

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

LARA LYNN LIPP NKA ZUCCO,

Plaintiff-Appellee,

v.

CARL LEE LIPP,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 CO 0001

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2008 DR 248

BEFORE:

Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:

Affirmed.

Atty. James R. Wise, Hartford & Wise Co., LPA, 91 W. Taggart, P.O. Box 85, East Palestine, Ohio 44413, for Plaintiff-Appellee

Atty. Charles C. Amato, Amato Law Office, LPA, 420 Broadway Avenue, Wellsville, Ohio 43968, for Defendant-Appellant

Dated: December 21, 2023

WAITE, J.

{¶1} Appellant Carl Lee Lipp appeals his second motion to reallocate parental rights to him due to his stated concerns about the health of his child. He and the child's mother divorced in 2010, and the divorce decree was affirmed on appeal. *Lipp v. Lipp*, 7th Dist. Columbiana No. 10 CO 38, 2011-Ohio-5759 ("*Lipp I*"). In it, Appellee mother was granted custody of their sole child. In 2012, Appellant filed a motion to reallocate parental rights, primarily based on his view that the child was overweight, and this caused health concerns. The motion was overruled, and the judgment was upheld in *Lipp v. Lipp*, 7th Dist. Columbiana No. 14 CO 0026, 2016-Ohio-4653 ("*Lipp II*"). Appellant filed a second motion for change of custody in 2021, arguing once again that the child's weight constituted a change of circumstances allowing for a reallocation of parental rights. The trial court rejected Appellant's argument and overruled the motion to reallocate parental rights.

{¶2} The record reflects that past issues regarding the child's weight had been resolved, there were no immediate medical concerns, the child was changing his eating habits, and that he had always been in the 95th-99th percentile of body mass index (BMI). The issue of the child's weight was thoroughly reviewed in the prior motion hearing and subsequent appeal. Appellant now repeats the identical argument that was rejected in the prior appeal. There is no abuse of discretion in the trial court's decision to find no change of circumstances, and the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} This case has been on appeal twice before, and the facts of the case are fully described in those two opinions. As we noted in a previous appeal: "The parties

have a contentious history." *Id.* at ¶ 1. The parties were married on August 4, 2001. They had one child, born on October 8, 2007. The divorce decree was issued by the Columbiana County Court of Common Pleas on May 21, 2010. Appellee, the child's mother, is the residential parent and has been since the divorce. Appellant filed an appeal of the divorce decree, and the trial court's judgment was affirmed on November 2, 2011.

{¶4} On March 7, 2012, Appellant filed a motion seeking to reallocate parental rights. The motion was overruled on April 24, 2014. Appellant filed an appeal. The major argument on appeal was whether the child's weight constituted a substantial change in circumstances such that the court could reallocate parental rights. We rejected Appellant's argument and affirmed the judgment of the trial court on June 13, 2016.

{¶5} On March 10, 2021, Appellant filed a motion asking for a change of custody and to terminate child support, and requested appointment of a guardian ad litem. Appellant's primary contention in the motion was that the child was extremely overweight. A magistrate's hearing on the motion was held on November 12, 2021. The following witnesses testified: both parties; the child's guardian ad litem; Dr. Bertia Jennings, Advanced Nurse Practitioner; and Appellee's stepdaughter. The magistrate overruled the motion on November 18, 2021. Appellant filed objections on December 2, 2021. The objection regarding the court's denial of the motion to change custody was based on the child's obesity and Appellant's concern about health risks relating to obesity. The trial court overruled the objections on May 4, 2022. This timely appeal followed.

Standard of Review

{¶6} Pursuant to R.C. 3109.04(E)(1)(a):

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, * * * 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 * * *, 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.

{¶7} In evaluating a motion to reallocate parental rights and responsibilities and to make a change in the residential parent, a court is required to find: (1) a change in circumstances, (2) modification is in the child's best interest, and (3) harm to the child from the modification is not outweighed by the benefits of the modification. *Rohrbaugh v.*

Rohrbaugh, 136 Ohio App.3d 599, 604, 737 N.E.2d 551 (7th Dist.2000). The record must adequately support each of these findings. *Id.* at 599. R.C. 3109.04(E)(1)(a) creates a rebuttable presumption that retaining the residential parent in the existing order is in the child's best interest. *Id.*

{¶8} "A change of circumstances must be one of substance, not slight or inconsequential, to justify modifying a prior custody order." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997).

{¶9} A trial court has broad discretionary powers in child custody proceedings and a reviewing court gives this discretion a great deal of respect in light of the gravity of the proceedings and the impact that a custody determination has on the parties involved. *Reynolds v. Goll*, 75 Ohio St.3d 121, 124, 661 N.E.2d 1008 (1996). If a trial court's decision regarding the custody of a child is supported by competent and credible evidence, it will not be reversed absent an abuse of discretion. *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 550 N.E.2d 178 (1990), syllabus. An abuse of discretion connotes that the trial court's decision was arbitrary, unreasonable, or unconscionable. *Rohrbaugh* at 603.

ASSIGNMENT OF ERROR

THE TRIAL COURT'S FINDING THAT "NO CHANGE IN CIRCUMSTANCES HAS OCCURRED IN ORDER TO ALLOW [THE] COURT TO CHANGE CUSTODY OF [THE CHILD] FROM MOTHER TO FATHER" WAS UNREASONABLE, ARBITRARY, AND UNCONSCIONABLE. APPELLANT HAS BEEN RAISING THE ISSUE OF HIS CHILD'S WEIGHT GAIN AND DETERIORATING HEALTH BEFORE

THE TRIAL COURT SINCE 2013. IN THAT TIME, THE CHILD'S HEALTH HAS CONTINUED TO DRAMATICALLY WORSEN. AT THE TIME OF THE MOST RECENT TRIAL COURT DECISION IN THIS MATTER, THE CHILD HAD BALLOONED TO OVER 300LBS, HIS BMI OF 40.41 WAS IN THE 99TH PERCENTILE, AND HE HAD BEEN DIAGNOSED AS MORBIDLY OBESE AND REFERRED TO A CARDIOLOGIST ALL BEFORE HIS FIFTEENTH BIRTHDAY. DESPITE THIS, THE TRIAL COURT CONTINUES TO HOLD THAT THE CHILD'S DETERIORATING HEALTH CANNOT CONSTITUTE A CHANGE IN CIRCUMSTANCES.

{¶10} Appellant's sole argument on appeal is that the child's increasing weight and related deteriorating health constituted a change of circumstances that would have permitted the court to then consider whether reallocating parental rights was in the best interests of the child. "[T]he finding of a change of circumstances is a necessary prerequisite to the further inquiry of whether the modification would be in the best interest of the child." *Sayre v. Furgeson*, 2016-Ohio-3500, 66 N.E.3d 332, ¶ 17 (3rd Dist.).

{¶11} The evidence at the hearing on the motion to reallocate provides no basis to overturn the trial court's decision that there was no substantial change of circumstances. There was testimony that the child was overweight and that this might become a problem in the future, but was not an immediate problem. The child had been in the 95th to 99th percentile for body weight since birth. The child had not had any major health issues that required hospitalization. The child had mental health concerns that were being treated, some of which were brought on by the ongoing custody dispute. The child has not developed diabetes. Evidence was presented that the child was changing

his eating habits. There was evidence of some disciplinary issues at school in the past, but nothing recently. The child's grades had suffered significantly during the Covid-19 pandemic, but had rebounded once the child began attending school in person again.

{¶12} Some aspects of Appellant's objections to the magistrate's decision are clearly spurious. For example, the objections stated: "The minor child's worsening obesity issues have prevented the child from enjoying activities that other children routinely get to enjoy * * *." (12/2/2021 Objections, p. 1.) Appellant himself testified that the child was physically active, was very involved in a youth soccer league, and enjoyed hiking, biking, and swimming. All of these activities can be categorized as activities that other children routinely enjoy.

{¶13} It is also unclear from Appellant's argument how the child's weight constituted a change of circumstances from the earlier decree issued in 2014. A finding of a change in circumstances must be "based on facts that have arisen since the prior decree * * *." 3109.04(E)(1)(a). Appellant now raises the identical arguments he raised in his prior motion to change custody. It is clear from the record that the child, who is now over six feet tall, has always charted in the highest percentile for BMI. *Lipp II* at ¶ 14.

{¶14} Appellant cites two cases in support of his argument. In *Guajardo v. Guajardo*, 2nd Dist. Miami No. 2021-CA-22, 2022-Ohio-209, the father filed a motion for change of custody after the mother made an unauthorized move from Miami County to Logan County. The child developed a significant weight gain and serious health issues after the move, and the move severely inhibited the father's parenting time. However, *Guajardo* was not determined solely due to the child's weight. It was based on the

mother's unilateral move to another county, the detriment to the father's parenting time, and medical and behavioral problems that were directly related to the move.

{¶15} Appellant also relies on *In re A.M.S.*, 8th Dist. Cuyahoga No. 98384, 2012-Ohio-5078. In that case, the child had a serious medical condition, a hole in his heart since birth, that was exacerbated by extreme weight gain. The father filed a motion for change of custody because of the child's weight gain, the mother's failure to attend to the child's foot problem, interference with visitation, being uncooperative in taking the child to appointments, and smoking in the presence of the child, among other issues. The trial court found in favor of the father and granted the change of custody. It is clear that the court's decision was based on several factors that impacted on the child's health, and did not solely rest on the child's weight. *In re A.M.S.* cannot be interpreted to require this Court to reverse the trial court's judgment based solely on the child being overweight, particularly when the same issue was thoroughly reviewed in a prior appeal.

{¶16} As Appellant raises no other arguments in favor of overruling the trial court judgment and this record fully supports the trial court's finding and decision, Appellant's sole assignment of error is overruled.

Conclusion

{¶17} Appellant seeks review of the trial court's denial of his second motion seeking to change custody due to his contention that his child is overweight. Appellant argues that his child's weight constitutes a change of circumstances justifying a change in custody, but this argument is identical to the one Appellant advanced in a prior appeal. The record reflects that past issues regarding the child's weight were resolved, there were no immediate medical concerns regarding the child who was changing his eating habits,

and that the child had always been in the 95th-99th percentile of BMI. In order to justify a custody change, the change in circumstances must be substantial, and based on facts arising since the previous decree or court order. There has been no change in the facts of this case since the previous motion for reallocation of parental rights. Based on this record, the trial court did not abuse its discretion in denying Appellant's second motion. The judgment of the trial court is affirmed.

Robb, J. concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignment of error is 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.