relevant part:

> This matter came on for consideration this 10th day of March, 2015 * * * pursuant to the Objections filed by [appellant's counsel] to the [Magistrate's] decision of November 18, 2014.
>
> Upon review of the court file, the Magistrate's Decision and the Objections, the Court finds the Objections are not well-taken. The Court affirms, approves and adopts said Decision and overrules said Objections.

{¶69} "A presumption of regularity attaches to all judicial proceedings." *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, ¶ 19. Accordingly, appellate courts presume that a trial court, in reviewing a magistrate's decision, conducted an independent analysis pursuant to Civ.R. 53(D)(4)(d). The party claiming that the trial court did not do so bears the burden of rebutting the presumption. *See Sheeter v. Sheeter*, 4th Dist. Jackson No. 12CA7, 2013-Ohio-1524, ¶ 27. This burden requires more than a

mere inference, and simply because a trial court adopted a magistrate's decision does not mean that the court failed to exercise independent judgment. *Id*.

{¶70} After reviewing the record, we find that appellant's second motion for modification mainly includes the same arguments raised in her first motion and in her objections to the magistrate's November 19, 2014 decision. Furthermore, appellant has failed to meet her burden of rebutting the presumed validity of the trial court's decision. Thus, we cannot say that the trial court erred or abused its discretion in determining that appellant failed to establish that a sufficient change in circumstance existed or in failing to conduct a full hearing as to appellant's second motion.

{¶71} In her fourteenth assignment of error, appellant argues that M.B's wish is not relevant in determining: (1) whether there is a change in circumstances and (2) whether visitation is in the child's best interest. We disagree.

{¶72} Although a child's wishes regarding custody, standing alone, are generally not enough to constitute a change in circumstances, the child's wishes are nevertheless relevant to the analysis. *See Rohrbach v. Rohrbach*, 3d Dist. Seneca No. 13-15-14, 2015-Ohio-4728, ¶ 18; *see also McLaughlin v. McLaughlin-Breznenick*, 3d Dist. Logan No. 8-06-06, 2007-Ohio-1087, ¶ 28, citing *Moyer v. Moyer*, 10th Dist. Franklin No. 96APF05-659, 1996 Ohio App. LEXIS 5762 (Dec. 17, 1996). Furthermore, in *Baxter v. Baxter*, 9th Dist. Lorain No. 10CA009927, 2011-Ohio-4034, the Ninth District Court of Appeals explained the application of a child's wishes to the R.C. 3109.04 analysis:

> consideration of a child's desire to live with one parent over another typically goes to a determination of what is in the child's best interest, not

> whether there was a change in circumstances. See R.C. 3109.04(B)(1); 3109.04(F)(1)(a). *See, also, Doerfler v. Doerfler*, 9th Dist. No. 06CA0021, 2006-Ohio-6960, at ¶ 34-36 (considering children's wishes to remain with mother under the best interest prong of R.C. 3109.04(E)(1)(a)).

Id. at ¶ 11.

{¶73} In *Ashbridge v. Berry*, 2d Dist. Greene No. 2009-CA-83, 2010-Ohio-2914, the court identified the proper analysis in determining a child's best interest:

> In determining a child's best interest, section 3109.04 instructs courts to consider all relevant factors, including those factors enumerated in subdivision (F)(1) of the section. *See* R.C. 3109.04(F). The relevant statutory factors are: the wishes of the parents regarding care; if the court interviewed the child, *the child's wishes expressed to the court*; the child's relations with his parents and others who might significantly affect his best interest; the child's adjustment to his home, school, and community; the mental and physical health of the child and his parents; the parent more likely to facilitate parenting time and visitation; child-support payment issues; and whether one parent lives, or plans to live, outside Ohio. R.C. 3109.04(F)(1).

(Emphasis added.) *Id*. at ¶ 15.

{¶74} We find that M.B.'s wishes are relevant to both the change of circumstances analysis and the best interest analysis under R.C. 3109.04. Accordingly, appellant's fourteenth assignment of error is overruled.

{¶75} In her fifteenth assignment of error, appellant argues that the court failed to submit findings of fact and conclusions of law. We disagree.

{¶76} First, appellant's request for findings of fact and conclusions of law was untimely. The magistrate filed her decision on March 2, 2015. Appellant requested findings of fact and conclusions of law on March 11, 2015 — outside of the seven-day period outlined in Civ.R. 53(D)(3)(a)(ii).

{¶77} Second, we find that the magistrate's March 2, 2015 decision already contained findings of fact and conclusions of law with regard to all of appellant's claims.

{¶78} In *Morgan Stanley Credit Corp. v. Fillinger*, 2012-Ohio-4295, 979 N.E.2d 362 (8th Dist.), this court held that the magistrate did not err in denying a party's request for findings of fact and conclusions of law when the magistrate's decision contained findings of fact and conclusions of law regarding all claims raised by appellant. *Id*. at ¶ 16-17; *see CitiMortgage, Inc. v. Kinney*, 8th Dist. Cuyahoga No. 100099, 2014-Ohio-1725, ¶ 14-15 (upholding the denial of appellant's request for findings of fact and conclusions of law because the magistrate's decision already contained findings and conclusions of all matters).

{¶79} In the instant matter, appellant's second motion claims that there has been a change in circumstances since the 2004 parenting order. The magistrate, in her decision, found that appellant neither showed a change in M.B.'s circumstances nor the appellee-father's circumstances, as required by R.C. 3109.04. Furthermore, the magistrate's decision states that M.B. does not wish to see appellant. The magistrate's decision concluded that the 2004 parenting order will remain "unchanged"due to appellant's failure to demonstrate a change in circumstances.

{¶80} After reviewing the record, we find that the magistrate's failure to issue findings of fact and conclusions of law was not an abuse of discretion given (1) appellant's failure to file a timely request and (2) the sufficient findings of fact and conclusions of law

in the March 2, 2015 decision. Accordingly, appellant's fifteenth assignment of error is overruled.

III. Conclusion

{¶81} Based on the foregoing analysis, we affirm the trial court's disposition of appellant's motions to modify visitation. Finding no merit to appellant's assignments of error, the judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
EILEEN T. GALLAGHER, J., CONCUR