

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

ERICA L. PREECE, :
 :
 Plaintiff-Appellant/Cross-Appellee, : CASE NOS. CA2008-09-024
 : CA2008-12-029
 :
 - vs - : OPINION
 : 6/1/2009
 :
 RICHARD F. STERN III, :
 :
 Defendant-Appellee/Cross-Appellant. :

CIVIL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 20340003

James W. Rolfes, Sr., 17 South Main Street, P.O. Box 24, London, Ohio 43140, for plaintiff-appellant/cross-appellee

Renae E. Zabloudil, Suite B, 58 East High Street, London, Ohio 43140, for defendant-appellee/cross-appellant

Wendy Starr, 62 South Oak Street, P.O. Box 615, London, Ohio 43140, guardian ad litem

BRESSLER, P.J.

{¶1} Plaintiff-appellant/cross-appellee, Erica Preece ("Mother") appeals the decision of the Madison County Court of Common Pleas, Juvenile Division, terminating an agreed parenting entry and establishing shared parenting. Defendant-appellee/cross-appellant, Richard Stern ("Father") appeals the same decision that also set child support without granting a deviation from calculation guidelines. We affirm the

decision of the trial court in part, reverse in part, and remand for further proceedings.

{¶12} As a result of a brief, non-marital relationship, Mother and Father had a daughter, Alyssa, born in July 2002. The parties filed an agreed entry with the trial court in May 2003 by which Mother was designated custodial parent, Father was granted visitation every other weekend, and was ordered to pay \$302.75 in child support each month. The parties abided by the terms of the agreed entry until Father filed a motion for reallocation of parental rights and responsibilities in July 2007.

{¶13} In his motion, Father asserted that there had been a change in circumstances to warrant the revocation of the agreed entry, and moved the court to name himself Alyssa's legal custodian and residential parent. In the alternative, Father moved the court to order shared parenting according to his submitted plan.

{¶14} The court appointed a Guardian ad Litem ("GAL") to represent Alyssa's interests in the matter, and also held a hearing during which the court heard testimony and admitted evidence regarding the custody issue. After the hearing, the court found that a change of circumstances had occurred and that shared parenting was in Alyssa's best interest. The court considered proposed shared parenting plans from Mother and Father and adopted Father's plan with a few modifications.

{¶15} As a result of the new plan, Alyssa now spends alternating weeks with Mother and Father. During the week that Alyssa is with each parent, that parent is designated the residential parent and legal custodian for his or her specific parenting time. The court also ordered father to pay \$438.44 a month in child support. It is from the trial court's decision that the parties now appeal, raising two assignments of error and one cross-assignment of error.

{¶16} For ease of discussion, we will address Mother's assignments of error

together.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN NOT FOLLOWING THE CASE LAW CONCERNING THE MODIFICATION OF A PRIOR AGREED DECREE AND O.R.C. 3109.04(E)(1)(a)."

{¶9} Assignment of Error No. 2:

{¶10} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN FINDING THAT MODIFICATION OF THE VISITATION SCHEDULE WAS IN THE CHILD'S BEST INTEREST."

{¶11} In Mother's assignments of error, she argues that the trial court erred in finding that a change of circumstances occurred that warranted the revocation of the agreed entry, and that adopting the shared parenting plan was not in Alyssa's best interest. While we sustain Mother's assignments of error, we do so for a different reason. Instead, the trial court's written decision did not explain its reasoning for finding a change in circumstances or analyze the best interest factors so that we are unable to determine whether terminating the agreed entry and establishing shared parenting was an abuse of discretion. We therefore reverse the trial court's decision and remand for further clarification.

{¶12} Because the court re-designated parental rights and responsibilities, it was required to first find that a change in circumstances occurred to warrant the change in legal custodianship. *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589. "R.C. 3109.04 does not define 'changes in circumstances'; however, courts have generally held the phrase to note 'an event, occurrence, or situation which has a material and adverse effect upon a child.'" *Lindman v. Geissler*, Delaware App. No. 06CAF060036,

2007-Ohio-2003, ¶33.

{¶13} When reviewing a custodial issue, an appellate court will apply an abuse of discretion standard of review so that the trial court's decision will not be reversed unless it is unreasonable, arbitrary, or unconscionable. *Smith v. Smith*, Butler App. No. CA2005-04-091, 2006-Ohio-2136, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "Moreover, we presume that the trial court's findings are correct, since the trial court is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use its observations in weighing the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. "Thus, deferential review in a child custody case is crucial since there may be much evident in the parties' demeanor and attitude that does not translate to the record well. *Davis v. Flickinger*, 77 Ohio St.3d 415, 419, 1997-Ohio-260." *Jones v. Jones*, Highland App. No. 06CA25, 2007-Ohio-4255, ¶33.

{¶14} Given the deference we are to afford the trial court, its written opinion takes on additional significance because through it, the trial court provides us with the information and reasoning it deemed integral when determining custody matters. However, when that analysis and clear reasoning is absent from the trial court's written opinion, it is impossible to review the decision without supplanting the trial court's judgment with our own. As doing so is not permitted in an abuse of discretion review, we are forced to ask the trial court to clearly enumerate its reasoning and to follow statutory precepts before we can review its decision to revoke the agreed entry and establish shared parenting.

{¶15} Here, the trial court did recognize that it was first required to address the change in circumstances and acknowledged that R.C. 3109.04 set forth the process by

which a trial court allocates parental rights and establishes shared parenting. However, the court couched those changes in terms of Father's concerns regarding Alyssa's health and safety, instead of listing the tangible changes that occurred since the enactment of the agreed entry in 2003.

{¶16} Regarding the first change the court references, Father argued that a change had occurred given that Alyssa's maternal grandfather ("Grandfather") now cares for Alyssa and her two sisters¹ while Mother is at work. In order to demonstrate that it is not in Alyssa's best interest that Grandfather provide such care, the court heard testimony from Mother's childhood friend who claimed that Grandfather molested her when she was a teenager and that Mother later acknowledged the sexual abuse.

{¶17} According to the record, at the time the agreed entry was enacted, and for the two years after it went into effect, Mother had a friend caring for Alyssa and her two sisters. Grandfather testified that while he worked, Alyssa would only spend Saturday night with him on some weekends or come over to play in his yard. However, when Grandfather retired in 2005, he began watching the girls while Mother worked. Based on Mother's current work schedule, Grandfather now watches Alyssa and her two sisters from 2:00 to 9:00, Monday through Friday.

{¶18} After hearing the testimony relating to Grandfather, the trial court noted in its decision that "there was evidence when a witness testified that maternal grandfather, who also provides child care for the child, touched the private parts of the witness when the witness and the mother were under 14 years of age. There were no charges filed at the time. There is no evidence since that time of similar behavior by the maternal grandfather." However, the court goes on to say that a change in circumstances had

occurred since Mother and Father filed the agreed entry because of "the suspicions of the maternal grandfather's behavior with one of the witnesses." Because these two observations by the court appear contradictory and the court fails to otherwise clarify Grandfather's impact on the requisite change in circumstances, we are unable to determine if the trial court abused its discretion in finding that a change occurred.

{¶19} While the record seems to indicate that the actual change in circumstances was that Mother has a new work schedule and that Grandfather now watches Alyssa seven hours a day, not that Father developed suspicions regarding Grandfather's past, we are unable to supplant our judgment for that of the trial court in order to make that specific finding. *In re Jane Doe 1* (1990), 57 Ohio St.3d 135.

{¶20} Similarly, the trial court referenced various health and hygiene issues it considered in determining if a change in circumstances had occurred. The court heard testimony that Alyssa has suffered multiple ailments that have gone under or un-treated by Mother. By her sixth birthday, Alyssa had 12 cavities and abscessed teeth. Due to the infection caused by the abscess, Alyssa had a boil-like sore reappear on her gums and when it went untreated, the infection traveled through her body, resulting in a boil on Alyssa's stomach.

{¶21} Alyssa also suffered from a few different skin conditions. While Mother claimed that Alyssa has eczema, Father provided evidence during the hearing that Alyssa had scabies for over a month. The court also heard evidence of a consistent rash on Alyssa's buttocks, and a severe case of poison ivy that lasted over a month. Each time Father would treat Alyssa's poison ivy, she would return the following visit with open sores and complain of severe itching.

1. Mother has two other daughters, one older than Alyssa who was eight years old at the time of the

{¶22} Alyssa also has vision problems. The court heard testimony that Mother fails to make Alyssa wear her glasses, and that the glasses might be an incorrect prescription. The court also heard testimony that Alyssa is frequently ill and has a constant cough. Father presented evidence that he took Alyssa to Urgent Care where she was diagnosed with tonsillitis. According to the doctor there, Alyssa had been suffering from the illness for a while.

{¶23} Overall, Mother testified that she does not take Alyssa to the doctor for every bump and bruise, and instead, knows when medical attention is necessary. However, on many occasions, Father has taken Alyssa to the doctor or has followed up his medical concerns over his daughter's health and well-being.

{¶24} The court also heard testimony regarding Alyssa's hygiene. Mother testified that she has given Alyssa increased independence regarding her hygiene and choice in clothing. During the hearing, the court heard testimony that when Father picked up Alyssa for his visitation, she would often smell badly and be dirty. The court also heard testimony that Alyssa would often wear clothes that were too small for her (often exposing her stomach when she would raise her arms) and that she did not have appropriate clothes for the colder seasons. When asked to explain, Mother testified that she was not going to buy winter socks for Alyssa because she refused to wear anything but ankle-socks.

{¶25} After hearing the evidence regarding Alyssa's declining health and hygiene, the court found that "the child has had some medical problems, but not to the extent that said problems would prove neglect or serious risk to the child," and stated that she was a "neat and clean" child. Just as with Grandfather providing care,

hearing, and one born after Alyssa who was two years old at the time of the hearing.

however, the court used the medical issues as another example of a change in circumstances. Again, the court couched the health and cleanliness issues in terms of "father's concerns about medical issues" but did not explain why Alyssa's health and hygiene issues specifically constitute a change in circumstances.

{¶26} Given the inconsistency in the court's opinion, we are unable to determine whether the court's finding that Alyssa's declining health and hygiene constituted a change in circumstances was an abuse of discretion without first interjecting our own judgment. Again, we are unable to do so, and ask that the trial court clarify the impact Alyssa's health and hygiene had on its change of circumstance analysis.

{¶27} The court concludes its statement on the change of circumstances by referencing Mother's work and school schedule, and how having an additional daughter has led to Father having concerns about Mother's ability to care for Alyssa. The record does indicate that since the agreed entry, Mother is now working at Staples, is taking nursing classes, and has had an additional daughter. However, the court did not specifically address these issues in terms of whether they have had a material or adverse impact on Alyssa, thereby constituting a change in circumstances. Instead, the court states that "increased time with father would provide increased protection from the realization of the father's concerns and provide the mother with assistance in caring for the child."

{¶28} Whether or not the purpose of having a shared parenting plan is to alleviate Father's concerns or to give Mother assistance in caring for her daughters, without knowing why the trial court deemed these matters a change in circumstances, we cannot review the decision without first employing our own judgment. Therefore, we remand and direct the trial court to clarify its analysis specific to Mother's work and

education, as well as having had another child since the enactment of the agreed entry.

{¶29} We also note that after the trial court clarifies its change of circumstance analysis, it will need to consider and analyze the best interest factors found in R.C. 3109.04. According to the statute, before a trial court can reallocate parental right and responsibilities, and in addition to the change of circumstances, a court is required to determine that adopting a shared parenting plan is in the child's best interest.

{¶30} However, the court stated that it found that the shared parenting plan "could be in the best interest of the child if an adequate shared parenting plan is submitted." Determining that a plan *could be* in Alyssa's best interest does not fulfill the statutory requirement that shared parenting be in the child's best interest. This court is aware that the trial court permitted the parties to submit shared parenting plans and then chose Father's plans with some modification. In a separate entry, the court stated that once modified, adopting Father's plan was in Alyssa's best interest. However, before we review whether adopting that plan was in Alyssa's best interest, we ask the trial court to analyze the R.C. 3109.04 factors specific to the adopted plan so that we may determine if ordering shared parenting was an abuse of discretion.

{¶31} Finally, the trial court will need to address R.C. 3109.04(E)(1)(a) which calls for a court to make one of three enumerated findings before terminating an existing parenting agreement. Because the parties did not agree to change their agreed entry, subsections (i) and (ii) are inapplicable, so that (iii) would apply. Therefore, in addition to the change in circumstances and best interest factors, the trial court should have addressed whether by creating the shared parenting plan, "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). While the court referenced the fact

that 3109.04(E)(1)(a) applied, it did not discuss the enumerated findings or the impact of a change in Alyssa's environment. Therefore, on remand, the trial court is directed to specify whether having shared parenting and the benefits of alternating weekly visitation outweighs any harm likely to occur as a result of the change in Alyssa's environment.

{¶32} Having directed the trial court to clarify its written opinion so that we may properly review the decision for an abuse of discretion, we sustain Mother's assignments of error, reverse the trial court's decision, and remand for further proceedings consistent with this opinion.

{¶33} Cross-Assignment of Error:

{¶34} "THE TRIAL COURT ERRED WHEN IT ORDERED APPELLANT-FATHER TO PAY CHILD SUPPORT UNDER A SHARED PARENTING PLAN WITHOUT GRANTING ANY DEVIATION FROM THE GUIDELINE SUPPORT CALCULATION."

{¶35} In Father's cross-assignment of error, he asserts that the trial court erred by not deviating from the support calculation guidelines to lower his support obligation. This argument lacks merit.

{¶36} According to R.C. 3119.23, a trial court may consider several factors when determining whether to deviate from the child support obligation calculation guidelines. Specific to Father's argument, he claims that the trial court abused its discretion by not relying on factors (D), "extended parenting or extraordinary costs associated with parenting time," and (K), "the relative financial resources, other assets and resources, and needs of each parent," in order to deviate from the guidelines thereby requiring him to pay no child support.

{¶37} In setting Father's child support obligation, the trial court's decision fails to

discuss the deviation factors set forth in R.C. 3119.23. However, unlike the change in circumstance and best interest factors in R.C. 3109.04, considering the deviation factors is discretionary and a court need not address them. *Zeitler v. Zeitler*, Lorain App. No. 04CA008444, 2004-Ohio-5551. Although it did not specifically address the deviation factors, the court did not abuse its discretion in ordering child support according to the child support obligation worksheet.

{¶38} Instead, the trial court conducted a child support obligation investigation in which Father's earnings were found to be \$42,925.27 and Mother's were \$27,108.84. Based on these calculations, and according to the Child Support Computation Worksheet, Father's obligation was set at \$438.44 a month, plus fees. Because of the shared parenting plan, Father visits with Alyssa every other week. While this additional time does provide Father more opportunities to directly provide for Alyssa's care, there nonetheless remains a large income disparity between the parties, as reflected by the computation worksheet, and requiring Father to pay according to the guidelines will allow Mother to provide necessary care for Alyssa during her visitation weeks. Therefore, the trial court's decision to not decrease Father's obligation was not arbitrary, capricious, or unreasonable. Having found no abuse of discretion, Father's cross-assignment of error is overruled.

{¶39} Judgment affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

POWELL and WALSH, JJ., concur.

Walsh, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.

