[Cite as *Gibson v. Gibson*, 2018-Ohio-2772.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

JOSHUA A. GIBSON,

Plaintiff-Appellee,

v.

JADE N. GIBSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 CO 0034

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2014-DR-452

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Dominic A. Frank, Betras, Kopp & Harshman LLC, 1717 Lisbon Street, East Liverpool, Ohio 43920 for Plaintiff-Appellee and

Atty. Christopher L. Trolinger, *Atty.Ronald R. Petroff*, Petroff Law Offices LLC, 140 East Town Street, Suite 1070, Columbus, Ohio 43215 for Defendant-Appellant.

Dated: June 25, 2018

Robb, P.J.

{¶1} Appellant Jade Gibson ("the mother") appeals the domestic relations decision of the Columbiana County Common Pleas Court granting the motion to modify the allocation of parental rights and responsibilities filed by Appellee Joshua Gibson ("the father"). The mother contends the court failed to recognize the presumption in favor of the residential parent and contests the findings as to changed circumstances, the child's best interest, and the advantages of the modification as compared to the harm. For the following reasons, the trial court's decision is affirmed.

STATEMENT OF THE CASE

{¶2} The parties were married in November 2008 and had a child in December 2009. The father filed for divorce in September 2014. The parties entered a separation agreement, which was incorporated into the court's divorce decree on December 4, 2014. The parties agreed the mother would be the residential parent and the father would exercise parenting time under the uniform long distance parenting time schedule in Loc.R. 9.41 but with modifications. The court's uniform local long distance schedule provided monthly weekend parenting time at the non-residential parent's house only if the travel time would not exceed three hours. At the time, the father was moving from North Carolina (where the parties had a marital residence) to Maryland, and the mother lived in East Liverpool. The parties' agreement added parenting time for the father during the school year on long weekends (of three days or more). The parties agreed to meet halfway for exchanges. For child support, the father was to pay $667.87 per month plus processing charges.

{¶3} Each party received a vehicle burdened by a lien, and each was to be responsible for the lien. The divorce decree showed the lien on the truck received by the mother was almost $17,000. When the mother failed to pay the monthly payments on the truck, the father made the payments as his name was on the lien. He then helped her to trade the truck for a more affordable vehicle by maintaining his name on the financing. (Tr. 254-255, 399-400). Although the mother believed the father

improperly received a check for the trade-in, the mother's exhibit from the dealership showed $15,022 from the trade-in went toward the prior debt on the truck and the remaining approximate amount of $3,500 went toward the vehicle being financed (reducing the amount needed to finance the replacement vehicle). (Def. Ex. C). When the mother failed to pay the new car payments, the car was repurchased by the dealer for what was owed on the debt in July 2015. (Tr. 256, 401).

{¶4} The parties experienced issues with communication and exchanges. In August 2015, the mother had a child with the man she was dating ("the boyfriend"). She said she was supposed to be on bedrest since January 2015 but worked part-time during some of this time. (Tr. 208-209). The mother believed the pregnancy and the father's return of the car excused her failure to meet him halfway for the exchanges. (Tr. 250-251, 256). The father resorted to police assistance in order to exercise his Thanksgiving 2015 parenting time; the police report was admitted. (Tr. 322, 394; Pl. Ex. 31). The mother originally agreed he could exercise parenting time the prior weekend (instead of Thanksgiving), but she canceled the plan stating the child was ill. (Tr. 463-464). The day before Thanksgiving, she attempted to obtain a physician's note saying the child was too ill to travel. (Tr. 268-269; Pl. Ex. 24). The mother would not meet for the Christmas 2015 exchange, and the father had to drive both ways. (Tr. 397-398).

{¶5} On January 27, 2016, the father filed a motion to reallocate parental rights and a motion for contempt. In February, the father waited at the exchange point, but the mother failed to exchange the child for the long President's Day weekend. (Tr. 389, 403). The next week, the child had surgery on her tonsils. Although the father was advised in the fall about the need for surgery due to recurrent strep throat, he was not informed the surgery had been scheduled and learned weeks after the fact from the child, who was six years old at the time. (Tr. 388, 391-393).

{¶6} On March 25, 2016, an ex parte emergency order was issued designating the father as the temporary residential parent. The father's affidavit filed in support of his ex parte motion said a warrant had been issued for the mother's live-in boyfriend who assaulted her while the child was present, citing to the police report and the municipal court case number. The affidavit also stated the mother withheld parenting time.

{¶7} On April 8, 2016, the emergency order was vacated after a hearing. The magistrate's order stated the domestic violence incident took place on March 5, 2016, and the mother discontinued contact with the boyfriend after his March 22 arrest, at which time he was ordered to have no contact with the mother or their baby. The magistrate found the father's concerns legitimate but believed continuation of the temporary order was not justified so long as the boyfriend had no contact with the parties' child. The order prohibited the mother from permitting the parties' child to have any contact with her boyfriend "either directly or indirectly, pending further orders of this Court." It was explained, "Any violation of this provision may result in a finding of contempt, with appropriate sanctions, and will be strongly considered by this Court in ultimately determining what is in the best interests of the child." The order required both the mother and the father to complete an online parenting course within 60 days and submit proof of completion to the court.

{¶8} A guardian ad litem was appointed in May. The father and his fiancée were interviewed at the office of the guardian ad litem in June 2016, and a home visit was conducted in July in Maryland while the child was there for the father's half of the summer. The guardian ad litem interviewed the mother at his office in July 2016 and agreed to wait to conduct the home visit until after she moved from public housing in East Liverpool to a house her mother owned in Wellsville. She was to call after she moved and/or collected certain paperwork for his review. When the guardian ad litem realized the hearing was in a week, he called the mother, but her phone was temporarily disconnected. He went to the new residence on the evening of August 21, 2016, without an appointment. The mother's boyfriend answered the door holding the baby. The guardian ad litem was under the impression the boyfriend left the room to contact the mother by phone as he reemerged and told the guardian ad litem the mother would return in 30 minutes. The guardian ad litem returned as instructed but received no response; he returned again after another 30 minutes but received no response. The next day, he set up an appointment with the mother through her attorney. The August 29, 2016 hearing on the father's reallocation motion was continued on the mother's request because, although the appointment order stated the report must be filed five

days before the hearing, a local rule required the guardian ad litem to file the report seven days before the hearing.

{¶9} The hearing proceeded before the magistrate on December 7 and 29, 2016. The father testified he was in the United States Army with 18 months remaining on his enlistment and would not be re-enlisting. (Tr. 338). He was deployed twice during the child's life, once for thirteen months and once for five months; however, he became non-deployable due to a back injury and produced evidence of this status. (Tr. 430-431). He moved to the Baltimore area in March 2015 and had plans to work as a civilian on the same base when his enlistment ended. (Tr. 338, 428). The father worked within ten minutes of his home on weekdays from 8:00 a.m. to 3:30 p.m. He and his wife were home from work before the afternoon school bus. (Tr. 353). He got married in July 2016 to a computer cyber-crimes agent with the F.B.I. (Tr. 345, 358). Her daughter was a year older than the parties' child, and the children had a close relationship. (Tr. 352). The father's mother-in-law occupied the in-law suite in their house and provided childcare. (Tr. 347, 439). The father spoke of the activities the child participated in while with him for half the summer, including ballet, tap dancing, and tutoring. He opined it would not be difficult for the child to be removed from her mother and local family, noting how well she does when she stays with him for six or seven weeks in the summer. (Tr. 440). The father provided a certificate showing he timely completed the online parenting course which the magistrate ordered both parties to complete. (Tr. 346). (There was no evidence the mother timely completed the course.)

{¶10} The father testified the mother did not drive to meet him for an exchange until after the ex parte order was issued. (Tr. 402). He claimed the mother only allowed him phone time with the child one or two times a week. (Tr. 404). (The local rule provides for daily contact.) In addition to the parenting time issues discussed supra, the father described the Labor Day 2016 exchange as involving the mother "yanking" the child from his mother-in-law's hands as she was assisting the child from the father's vehicle. (Tr. 410). The father submitted a recent online post by the mother's boyfriend containing a photograph of the couple and an expression of love. (Tr. 420). He believed from the child's demeanor that she had been in the presence of the mother's

boyfriend. (Tr. 456). He saw the boyfriend's truck at the mother's house on December 5, 2016. (Tr. 457).

{¶11} The father expressed concern the child missed a lot of school during kindergarten. Yet, he acknowledged: she was often sick, which is why she needed surgery; she was off school for over a week due to her surgery; and she missed school after he took her to Maryland under the ex parte order. (Tr. 371, 465). He noted she already received a five-day letter from the school in early November of the first grade. (Tr. 371). The absences were concerning to him because the child had difficulty reading simple words, including sight words, and struggled to differentiate letters and numbers. (Tr. 367).

{¶12} The child's first grade teacher testified her reading was at level B, which is low as the typical child should be a level D when entering first grade and level G at this point in first grade. (Tr. 8). Upon noticing the child had an expressive problem resulting in stuttering, the teacher advised the mother the child needed to be evaluated by a speech pathologist at the school. Authorization forms were provided to the mother in October 2016, who failed to sign and return the forms. (Tr. 20-21). A former daycare worker testified the child was clean, neatly dressed, and always happy to see her mother. (Tr. 50, 52).

{¶13} The paternal grandmother testified the child had a good relationship with the father, his wife, and his step-daughter. She observed the child stuttered when telling a lie and was frightened for her mother about the domestic violence situation. (Tr. 82-84). The last time the mother permitted her to see the child was Labor Day 2015. The mother would not let her transport the child even when the mother was without transportation to make an exchange. (Tr. 65-67, 70). The paternal grandmother related a story about the child being sick at school in September 2016: the nurse contacted the father after she could not make contact with the mother; the father asked her to pick up the child; so she left work in West Virginia and retrieved the child from school. She believed the mother then attempted to file kidnapping charges against her at one police station while she was waiting at another police station for the mother to retrieve the child. (Tr. 92). The paternal grandmother said the mother arrived, grabbed the shocked and distraught child by the arm, and pulled her away. (Tr.

93-95). The mother agreed she was upset but denied she attempted to file kidnapping charges. (Tr. 308-311).

{¶14} The paternal grandfather testified: the father and the child had a good relationship; the child's step-mother treated her like her own child; and the child's step-sister was like the child's sister. (Tr. 176-177). He confirmed the mother stopped answering his texts about visiting with the child and refused his offers to drive halfway when the mother could not. (Tr. 182, 184, 195).

{¶15} A worker from children's services testified she opened an alternative response file due to the March 2016 assault by the boyfriend with the baby present. She closed the case within approximately 45 days (while there was still a no-contact order on the boyfriend) due to her impression that the mother "really had it together." (Tr. 129, 139).

{¶16} The mother's brother testified to the loving bond between the mother and the child, the child's good relationship with him and the maternal grandmother, and the extended family in the area. (Tr. 142-151). He did not believe the child was ever around the mother's house when the boyfriend was there. (Tr. 169, 172).

{¶17} The maternal grandmother testified there were some weeks she saw the child every day and the child spent the night at her house every couple of days. (Tr. 509). The child's great-grandmother lived in this house as well. Other extended family members lived in the area. (Tr. 519). The maternal grandmother described how the child loved her baby sister. (Tr. 520). She believed the issues with visitation and communication started when the father met his wife. (Tr. 512). She testified she heard the father say he wanted custody because the mother was planning to go to school, there was better medical care where he lived, and he believed the mother "was not a multi-kid person." (Tr. 515). She believed the mother was no longer in a relationship with the boyfriend and stated the child at issue was with her (or the mother) when the boyfriend was at the mother's house. (Tr. 524).

{¶18} The mother testified she moved to a house owned by her parents in Wellsville in July 2016. A police report from the March 5, 2016 domestic violence incident was admitted, as was the April 2016 judgment entry of conviction showing the boyfriend pled no contest to an amended charge of first-degree misdemeanor assault.

(Tr. 230-231; Def. Ex. B; Def. Ex. FF). She explained he was upset because she invaded his privacy by reading a text message. (Tr. 561-562). He shoved her, picked her up, and hit her head against the wall, causing her to sustain injuries which included gashes on head, shoulders, and arm. (Tr. 230-231, 562). She testified this was the first time he exhibited violence. (Tr. 561). The mother said the child at issue was sleeping in her own bed at the time and the baby was asleep in the mother's bed; the police report said the boyfriend removed the baby from the mother's arms and the baby rolled off the bed during the incident. (Tr. 562). The mother explained a no-contact order was entered in the criminal case, but it was lifted with her permission after she went to counseling with the boyfriend in July or August 2016. (Tr. 232-234, 565). She insisted she had not been in a relationship with the boyfriend since the no-contact order or before. (Tr. 219). The mother drove and made payments on a vehicle jointly titled in her name and the boyfriend's name, which she said was purchased prior to the assault. (Tr. 251-253).

{¶19} In the week leading up to the December 7, 2016 hearing, the boyfriend was at her house "mostly every day" because he was laid off from work; she answered in the affirmative when asked if "he basically stays there all the time?" (Tr. 204, 238, 240). She insisted he did not live with her, but she had been letting him stay at her house since approximately October 2016 in order to visit with their baby. (Tr. 203). She said he stayed in his parents' basement, but it was not an appropriate space for their baby to visit. (Tr. 234-235, 568). The mother explained that if he stayed, then she went to her mother's house with the child at issue herein or "people take [the child] somewhere out of the vicinity." (Tr. 204-205, 570). When she was asked where she stayed in the days before the first hearing, she said she stayed at her mother's on Wednesday and "probably" stayed at her mother's on Monday and Tuesday. (Tr. 204-205). She insisted the child has not been around the boyfriend since the incident. (Tr. 569). At the second hearing, three weeks after the first hearing, she estimated the boyfriend was at her house two days a week. (Tr. 569). The guardian ad litem saw his truck in front of the house the night before the hearing at 8:30 p.m., but she said the boyfriend did not stay at her house that week. (Tr. 666, 696).

{¶20} The mother passed the state police test in 2014 but then got pregnant and decided against seeking a law enforcement position. (Tr. 553). She worked part-time in 2015, making $4,000. In the middle of 2016, she started full-time nursing school (which she described as a two-year LPN program compressed into one year); this required the child to go to daycare before school. (Tr. 218, 221-222, 548-549). After finishing the LPN program, she planned to work and start an RN program. (Tr. 549-550). The mother said she read with the child every night and believed the child did fine in school but had trouble reading. (Tr. 648).

{¶21} The mother acknowledged she ignored the father's texts if the child did not wish to talk and believed the child talked to her father three or four times a week if the child wished to talk. (Tr. 261, 323-324, 630). The mother seemed unhappy the father brought the child to an eye doctor and to a physician for an extreme eczema-like flare-up and a respiratory illness (after which he purchased prescriptions). She explained she did not inform him the surgery had been scheduled because when she first advised him of the need for surgery, he asked for custody (mentioning better hospitals in Maryland and her desire to start college). (Tr. 271-274, 621). The child was in a bible class one night a week, was intermittently enrolled in gymnastics, and participated in cheerleading with a season running from August to November 2016. (Tr. 651). The mother admitted telling the father she would remove the child from cheering if he (or his relatives) showed up to watch (unless it was during his parenting time). (Tr. 275-278). The mother had issues with photographs posted online by the father's wife. She also had issues with people exiting the father's vehicle at exchanges to say goodbye to the child; she felt it was "demoralizing" and noted they sometimes recorded her. (Tr. 312-315, 603, 662). The mother believed the father made her meet him at the Breezewood exit for an exchange even though he was on his way to the vicinity of Columbiana County (or his parents' house near the West Virginia border). (Tr. 289-290, 610-611). The father denied this, explaining he came to the vicinity on a subsequent day during his parenting time to visit with family or for a court hearing.

{¶22} In addition to certain facts set forth supra, the guardian ad litem refuted the mother's claim that he failed to return calls between the office interview and the home visit. (Tr. 715). When he saw the child at the father's house in July 2016, he said

the mother assured him she would not have to see the boyfriend again. (Tr. 702). The guardian ad litem acknowledged both parties were decent parents but found the mother unreliable in relaying facts. (Tr. 704, 707). He opined the child's best interest would be better served if the father was named residential parent. (Tr. 725).

{¶23} On January 9, 2017, the magistrate issued a decision reallocating parental rights and naming the father the residential parent. The mother was provided parenting time in accordance with the long distance schedule in Loc.R. 9.41 with additional time every other year during the weekends of Martin Luther King Day, President's Day, Memorial Day, Labor Day, and Thanksgiving. The magistrate also decided: exchanges should take place at a certain location at the Breezewood exit; neither party can bring more than four people to the exchange; and only the parties and the child can exit the vehicles. For child support, the mother was ordered to pay $119.95 per month plus the processing fee; income for full-time minimum wage job was imputed to her.

{¶24} In explaining the decision, the magistrate found a change of circumstances and listed four considerations: the assault on the mother by the boyfriend while the child was in the home combined with the mother's subsequent close relationship with the boyfriend (in which he continued to spend nights at the child's home); the child's significant reading difficulties; increasing communication difficulties between the parties; and increasing exchange difficulties. The magistrate listed the best interest factors, addressed each one, and found modification of the parental rights allocation was in the child's best interest. The magistrate concluded the harm in changing the child's environment was outweighed by the advantages to the child and made some findings in support of this conclusion. The trial court issued a judgment entry in accordance with the magistrate's decision the same day.

{¶25} The mother filed timely objections, which were supplemented upon the filing of the transcript. The trial court entered an interim order allowing the magistrate's decision to go into effect without waiting for a ruling on objections; this order was thereafter extended pending the court's ruling on the objections. On September 13, 2017, the trial court overruled the mother's objections and adopted the magistrate's decision. In a 21-page judgment entry filed after reading the 726-page transcript, the trial court set forth the law and made independent findings of fact as to the mother's

objections. The mother filed a timely notice of appeal, and the trial court denied her motion for a stay pending appeal.

GENERAL LAW: REALLOCATION OF PARENTAL RIGHTS

{¶26} A trial court's custody modification decision is reviewed for an abuse of discretion. *Davis v. Flickinger*, 77 Ohio St.3d 415, 418-419, 421, 674 N.E.2d 1159 (1997); *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 23, 550 N.E.2d 178 (1990). An abuse of discretion is more than a mere error of law or judgment; it requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Where both parents are loving and bonded to the children, a custody decision is "difficult and agonizing" for the fact-finder. *Id.* at 418. These cases are also distressing to reviewing judges. *Garrett-Long v. Garrett*, 7th Dist. No. 15 MA 0221, 2016-Ohio-7041, ¶ 50.

{¶27} A reviewing court cannot substitute its judgment for the trial court's broad discretion. *Davis*, 77 Ohio St.3d at 418-419, 421. *See also Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988) (the reviewing court should be guided by the presumption that the trial court's findings were correct). Where the decision is supported by a substantial amount of credible and competent evidence, it will not be reversed as being against the weight of the evidence. *Davis*, 77 Ohio St.3d at 418. The fact-finder occupies the best position from which to view the witnesses and observe their demeanor, gestures and voice inflections and use these observations in weighing the testimony. *Id.* "This is even more crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well." *Id.* at 419.

{¶28} The trial court must exercise its discretion within the bounds of the governing statute, which 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, 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 * * * 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)(iii).

{¶29} The mother sets forth four assignments of error, each related to a different aspect of this statute. We address the fourth assignment of error first as it relates to a general legal premise in the statute. We then address each of three requirements for modifying the allocation of parental rights, contained respectively in assignments of error one through three.

PRESUMPTION FOR RESIDENTIAL PARENT

{¶30} The mother's fourth assignment of error contends:

"THE TRIAL COURT ERRED AS A MATTER OF LAW AND FACT BY FAILING TO APPLY AND ACKNOWLEDGE THAT THERE IS A PRESUMPTION IN MAINTAINING THE RESIDENTIAL PARENT AND THE ANALYSIS OF R.C. § 3109.04(E)(1)(a)(iii) MUST BE CONDUCTED WITH THIS PRESUMPTION IN MIND."

{¶31} The mother emphasizes the part of the statute instructing "the court shall retain the residential parent designated by the prior decree the court" in applying the standards unless modification is in the best interest of the child and one of the three listed factors exist. *See* R.C. 3109.04(E)(1)(a). The mother points out this statute "creates a rebuttable presumption that retaining the residential parent designated by the prior decree is in the child's best interest." *Rohrbaugh v. Rohrbaugh*, 136 Ohio App.3d 599, 604, 737 N.E.2d 551 (7th Dist.2000), citing *Meyer v. Anderson*, 2d Dist. No. 96CA32 (April 18, 1997). *See also Lipp v. Lipp*, 7th Dist. No. 14 CO 0026, 2016-Ohio-4653, ¶ 11; *Martin v. Martin*, 7th Dist. No. 97-JE-11 (June 30, 2000).

{¶32} The mother alleges the magistrate's decision and the trial court's judgment entry failed to reference the presumption in favor of maintaining the residential parent. As the father points out, a declaration by the court acknowledging this presumption was not mandatory. Furthermore, the magistrate's decision (which was adopted by the trial

court) quoted R.C. 3109.04(E)(1)(a) in its entirety. Finally, the trial court's judgment entry specifically recognized the statute "sets a high standard and creates a strong presumption in favor of retaining the designated residential parent." (9/13/17 J.E. at 3). The mother's argument about the court's failure to recognize there was a rebuttable presumption is without merit.

{¶33} The mother also contends the court failed to conduct the reallocation analysis with a presumption in favor of maintaining the residential parent designated in the parties' divorce decree. She contends the presumption should stand due to the lack of evidence presented to support modification in this case, noting the burden was on the father. She combines her argument on the presumption with her arguments under her third assignment of error on whether the harm from the change would be outweighed by the advantages of the change, which will be discussed last under her third assignment of error. To the extent the principles relating to the presumption in favor of the residential parent apply to other statutory standards, we will be guided by such principles in analyzing the three assignments of error reviewed infra.

<u>CHANGE OF CIRCUMSTANCES</u>

{¶34} The mother's first assignment of error provides:

"THE TRIAL COURT ERRED IN DETERMINING THAT A CHANGE IN CIRCUMSTANCES OCCURRED."

{¶35} This assignment is based upon the portion of the modification statute requiring the court to find "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 * * *." R.C. 3109.04(E)(1)(a). To qualify as a change in circumstances, "the change must be a change of substance, not a slight or inconsequential change." *Davis*, 77 Ohio St.3d at 418. However, the change need not be "substantial." *Id.* at 417-418.

{¶36} Contrary to the mother's initial contention, the court was not limited to evidence on the situation as it existed at the time the motion for reallocation was filed. As the father points out, there was no objection to evidence on events occurring after the motion. Regardless, the trial court is to consider the entire situation, which includes not only the situation at the time the motion was filed but also evidence of the situation

as it unfolded thereafter. *See Simkins v. Perez*, 7th Dist. No. 11 MA 80, 2012-Ohio-1150, ¶ 24. As long as the change occurred after the prior decree or was based on facts unknown at that time, the statute permits the court to consider it as a change in circumstances for modification. R.C. 3109.04(E)(1)(a). "If a court could not consider events as they continued to unfold once a custody motion is filed, the trial court would be perpetually re-addressing new filings alleging a change in circumstances due to the inevitable passage of time between the filing of the original custody motion and the date of the hearing on the motion." *Wright v. Wright*, 5th Dist. No. 2012CA00232, 2013-Ohio-4138, ¶ 23. *See also Pierson v. Gorrell*, 12th Dist. No. CA2011-11-216, 2012-Ohio-3878, ¶ 24-25 (trial court is to consider most up-to-date facts). Moreover, an ex parte order was issued based on new facts. Upon vacation of the ex parte order due to the lack of an existing emergency, the magistrate ordered the mother not to allow the child to have direct or indirect contact with the boyfriend pending the court's decision on reallocation.

{¶37} Next, the mother notes the intent of the statute is to "spare children from a constant tug of war" by providing some stability to a child's custodial status. *See id.* at 418. She contests the four considerations listed by the magistrate and reviewed in detail by the trial court when discussing changed circumstances. The mother contends there was no evidence the child maintained exposure to the boyfriend, claiming it was error to find the mother had a relationship with him beyond co-parent to the child's half-sister. The mother emphasizes the court should not hold it against her that she was once a victim of an assault or that she fosters her second child's relationship with her father. On the subject of the child's reading difficulties, the mother notes the child is only in first grade, there was not a decline since kindergarten, she employed a summer tutor, and a difficulty learning to read is not necessarily a parent's fault. *See, e.g., Allen v. Allen*, 11th Dist. No. 2016-T-0015, 2017-Ohio-505, ¶ 26 (an actual change in academic progress must be material and not a temporary or minor grade fluctuation; it is not sufficient to show stagnant academic progress where the child's grades were always "lackluster"). As for communication and exchange difficulties, the mother claims this is not new since the divorce. *See, e.g., Depascale v. Finocchi*, 7th Dist. No. 08 MA 216, 2010-Ohio-4869, ¶ 63 (trial court could reasonably find the relationship between

the parents at the time of the divorce included the same level of hostility and lack of communication). The mother blames the exchange problems on her pregnancy and the father's decision to return the car to the dealer (apparently instead of making the payment for her). She states her failure to drive halfway was not interference with his parenting time as he could have traveled the whole way (both ways).

{¶38} The father responds that the mere presence of the child in the house at the time of an assault on the mother by her boyfriend was a change in circumstances. He states there was evidence it materially affected the child. In any event, he points to evidence suggesting the child continues to encounter the boyfriend as he often stays at the child's house. He notes the guardian ad litem reported the child spoke of a memory of her mother bleeding and police arriving. Regarding educational issues, the father says the child was not merely struggling with reading but was also struggling with letter and number recognition. In addition, the mother failed to authorize an evaluation with a speech pathologist after the teacher advised her of the need for speech services due to expressive difficulties including a stutter. *See, e.g., Paparodis v. Paparodis*, 7th Dist. No. 88 C.A. 119 (Mar. 23, 1989) (delay in testing for a learning disability is a consideration). The father voices concern with the child's school absences as well. With regard to the communication and cooperation issues, he notes the mother's evidence confirmed this worsened after the divorce. As for exchange issues and interference with parenting time, contrary to the mother's suggestion, there was no evidence of this being an issue prior to the divorce decree. The father concludes a change in circumstances can be found when the custodial parent interferes with visitation and there is a breakdown in parental communication. *See, e.g., Williamson v. Williamson*, 7th Dist. No. 16 JE 0022, 2017-Ohio-1082, 87 N.E.3d 676, ¶ 30, citing *Reese v. Siwierka*, 11th Dist. No. 2012-P-0053, 2013-Ohio-2830, ¶ 31. *See also Pierson*, 12th Dist. No. CA2011-11-216 at ¶ 26 (increased hostility and frustration of visitation constitutes a change).

{¶39} The prior decree was entered December 4, 2014. The evidence was constrained to events occurring thereafter. There was evidence of interference with parenting time by failing to meet halfway as ordered in the divorce decree. There was evidence of interference with parenting time. Even after the father drove the entire

distance to the child's house (Thanksgiving 2015), he had to rely on police assistance to receive his parenting time. The mother also agreed to provide the father with the weekend before Thanksgiving and then withdrew her agreement. There was interference with parenting time even after the father filed his motion for reallocation, e.g., President Day's weekend 2016. A residential parent's interference with the non-residential parent's parenting time can be considered a change in circumstances allowing for a reallocation of parental rights. *Meeker v. Howard*, 7th Dist. No. 17 JE 0013, 2017-Ohio-9410, ¶ 27.

{¶40} Communication deteriorated since the decree. At first, the parties were cooperating. The father put his name on financing for a car in April 2015, when the mother could not afford the payment of the truck she was granted in the divorce. The mother testified things were more civil at the time of the divorce. Her mother testified the issues began when the father started dating his wife (which was in the spring of 2015). Hostilities got worse after the father filed the motion for reallocation of parental rights. The mother failed to inform the father about the child's surgery. Thus, he was deprived of the opportunity to be present during the child's hospital admission and recovery, and the child was deprived of her father's presence. Hostilities were still at a high level at the Labor Day 2016 exchange. Around this time, the mother threatened to remove the child from cheering (an activity scheduled for a season from August through November 2016) if the father or his relatives attended a cheering event on a day that was not his parenting time.

{¶41} The entirety of the situation with the mother's boyfriend was also a change in circumstances. Her boyfriend was charged with domestic violence for assaulting the mother while their baby was on the bed and the subject child was in her own bed. There is risk to a child when a parent is assaulted in the home where the child was present, whether they are thought to be sleeping or not. This incident and the resulting assault conviction was not the only consideration. The mother attended counseling with the boyfriend in order to have his no-contact order lifted in the criminal court. Nevertheless, there was still a magistrate's order in this case instructing her to not allow the child to have contact with the boyfriend, directly or indirectly. The mother attested she had no romantic relationship with the boyfriend and the child had no contact with

him since the assault. However, the mother admitted he was at the child's house frequently in the fall of 2016, staying overnight often (while publicly expressing his love for the mother). Although the mother claimed the child was never present when the boyfriend was at the home, the fact-finder could find the mother's description of her relationship and housing situation less than forthcoming. Alternatively, there could be valid concern the child was continually being removed from her own home because the baby's father was coming to visit overnight with the baby.

{¶42} Furthermore, there is no need to analyze the sufficiency of each category of circumstances separately. A change of circumstances can be upheld based on a collection of findings as to how the lives of the residential parent and the child have changed since the prior decree. A trial court could rationally find this collection of circumstances was a change of substance. In doing so, the court could reasonably add the observation that the child had reading difficulties; although only in first grade, the reading level was much lower than typical and there was the matter of the mother failing to ensure the child was evaluated by a speech pathologist notwithstanding the child's stutter, the teacher's advice, and the provision of paperwork to the mother. The trial court did not abuse its discretion in finding the changed circumstances test was satisfied. This assignment of error is overruled.

BEST INTEREST

{¶43} The mother's second assignment of error provides:

"THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW AND FACT IN DETERMINING A MODIFICATION WAS NECESSARY TO SERVE THE BEST INTERESTS OF THE CHILD AS SUCH WAS NOT SUPPORTED BY THE LAW OR THE EVIDENCE."

{¶44} In determining the best interest of a child upon a motion to modify the allocation of parental rights, the court shall consider all relevant factors, including, but not limited to: (a) the parent's wishes; (b) the child's wishes and concerns, if the court conducted an in chambers interview; (c) the child's interaction and interrelationship with parents, siblings, and any other person who may significantly affect the child's best interest; (d) the child's adjustment to home, school, and community; (e) the mental and physical health of all involved; (f) the parent more likely to honor and facilitate parenting

time rights; (g) any failure to make child support payments; (h) whether a parent or household member has been convicted of certain offenses; (i) whether the residential parent continuously and willfully denied court-ordered parenting time; and (j) whether either parent has established a residence, or is planning to establish a residence, outside this state. R.C. 3109.04(F)(1).

{¶45} Both parents wished to be named the residential parent. See R.C. 3109.04(F)(1)(a). Although the mother did not file a motion to modify parenting time, she believed the father's parenting time should be decreased to eliminate the long weekend arrangement in the divorce decree. The child's wishes and concerns were not ascertained as this factor provides: "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 * * *." R.C. 3109.04(F)(1)(b).

{¶46} Appellant complains the court did not conduct an in camera interview after learning the guardian ad litem did not ask the child her wishes. However, a preceding statutory division provides: "the court, in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation." R.C. 3109.04(B)(1). Neither party requested an in camera interview of the child. The guardian ad litem believed the child was "too young to interrogate." She was 6 years old when he spoke to her at each of her houses. The child turned 7 between the first and second hearings. The magistrate found it unlikely the child would have sufficient reasoning abilities on this topic. *See* R.C. 3109.04(B)(2)(b) (if the court does interview the child, this is the threshold for continuing the interview). The trial court found the decision to refrain from sua sponte conducting an in camera review was within the magistrate's discretion. This decision was not unreasonable, arbitrary, or unconscionable.

{¶47} The mother next claims the court failed to consider the child's extended family residing near her residence and the impact of removing the child from the home where her half-sister resided. The magistrate concluded the child had appropriate interactions with both parents, her half-sister, her step-sister, and both extended families. *See* R.C. 3109.02(F)(1)(c). The magistrate noted the mother's restrictions on

the father's family and related the incident when the paternal grandmother was asked to retrieve the child from school when she was sick and no one else was available, finding the drama which unfolded thereafter was the mother's fault. The trial court added the observation that the mother would not permit the paternal grandparents to drive the child to the halfway point when the mother could not. The trial court noted the child's good relationship with the step-sister and step-mother. The magistrate and the trial court recognized that *both* extended families lived in the area, and the trial court cited to the testimony of the mother's brother.

{¶48} The mother notes the child was acclimated to her residence and the maternal grandmother's residence and was adjusted to her school and community. In a decision adopted by the trial court, the magistrate noted the child seemed to adjust well to each home; she struggled with reading at school; and both extended families lived in the area. *See* R.C. 3109.04(F)(1)(d). The trial court's entry overruling the objections added the guardian ad litem's observation that the child did well in the father's residence (for instance, during his half of the summer) and was content there. The father notes the child was only in first grade, participated in activities in his community, and made friends locally, including his step-daughter who was her approximate age.

{¶49} As for the health of both parties, the magistrate expressed concern about the father recording the mother's phone conversations with the child and bringing members of his family to exchanges during which the exchange was recorded. *See* R.C. 3109.04(F)(1)(e). Still, the magistrate suggested the mother exaggerated the issues with the exchange. The magistrate also made findings regarding the mother's relationship with the boyfriend. The magistrate found there was strong circumstantial evidence that the mother violated the temporary order by exposing the child to the boyfriend pending the hearing. The trial court made additional findings as to this relationship, reviewing its concerns and the suggestions the child continues to have some contact with the boyfriend. *See* R.C. 3109.04(F)(1) (consider all relevant factors, including but not limited to those listed). The mother refers to her arguments under the prior assignment of error as to these findings.

{¶50} The magistrate found the father was the parent more likely to honor and facilitate court-approved parenting time. *See* R.C. 3109.04(F)(1)(f). The mother

disagrees and also claims there is no evidence she willfully and continuously denied the father parenting time. *See* R.C. 3109.04(F)(1)(i). On the latter factor, the magistrate noted the mother failed to meet halfway (as she agreed in the divorce) for a continuous period. The magistrate opined the mother used the return of the car (due to her failure to make payments) and her pregnancy as excuses to deny the father parenting time. The magistrate emphasized how the mother unsuccessfully attempted to obtain a note from the pediatrician to prohibit the child from traveling to the father's for Thanksgiving 2015, when he had to resort to police assistance. The magistrate noted the denial of parenting time for President's Day 2016. The magistrate also pointed out the mother offered no proof she completed the online parenting course as ordered eight months prior to the hearing. The trial court agreed with the findings under (F)(1)(f) and (i), referring to its findings on interference with parenting time set forth as a changed circumstance. As set forth above, the conclusions on interference with parenting time are supported by the record. The parties' credibility and intent were matters for the trial court as was the prediction of future compliance with court orders.

{¶51} As for the factor asking whether either parent has established or was planning to establish a residence outside of the state, the magistrate recited the father's North Carolina station at the time of divorce and his move to a new base in Maryland. *See* R.C. 3109.04(F)(1)(j). It was noted his status was non-deployable and he will not be re-enlisting. There was no indication the father failed to make all child support payments. *See* R.C. 3109.04(F)(1)(g). The guardian ad litem found living with the father would be in the child's best interest. *See* R.C. 3109.04(F)(1) (all relevant factors, including but not limited to those listed). The factor based on certain criminal convictions of the parties or household members was found inapplicable. *See* R.C. 3109.04(F)(1)(h).

{¶52} Although some factors may have weighed in favor of the mother, others weighed in favor of the father. The ultimate weighing of the best interest factors was within the trial court's discretion. The decision was not arbitrary or unconscionable; nor was it unsupportable by any sound reasoning process. *See AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597, 601 (1990). Substantial competent and credible evidence supported the

best interest decision. The credibility of the parties and other witnesses was a matter for the trier of fact, and there may have been "much evidence in the parties' demeanor and attitude that does not translate to the record well." *Davis*, 77 Ohio St.3d at 418-419 (fact-finder had opportunity to view the witnesses and observe their demeanor, gestures and voice inflections and to use these observations in weighing credibility). This assignment of error is overruled.

HARM OUTWEIGHED BY ADVANTAGE OF CHANGE

{¶53} The mother's third assignment of error contends:

"THE TRIAL COURT ERRED AS A MATTER OF LAW AND FACT IN FINDING THE HARM IN CHANGING THE ENVIRONMENT OF THE CHILD IS OUTWEIGHED BY THE ADVANTAGES OF THE CHANGE OF ENVIRONMENT TO THE CHILD WITHOUT CORRECTLY APPLYING THE STATUTORY ANALYSIS."

{¶54} Lastly, we address the mother's arguments corresponding to the final statutory test to be employed when reallocating parental rights: "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)(iii). The mother acknowledges there is some overlap between the best interest considerations and the harm/advantage analysis. She points out, however, the final analysis is more stringent than the best interest analysis, quoting: "Although it may seem that such considerations are redundant to the 'best interest of the child' analysis, a more profound inquiry is explicitly contemplated by the legislature * * *." *Martin*, 7th Dist. No. 97-JE-11. She concludes the court merely gave "lip service" to the harm versus benefit analysis, the evidence does not support the court's conclusion, and the advantages perceived by the court were based on mere conjecture. As aforementioned, she also urges the presumption in favor of maintaining the residential parent was not properly respected.

{¶55} In analyzing "whether any harm in changing environment is outweighed by the advantages of the change of the environment to the child," the magistrate's decision adopted by the trial court found "very little risk of harm in changing [the child's] environment." Regarding advantages, the magistrate believed: the father would be more attentive to the child's educational issues; there was no known risk of domestic

violence at his residence; and she would have unobstructed companionship with the non-residential parent and more access to both sides of her extended family.

{¶56} In addressing the mother's objections, the trial court pointed out there are no specific statutory factors a trial court must consider in weighing whether the harm caused by a change in custody is outweighed by the benefits of the change, citing *In re Jeffreys*, 7th Dist. No. 01-BA-4, 2002-Ohio-703. The trial court noted the magistrate nevertheless did specify some facts it considered in weighing the harm against the advantages. In concluding the findings were supported by the record, the court referred to: the child's educational needs and the mother's failure to ensure the child was evaluated by a speech pathologist; the mother's continuing relationship with the boyfriend, which increased the likelihood of the child's exposure to him; the mother as the only parent with a history of interfering with court-ordered parenting time; and the father was the parent most likely to honor and facilitate court-ordered parenting time, which would give the mother unobstructed parenting time and give the child greater access to both sides of her extended family.

{¶57} Contrary to the mother's suggestions, the court was not limited to direct evidence. Reasonable inferences can be made. Additionally, circumstantial evidence has the same probative value as direct evidence. *State v. Treesh*, 90 Ohio St.3d 460, 485, 739 N.E.2d 749 (2001). Judging the credibility of the witnesses is the province of the fact-finder. *Davis*, 77 Ohio St.3d at 418-419. There are multiple details of testimony, not transmissible through a written record, that can suggest a party or other testifying witnesses appeared truthful, deceitful, nervous, confrontational, unremorseful, etc. *See id.* The circumstances in this case do not indicate the trial court clearly lost its way and created a manifest miscarriage. Although a close decision, the trial court acted within the statutory framework and within its broad discretion. This assignment of error is overruled.

{¶58} For the foregoing reasons, the trial court's decision is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.