

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

IN THE MATTER OF: [J.C.]
A minor child

:
:
:
:
:
:
:

Case No: 09CA3334

**DECISION AND
JUDGMENT ENTRY**

File-stamped date: 8-20-10

APPEARANCES:

Marie Moraleja Hoover and R. Tracy Hoover, Portsmouth, Ohio, for Appellant.

Randall L. Lambert of Ironton, Ohio, for Appellee.

Kline, J.:

{¶1} Ashley Diller appeals the judgment of the Scioto County Common Pleas Court, Juvenile Division, denying her motion to modify the parties' agreed custody order. On appeal, Diller claims that the trial court abused its discretion in determining that the best interests of the child did not support designating her as the residential parent. However, we find some competent, credible evidence in the record for the trial court's decision and conclude that the trial court acted well within its broad discretion. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} The child at issue, J.C., was born to Diller and Joshua Cannon in 2004. At the time the child was born, both Diller and Cannon were addicted to illicit drugs. Eventually, Dan and Julie Cannon, Joshua's parents, obtained custody when both parents admitted they were unfit as parents and unable to provide parental care due to

their drug addictions. Both parents have subsequently overcome their addictions. The trial court issued an agreed judgment entry on March 24, 2008 that established the present shared parenting arrangement.

{¶3} Joshua Cannon is 28 years old and has completed treatment for his drug addiction. He still lives with his parents. His only current employment is with the Army National Guard, and this pays about two hundred dollars a month. He does not own a car, and he still lacks the one year of schooling required to earn his bachelor's degree. Diller's brief and the brief filed by Cannon both mention that Joshua Cannon has been activated and is presently serving in Afghanistan.

{¶4} Ashley Diller was undergoing treatment for her addiction to opiates at the time of the trial court's decision. She was living at a home she had purchased with her fiancé. She was enrolled in a patient care tech program and was scheduled to complete that program in March 2010. This was, apparently, also the date on which she was scheduled to complete her drug treatment program.

{¶5} On February 18, 2009, Diller filed a motion to modify the shared parenting plan to designate her as the residential parent.

{¶6} The trial court considered the evidence and found that Joshua Cannon's recent employment with the National Guard constituted a change in circumstances. The trial court also concluded that the child's best interests did not require a change in the custodial parent and the harm of changing the child's residential parent would outweigh any benefit.

{¶7} Diller appeals the trial court's judgment and assigns the following error for our review: "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED ASHLEY DILLER'S MOTION TO MODIFY CUSTODY."

II.

{¶8} Diller contends that the trial court erred by refusing to modify the shared parenting plan. The revised code authorizes a trial court to modify a prior decree where "a change has occurred in the circumstances of the child, the child's 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: * * * (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." R.C. 3109.04(E)(1)(a).

{¶9} A trial court enjoys broad discretion in custody proceedings. See *Davis v. Flickinger*, 77 Ohio St.3d 415, 1997-Ohio-260, paragraph one of the syllabus. We will not disturb the trial court's decision regarding a motion for modification of custody unless the trial court abused that discretion. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74.

{¶10} An abuse of discretion consists of more than an error of judgment; it connotes an attitude on the part of the trial court that is unreasonable, unconscionable, or arbitrary. *State v. Lessin*, 67 Ohio St.3d 487, 494, 1993-Ohio-52; *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112. When applying the abuse of discretion standard of

review, we are not free to merely substitute our judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-38, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169. Furthermore, judgments supported by some competent, credible evidence will not be reversed. *Sec. Pacific Natl. Bank. v. Roulette* (1986), 24 Ohio St.3d 17, 20; *C.E. Morris Constr. Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280. The trial court is in the best position to judge credibility of testimony because the trial judge is in the best position to observe the witness's gestures and voice inflections. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶11} “However, the record must contain sufficient factual evidence to support the court’s findings regarding the change in circumstances, the child’s best interests, and the determination that the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.” *In re D.M.*, Cuyahoga App. No. 87723, 2006-Ohio-6191, at ¶30. In conducting our review, we must make every reasonable presumption in favor of the trial court’s findings of fact. *Haynes v. Markel*, Ross App. No. 01CA2587, 2001-Ohio-2624, citing *Seasons Coal Co.* at 80. Conflicts in testimony, especially in the area of custodial rights, are properly determined by the trier of facts. *John A.L. v. Sheri B.*, Lucas App. No. L-04-1250, 2005-Ohio-5357, at ¶28.

{¶12} The gist of Diller’s argument is that the trial court abused its discretion in not designating her the residential parent because Joshua Cannon’s parents were in fact providing J.C.’s care.

{¶13} In her brief, Diller relies heavily on the fact that Joshua Cannon is presently in Afghanistan. She further argues that the trial court’s continued placement of J.C. with

Joshua in fact leaves the child in the custody of Dan and Julie Cannon. Diller contends that this elevates the interests of the grandparents above the interests of the parent. However, we cannot consider this argument. As Diller's brief notes, Joshua Cannon was only activated and deployed overseas after the hearing before the trial court. Joshua's deployment to Afghanistan formed no part of the trial court's decision. We are a court of review, and we do not generally render a decision based on facts that occur after a hearing. See App.R. 9(A) (defining the record on appeal) & App.R. 12(A)(2) ("court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based").

{¶14} As such, we must consider the testimony before the trial court. Joshua Cannon testified that he was the primary caretaker of J.C., notwithstanding the fact Joshua Cannon lived with his parents. Transcript of Sept. 25, 2009, at 176. Julie Cannon bolstered this testimony. *Id.* at 207-08. The trial court could have concluded on this testimony that, at the time of the hearing and subsequent judgment, Joshua Cannon remained the primary caretaker of J.C.

{¶15} In determining the child's best interest, the trial court issued a detailed opinion that carefully explained its application of each factor under R.C. 3109.04(F)(1). Diller makes no argument under this section. Indeed, she fails to cite to any of the factors contained therein. Nor does Diller claim that the trial court erred in holding, in the alternative, that "[a]ssuming ARGUENDO that a modification was in the child's best interest, the Court would NOT find pursuant to RC §3109.04 (E)(1)(a)(iii) that the harm likely to be caused by a change in environment is out-weighed by the advantages of the change of environment to the child."

{¶16} Instead, Diller contends that under *In re Perales* the trial court was obliged to find first that Diller was unsuitable before granting custody to a nonparent. See *In re Perales* (1977), 52 Ohio St.2d 89, 97. The *Perales* Court held that “[i]n an R.C. 2151.23(A)(2) child custody proceeding between a parent and a nonparent, the hearing officer may not award custody to the nonparent without first making a finding of parental unsuitability[.]” *Id.* at the syllabus. We find this unpersuasive for two reasons. First, as noted above, based on the facts in the record the trial court may have disregarded the factual basis of this claim. That is, the trial court could easily have concluded that Joshua Cannon was the primary caretaker of J.C.

{¶17} Second, the *Perales* Court expressly distinguished the proceedings at issue in that case from proceedings under R.C. 3109.04 at issue here. See *id.* at 98. Notwithstanding Diller’s creative argument, the Ohio General Assembly laid out the statutory framework for modifying shared parenting plans at R.C. 3109.04(E). And *Perales* does not alter or supplement this framework.

{¶18} We find that the trial court correctly stated the law in its opinion. And upon review of that opinion, we find competent, credible evidence supports the trial court’s findings. Consequently, we find that the trial court did not abuse its discretion.

{¶19} Accordingly, we overrule Diller’s sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and Appellant shall pay the 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 Scioto County Common Pleas Court, Juvenile Division, 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. Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.