[Cite as *In re C.A.C.J.*, 2018-Ohio-4501.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

IN RE:

C.A.C.J.,

MINOR CHILD

OPINION AND JUDGMENT ENTRY
Case No. 18 BE 0010

Civil Appeal from the
Court of Common Pleas, Juvenile Division of Belmont County, Ohio
Case No. 15 JG 479

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed.

Atty. Joseph Vavra, 132 West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee

Atty. Steven A. Stickles, 500 Market Street; Suite #2, Steubenville, Ohio 43952, for Defendant-Appellant.

Dated: November 2, 2018

WAITE, J.

{¶1} Appellant-Father appeals the January 5, 2018 decision of the Belmont County Common Pleas Court, Juvenile Division granting custody of Appellant's minor

child to Appellee-Mother. Appellant contends the trial court abused its discretion in utilizing the R.C. 3109.04(E) change of circumstances standard and that the trial court's judgment is against the manifest weight of the evidence. After review of this record, we conclude the trial court correctly applied the law and did not abuse its discretion in granting custody to Appellee, and its decision is not against the manifest weight of the evidence. The judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} The parties were never married. Appellant was 15 years old and Appellee was 18 years of age when the minor child was born on December 19, 2011. Both parents were still in high school. After the child's birth, Appellant exercised parenting time as agreed by the parties. Appellee was cooperative with parenting time with the exception of a single incident wherein she was concerned about placing the child in Appellant's care. (7/28/17 Tr., p. 123.) Shortly after that incident, Appellant filed a motion for reallocation of parental rights and responsibilities with the trial court. The parties subsequently entered into a parenting plan which was filed with the juvenile court on November 13, 2015. The terms of the parenting plan included, *inter alia,* that Appellant was to exercise parenting time with the minor child every weekend and that Appellee would exercise parenting time during the week. The parties also agreed that as Appellant was attending West Virginia University, no child support would be ordered and the parties would reevaluate the issue once Appellant graduated from college. On completion of his studies, Appellant was ordered to pay child support, effective April 1, 2016. On November 21, 2016, after graduation, Appellant filed a motion for reallocation of parental rights and responsibilities with the trial court. Appellee filed her own motion

for termination of shared parenting and reallocation of parental rights and responsibilities on December 5, 2016.

{¶3} After a series of continuances, a hearing on the motions was held on July 28, 2017. A number of persons testified, including the parties, Appellant's wife, Appellant's college roommate, and Appellee's father. Appellant testified that after graduation from college he accepted a position near Detroit, Michigan. He testified that he had moved there with his wife and that he exercised visitation with the minor child at his residence, which was approximately a six-hour drive from Appellee's home. Appellant also testified that while a position was potentially available to him in Pittsburgh, it offered a lower salary and fewer benefits than the Michigan job.

{¶4} Appellee testified that she denied Appellant visitation only once since the child was born, and that was prior to the existing decree. She testified that neither she nor her husband were presently working and that she had another child at home and was currently pregnant. Both parties provided testimony regarding their respective income, expenses, and standard of living. The matter was taken under advisement and a magistrate's decision was issued on November 28, 2017. In this decision, the magistrate concluded that: (1) although the parties contemplated Appellant's graduation from college, a substantial change in circumstances occurred pursuant to R.C. 3109.04(E) when Appellant accepted a job after graduation near Detroit, Michigan, a six-hour drive from Appellee's residence; (2) the parenting agreement should be terminated; and (3) Appellee should be granted residential custody and Appellant should be awarded standard parenting time. The magistrate also ordered both parties to submit all relevant income information to the Belmont County Child Support

Enforcement Agency for a child support and medical support calculation. (11/6/17 Magistrate's Decision, p. 6.)

{¶5} Appellant filed objections to the magistrate's decision on November 28, 2017. In a judgment entry dated January 5, 2018, the trial court concluded the magistrate's decision was supported by the evidence and testimony provided at the hearing and overruled Appellant's objections. Appellant filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

> AS THE PARTIES HAD ALLOWED FOR A FINDING THAT A CHANGE OF CIRCUMSTANCES EXISTED UPON THE APPELLANT GRADUATING FROM COLLEGE, THE TRIAL COURT CORRECTLY FOUND THAT THERE WAS A CHANGE OF CIRCUMSTANCES HOWEVER THE COURT INCORRECTLY APPLIED O.R.C. 3109.04 AND SHOULD HAVE GRANTED THE APPELLANT'S MOTION AND CHANGED THE ALLOCATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AS IT WAS IN THE BEST INTEREST OF THE MINOR CHILD.

ASSIGNMENT OF ERROR NO. 2

> THE TRIAL COURT DID ABUSE ITS DISCRETION IN DENYING APPELLANT'S OBJECTIONS TO THE MAGISTRATE'S DECISION WHEN THE MAGISTRATE HAD INCORRECTLY APPLIED THE LAW OF THE STATE OF OHIO.

{¶6} In his first and second assignments of error Appellant agrees the trial court properly found that a change of circumstances occurred once Appellant graduated from

college, and that both parties agree that only a best interest determination was required in this matter. Appellant contends, however, that the trial court erred in determining it was in the best interest of the minor child for mother to be given custody of the child.

{¶7} A determination of legal custody by the juvenile court will only be reversed for an abuse of discretion. *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 421, 674 N.E.2d 1159 (1997); *In re D.D.D.,* 7th Dist. No. 12 JE 7, 2012-Ohio-5254.

{¶8} When making a custody determination between parents, the juvenile court shall exercise its jurisdiction in child custody matters in accordance with R.C. 3109.04. R.C. 2151.23(F)(1). In determining a motion for reallocation of parental rights, 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, 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:
>
> (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.

{¶9} Appellant argues that he and Appellee agree that Appellant's graduation from college constituted a change of circumstances. Hence, in making its custody determination the trial court was required only to consider the best interest of the child. Appellant asserts that the court erred in granting custody to Appellee after conducting its best interest analysis because the evidence demonstrates that all of the R.C. 3109.04(F)(1) factors favor Appellant.

{¶10} In its findings of fact, the magistrate recognized that the parties anticipated Appellant's college graduation:

The parties entered into a Parenting Plan, which has been referred to throughout the record as a Shared Parenting Plan. The parties acknowledged at the creation of the Plan that changes would be necessary when Father graduated from college. The entire Plan revolved around Father's college schedule. However, the plan clearly notes Mother is the "Custodial Parent" and Father is the "Non-Custodial Parent."

(11/6/17 Magistrate's Decision, p. 3.)

{¶11} The magistrate also found that:

Pursuant to ORC §3109.04(E), modification of a prior decree allocating parental rights and responsibilities can only occur if specific elements are

> met. Because both parties are seeking a termination of the prior Plan and said Plan has been considered in the nature of a shared parenting plan by the parties and the court, there has been a change in circumstance of one of the parents subject to a shared parenting decree. Specifically, Father has graduated from college and is moving to Michigan. Further, the parties had agreed to reexamine the Plan upon Father's graduation.

(11/6/17 Magistrate's Decision, p. 4.)

{¶12} Although the parties agree that the trial court was not required to find a change in circumstance in this case, the record reflects that the trial court did conduct the two-part change of circumstances/best interest analysis. The trial court incorporated into its judgment entry the language of the parenting plan, which specifically anticipated the graduation of Appellant from college and set that event as the termination date for the agreement: "**Agreement Effective Date**: 11/13/2015, until the Father's anticipated college graduation date. Whereupon a new agreement shall be written." (11/13/15 J.E., p. 1 of Shared Parenting Plan.) This record reveals that the triggering event for the termination of the parties' parenting plan was Appellant's college graduation. As this event is neither a fact that was unknown at the time of the original decree, nor was it a new event that arose after the entry of the prior decree, it falls completely outside of the statutory definition of "change in circumstances." See R.C. 3109.04(E)(1)(a). Following a hearing on the parties' competing motions, the magistrate determined that an actual change of circumstance did occur, however: Appellant elected to take a job in the Detroit area. In fact, by the time of the hearing, Appellant had begun employment in Michigan, rented a home there with his wife and

exercised parenting time in Michigan with the minor child. Although the parties gloss over any examination of a change in circumstance, the record reflects that the trial court appropriately concluded that Appellant's decision to relocate out of state, some six hours by car from Appellee and the child's home, amounted to a change of circumstance.

{¶13} Once the trial court determined a change of circumstance existed, it was then required to determine the best interest of the child. In conducting a best interest analysis, the trial court must utilize factors set forth in R.C. 3109.04(F)(1). These factors include, but are not limited to: (a) the parents' wishes; (b) the child's wishes if the court has interviewed the child; (c) the child's interaction and interrelationship with the parents, siblings, and any other person who may significantly affect the child's best interests; (d) the child's adjustment to home, school, and community; (e) the mental and physical health of all relevant persons; (f) the parent more likely to honor and facilitate court-approved parenting time or companionship rights; (g) whether there has been a failure to make child support payments; (h) whether there have been any previous convictions for certain criminal offenses involving children; (i) whether there has been any denial of visitation; and (j) whether any party is planning on establishing a residence outside of Ohio. R.C. 3109.04(F)(1)(a)–(j).

{¶14} Appellant contends that in applying the statutory factors the trial court abused its discretion in determining that it was in the child's best interest to grant Appellee custody. Appellant raises the fact that Appellee had denied him parenting time in the past. However, the one instance in question occurred prior to the 2015

agreement and there have been no visitation issues since that time. (7/28/17 Tr., p. 123.)

{¶15} Appellant next argues that while Appellee testified she would share transportation if she was granted custody, Appellee is unemployed. Since she testified that she has asked her father for gas money for her vehicle, she will most likely not be able to help with transportation. Appellant states that Appellee has elected not to pay her cell phone bill in the past due to financial constraints and has no landline, which creates a safety issue for the child in the event of an emergency. Finally, Appellant asserts that because Appellee lives in subsidized housing and has lived with the child in three different residences within five years this fact "should be considered as a negative for maintaining custody." (Appellant's Brf., p. 6.)

{¶16} Appellant acknowledges that the trial court was correct in stating that, pursuant to R.C. 3109.04(F)(3), it cannot give preference to either parent based on financial status alone. Appellant contends the concerns he raises are not really financial in nature, but are instead concerns for the child's best interest.

{¶17} R.C. 3109.04(F)(3) states, "[w]hen allocating parental rights and responsibilities for the care of children, the court shall not give preference to a parent because of that parent's financial status or condition." The magistrate found:

> In addition to the factors set forth above, the court has considered that Mother has been the primary caretaker and "Custodial Parent" of the minor child. Father has established a nice, safe home for the minor child. However, no testimony or evidence was presented that establishes Mother has not done the same. The child does share a room at Mother's

> home and her resources are more limited, but there has been no testimony that her home is unsafe, unclean or the child is mistreated."

(11/6/17 Magistrate's Decision, p. 5.)

{¶18} This record does not reveal that Appellee's financial condition has had any impact on the child's health, safety or welfare. Nor does Appellant cite to any evidence. In fact, the record reflects the parties have had no disruption in the parenting agreement since its filing in 2015 and have cooperated with family members to ensure transportation and communication between the parties. While Appellant may be commended for his dedication to his child, considering the extreme youth of both parents when the child was born, the disruption to the otherwise uneventful flow of the 2015 parenting plan has been created by Appellant. Appellant's relocation to another state has created the difficulty in this matter. While any parent must be encouraged to further their education and improve their economic condition, and we applaud Appellant for his accomplishments, one parent may not utilize those accomplishments against the parent who clearly has not had similar opportunities. No matter how he couches his argument, Appellant attempts to rely on solely financial factors when claiming that it is in the best interest of the child that he be granted custody. R.C. 3109.04(F)(1) sets forth a number of factors to be considered by the trial court in making its determination and they were considered, here. The court noted the child is bonded with both parents and, as they were extremely young parents when the child was born, noted that their extended families have played a large role in caring for the child. The court determined that both parties are likely to honor and facilitate parenting time, which has been consistent since the 2015 agreement. The court recognized that both parties and their

extended families have resided in the Belmont County area for the child's entire life and the child is well established in the area with both families.

{¶19} The trial court in this matter considered the parties' circumstances in their entirety and concluded that it was in the minor child's best interest to grant Appellee custody. That conclusion is supported by the record. The trial court did not abuse its discretion in overruling Appellant's objections to the magistrate's decision. The court correctly determined that a change in circumstance had occurred and this record supports the determination that granting Appellee custody was in the child's best interest. Appellant's first and second assignments are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT'S DECISION TO DENY THE APPELLANT'S MOTION FOR REALLOCATION OF PARENTAL RIGHTS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶20} Appellant contends the trial court's decision to grant custody to Appellee was against the manifest weight of the evidence. "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.' " (Emphasis deleted.) *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 12. In considering a challenge to the manifest weight of the evidence, the reviewing court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *In re A.S.*, 7th Dist. No. 11 JE 29, 2012-Ohio-5468, ¶ 10.

{¶21} In weighing the evidence, a reviewing court must be mindful of the presumption in favor of the finder of fact. *Id.* In determining whether the trial court's decision is manifestly against the weight of the evidence, "every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts." *Eastley* at ¶ 21. "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Id*.

{¶22} Appellant urges that the court's decision was not supported by the evidence and that without considering all of the other evidence in this case the trial court based its entire decision on the fact that Appellant had relocated to another state. Citing *Silverman v. Silverman,* 4th Dist. No. 03CA2, 2003-Ohio-3757, Appellant contends the trial court did not look at all of the factors before granting Appellee custody. In *Silverman,* the Fourth District concluded that although the Appellant alleged the trial court had only looked at the parties' financial status in making its custody determination and awarded custody to the more financially well-off parent, the record demonstrated that several factors, including issues with visitation and medical concerns of the children while under the appellant's care, were present in that case. Based on all of these factors, the court changed the children's custodial parent. *Silverman* has no application in this matter. The record here demonstrates that there were no concerns by any party related to the health and welfare of the child, visitation, or any other matter to demonstrate removing primary custody from the child's primary caretaker was in the child's best interest. Appellant's assertion is not supported by the record, or by the very

language of the trial court's decision. The trial court determined that a change of circumstance occurred once Appellant relocated to another state, a six-hour drive away from his child. In reviewing the pertinent factors, the court found that the child has spent his entire life in that community along with both parties' families and there were no other associations in Michigan. The court noted there had been no disruptions in visitation since the 2015 agreement and that there were no allegations that one parent or the other was not providing for the child, despite their unequal economic status. Appellant has acknowledged that the trial court may not utilize the parties' financial condition as a criterion in making its determination, yet his arguments are all based on his financial status. Appellant states, without any support from the record, that he would facilitate the child's educational development. He states that the child would have his own bedroom, his own playroom, outdoor space, could be involved in more extracurricular activities and be in a "healthier environment which would give him the greatest opportunity for success." (Appellant's Brf., p. 8.) Even if all of these unsupported assertions are true, they all relate to the differences in the financial status of the parents, and may not be considered in a best interest analysis absent any evidence regarding a danger to the health and safety of the child, which are not present in this case.

{¶23} After review of the record before us, the trial court's determination was not against the manifest weight of the evidence. Appellant's third assignment of error is without merit and is overruled.

{¶24} Based on the foregoing, Appellant's assignments of error are without merit and the judgment of the trial court is affirmed.

Robb, P.J., concurs.

Bartlett, 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, Juvenile Division, of Belmont 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.