[Cite as *Rutherford v. Rutherford*, 2010-Ohio-4195.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

TAWNIA RUTHERFORD,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-P-0086**
- vs -	:	
ELI RUTHERFORD,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2003 DR 0348.

Judgment: Affirmed.

Stephen C. Lawson, 250 South Chestnut Street, #17, Ravenna, OH 44266 (For Plaintiff-Appellant).

Melissa R. V. Roubic, Roubic Law Offices, L.L.C., 218 West Main Street, #150, Ravenna, OH 44266-2744 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Tawnia Rutherford appeals from the judgment entry of the Portage County Court of Common Pleas, Domestic Relations Division, adopting the decision of its magistrate, and awarding custody of their children to her former husband, Eli Rutherford. We affirm.

{¶2} Tawnia and Eli were married July 25, 1998. There is issue of the marriage: Savannah Nicole Rutherford, born February 29, 1996; Dalton James Rutherford, born December 5, 1998, and Bailey Kevin Rutherford, born May 9, 2000. Tawnia filed a complaint for divorce May 23, 2003. The trial court granted the divorce in a decree filed January 6, 2004. Tawnia was made residential parent and legal custodian of the children, while Eli was granted visitation under the trial court's standard order.

{¶3} September 26, 2007, Eli moved the trial court for a shared parenting plan. October 19, 2007, the motion came on for hearing. The Rutherford children were to spend alternate weeks with each parent, during which time that parent would be their residential parent and legal custodian.

{¶4} March 20, 2009, Tawnia moved the court to modify the October 22, 2007 order adopting the shared parenting plan. She requested custody. April 9, 2009, Eli countered with his own motion, requesting that he be designated the children's sole residential parent. Eli relied on the best interest of the children as support for this change.

{¶5} The trial court's magistrate appointed a guardian ad litem, who duly submitted her report. In camera interviews with the children were conducted. Hearing went forward on or about September 24, 2009. October 23, 2009, the magistrate filed his decision. The magistrate noted that, since the time the shared parenting plan had been instituted in 2007, Tawnia's work as an emergency medical technician with varying schedules and frequent overtime, often made her unavailable to the children. He further remarked that Tawnia had changed residence four times since October 2007, thus

causing frequent changes in the children's schools. The children had been attending school in the Wyndham district, where Eli lives, since December 2008, with an improvement in their performance. The magistrate found that, due to Tawnia's work, she was often unavailable for the children's extracurricular activities. The magistrate cited to the GAL's recommendation that Eli receive custody, due to the stability his living arrangements provided. Ultimately, the magistrate recommended that Eli be given custody of the children, and that Tawnia receive visitation at least equal to that provided for in the trial court's standard order. He further recommended that Tawnia pay child support in excess of six hundred dollars per month.

{¶6} No objections to the magistrate's decision were filed by either party.

{¶7} November 16, 2009, the trial court filed its judgment entry approving and adopting the magistrate's decision.

{¶8} December 16, 2009, Tawnia noticed this appeal, assigning a single error:

{¶9} "IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO REMOVE THE APPELLANT AS RESIDENTIAL PARENT OF THE PARTIES (sic) MINOR CHILDREN AS NO CHANGE OF CIRCUMSTANCES WERE FOUND TO MERIT SAID REMOVAL."

{¶10} Normally, we review a judgment of the trial court adopting the decision of its magistrate for abuse of discretion. *In re K.E.C.*, 11th Dist. No. 2009-T-0035, 2010-Ohio-2819, at ¶24. However, in this case, Tawnia did not file objections to the magistrate's decision.

{¶11} "'Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not

specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).' Civ.R. 53(D)(3)(b)(iv). 'In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.' *Goldfuss v. Davidson* [(1997)], 79 Ohio St.3d 116, ***, at syllabus." *Deerfield Twp. v. Deerfield Raceway, LLC*, 11th Dist. No. 2007-P-0060, 2008-Ohio-4047, at ¶25.[1]

{¶12} Consequently, we review the trial court's judgment for plain error.

{¶13} In support of her assignment of error, Tawnia urges that the magistrate applied the wrong legal standard in reaching his decision. Tawnia asserts the magistrate looked solely to the best interest of the children, which standard applies when a trial court modifies the term of a shared parenting plan, or terminates it. R.C. 3109.04(E)(2)(a)-(c). Tawnia asserts the correct legal standard is to be found in R.C. 3109.04(E)(1)(a), which applies to modifications of "a prior decree allocating parental rights and responsibilities." Pursuant to R.C. 3109.04(E)(1)(a), prior to advancing to a best interest analysis, the trial court must make a threshold finding of a "change in circumstances." Cf. *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, at the syllabus.

{¶14} In *Fisher*, the Supreme Court of Ohio was presented with the following question certified by the Third District Court of Appeals:

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1. We further note that the transcript of the September 24, 2009 hearing before the magistrate was unavailable for the trial court's review, though it has been filed on this appeal. We respectfully decline to

{¶15} "'Is a change in the designation of residential parent and legal custodian of

consider it. Civ.R. 53(D)(3)(b)(iii) and (iv).

children a 'term' of a court approved shared parenting decree, allowing the designation to be modified solely on a finding that the modification is in the best interest of the children pursuant to R.C. 3109.04(E)(2)(b) and without a determination that a "change in circumstances" has occurred pursuant to R.C. 3109.04(E)(1)(a)?'" *Fisher* at ¶1.

{¶16} Speaking through Chief Justice Moyer, the Supreme Court answered this question in the negative. *Fisher* at ¶1. It determined that a change in the designation of a residential parent and legal custodian in a shared parenting plan is an "allocation of parental rights and responsibilities," subject to R.C. 3109.04(E)(1)(a). *Fisher* at ¶26. Accord, *Gunderman v. Gunderman*, 9th Dist. No. 08CA0067-M, 2009-Ohio-3787.

{¶17} In this case, the parents went from alternating weekly as residential parent and legal custodian of the children, to Eli having sole custody. Thus, *Fisher* is applicable.

{¶18} We note that Tawnia failed to file a request for findings of fact and conclusions of law pursuant to Civ.R. 52. Consequently, the trial court would have been justified in entering a general judgment. *Dadosky v. Dadosky*, 4th Dist. No. 02CA706, 2003-Ohio-7282, at ¶8. Nevertheless, a plain reading of both the magistrate's decision, and the trial court's subsequent judgment entry, indicates that both change in circumstances, and best interest, analyses were made, as required by R.C. 3109.04(E)(1)(a). The magistrate and trial court found that, since 2007, Tawnia's circumstances had changed, in that her work schedule, and propensity for moving her residence, had created instability in the lives of her children. The magistrate and trial court clearly found that the stability in Eli's living arrangements was conducive to the children's best interests.

{¶19} The assignment of error lacks merit.

{¶20} The judgment of the Portage County Court of Common Pleas, Domestic Relations Division, is affirmed.

{¶21} It is the further order of this court that appellant is assessed costs herein taxed.

{¶22} The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.