

[Cite as *In re M.H.*, 2019-Ohio-2439.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

IN RE M.H. :
 : Nos. 107612 and 107613
A Minor Child :
 :
[Appeal by S.J., Mother] :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED AND REMANDED
RELEASED AND JOURNALIZED: June 20, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. CU 12108014 and CU 12108015

Appearances:

Bartos & Bartos, L.P.A., and David Bartos, *for appellant.*

Dean A. Colovas, *for appellee.*

LARRY A. JONES, SR., J.:

{¶ 1} In this appeal, appellant S.J. (“Mother”) challenges the trial court’s judgments granting appellee B.H.’s (“Father”) motion to modify custody. For the reasons that follow, we affirm and remand.

Procedural History

{¶ 2} This case dates back to 2012, when Father filed an application for custody of the children at issue, twin boys M.H. and A.H., who were born in July 2010. As a result of the initial proceedings, the boys were placed in the legal custody of Mother in 2014.

{¶ 3} In February 2017, Father, pro se, filed a motion for modification of custody and an emergency motion for temporary custody of the boys. Father contended in the motions that he learned that Mother was in an inpatient drug treatment facility and unavailable to care for the children. On March 16, 2017, the trial court granted the emergency motion for temporary custody.

{¶ 4} On March 31, 2017, Mother, by and through counsel, filed a motion to vacate the trial court's order and a motion for temporary orders. The motions were set for hearing on April 14, 2017, but the date was continued until May 18, 2017. On May 11, 2017, Mother filed a motion for an in camera interview of the boys. The May 18 hearing was held, and the trial court denied Mother's motions to vacate and for temporary orders. Mother's attorney was granted permission to withdraw from the case at the hearing. The matter was set for further proceedings to take place in August 2017.

{¶ 5} The August 2017 hearing did not take place, however, because the matter was continued for the appointment of a guardian ad litem ("GAL") for the children. The next hearing was in October 2017, at which Mother's parenting

schedule was adjusted for the upcoming holidays and the matter was set for trial to take place on January 19, 2018. Father had counsel at that hearing; Mother did not.

{¶ 6} The trial did not take place on January 19, but the GAL did file her report on that date; the trial was continued until March 30, 2018. On February 22, 2018, Father filed a supplemental affidavit averring to issues that were not directly addressed in his initial pro se motion for modification of custody.

{¶ 7} The trial took place on March 30, 2018, whereupon the following testimony was elicited.

Trial Testimony

{¶ 8} Mother testified that in May 2015 she was living with her parents, but she was “in and out of the streets and institutions and jails,” and at that time, her mother was primarily taking care of the boys. She “caught a case” in July 2015, and went to jail. Mother testified that after her release from jail, she did not want to return to her parents’ house; her mother told her that she was not allowed to see the boys until after she stopped using heroin. Mother testified that her “drug of choice [was] any and every mind or mood-altering substances or activities.”

{¶ 9} Mother testified that after her release from jail she participated in two inpatient treatment programs: the first was a 90-day program that she attended from approximately February 2016 to May 2016, and the second was an approximate 69-day program that she attended from about February 1, 2017 through April 13, 2017.

{¶ 10} In mid-July 2017, Mother tested positive for marijuana and cocaine. Mother testified that after testing positive, she continued attending Alcoholics Anonymous meetings to help her stay sober, which she contends she has been since that July 2017 relapse. She was diagnosed with anxiety, depression, and bipolar disorder, and she takes medications (an antidepressant and mood stabilizer) to help her with those issues. Mother admitted that, as of the time of trial, she had not been successful in finding a medication that helped with her anxiety, but testified that she was treating with a behavioral therapist and a psychiatrist.

{¶ 11} At the time of trial, Mother was employed as a painter. She did not have a valid driver's license. She testified that the house she lived in belonged to her grandparents. Originally, she and the boys lived in the house with her parents and her brother, who was responsible for the rent payments to the grandparents. The brother, however, whom Mother referred to as "no good," defaulted on the payments and her father took them over. Her father also defaulted and was "told to leave."

{¶ 12} At the time of trial, only Mother and her mother resided in the house that Mother hoped the twins would be able to purchase one day so that they could have "a roof over their head" and Mother could "go on [her] merry way." Mother was happy that it would be just her and her mother living in the house because she did not want her brother to be around the boys. According to Mother, her brother was an "addict," and he had been hiding out in the basement of the house when he was not supposed to be there.

{¶ 13} A police officer also testified. He stated that in March 2016 he responded to Mother's home and found drugs and drug paraphernalia "in plain sight" in the house. The record established that, at the time, Mother was not residing in the house because she was in rehabilitation.

{¶ 14} Paternal grandmother testified as well. Father lives with paternal grandmother; paternal grandmother's other son, who was a firefighter, also resided in the home. Grandmother described Father as a "good dad" who engages in many activities with the boys, including Cub Scouts. She testified that she was also involved in activities with them, including taking them to Sunday school, and their uncle was involved as well.

{¶ 15} As it related to Mother, paternal grandmother testified as follows: "[Mother] is a very good mom. She has mood swings. Sometimes I don't really want to deal with her, but [she] is a good mom. I'm not gonna say she's not." She described the boys as "a handful," but noted that because of the family, they were "loved."

{¶ 16} Father testified that he is a construction worker and had been employed for the past two years at a company. When the boys were living with Mother, they were attending the Parma City Schools and they both had individual educational plans ("IEPs"). Father lives in Cleveland and once he got emergency custody of them, he enrolled them in the Cleveland Public Schools.

{¶ 17} According to Father, the Cleveland Public Schools "refused everything that came from Parma," including the IEPs. The Cleveland Metropolitan

School District then issued new IEPs. Father testified that he is actively involved in their education, and that both boys were doing well in the Cleveland public school district, as measured by their results on state testing and their report cards.¹

{¶ 18} Father testified that he supports Mother spending time with the boys and will occasionally extend their visitation time with each other: “That’s a strong belief of mine, that they need to see both parents, and I’m always gonna stick to that.”

{¶ 19} Mother testified in the narrative form. She told the court that she had been working hard to better herself. She believed that the main problem that caused her to lose custody was her brother living in her house, and that had been rectified, because he moved out about one week prior to the hearing. She acknowledged that Father took good care of the boys, but had concerns about them being left alone with paternal grandmother because she believed the grandmother had physical limitations, and referenced an injury that one of the boys suffered while at Father’s house. She was concerned that the GAL had never visited Father’s house.

{¶ 20} In seeking admission of exhibits, Father’s attorney asked the court to also entertain the GAL’s report, which he told the court had been filed, but that he did not have access to at that time. The court noted that it had received a copy of the report and asked the GAL to summarize her report and recommendation.

¹Father admitted that state testing was a “rough” area for the twins. But, as of the hearing date, one twin had advanced 15 points in both math and reading, and the other twin had advanced 18 points in math and 2 points in reading. Both boys were on the merit roll.

{¶ 21} The GAL told the court that she did have a visit to Father's home scheduled, but because of scheduled activities that the boys had, the visit was cancelled. She told the court that she did not have any time in her schedule between when the visit was cancelled until the time when she believed the hearing would go forward (i.e., January 19, 2018, when she filed the report) to reschedule. The GAL told the court that although she did not have a home visit with Father and the twins, she did have occasions to observe them interacting. She also noted that no concerns had ever been raised about the appropriateness of Father's home.

{¶ 22} She further stated that she was not overly concerned about injuries that the boys had sustained at either Mother or Father's house because they have "tons of energy," and are constantly running and jumping.

{¶ 23} The GAL told the court that, because she knew that Mother and her brother (who, as mentioned, lived there) both had substance abuse issues, she found it concerning that at her visit to Mother's house she saw a beer can on the front porch. She also told the court that it was concerning that the twins, who were eight years old, unprompted, wanted to talk to her about drugs.

{¶ 24} The GAL acknowledged that Mother has "done a phenomenal job working toward recovery. That is really hard and I've got to give her credit for that." But she balanced that against the fact that, at that time, the boys had been with Father for approximately one year: "They have been laying their head down to sleep in this same place with dad. Dad's reasonable. I find him to be completely reasonable, completely logical every time I've talked to him." She noted in particular

that Father knows that the boys love Mother and he encourages them to love her and to not “feel bad” about her.

{¶ 25} The GAL interviewed the children twice and found that they knew that Mother and Father were “fighting over them” and they hated that; they were eager for the proceedings to be over. The boys told the GAL that they knew they did not live with Mother anymore “because [Mother] and her brother did a lot of drugs.” The GAL found that statement “most persuasive.”

{¶ 26} The GAL further noted the following: (1) the kids did not express a strong desire to go back to residing with Mother; (2) the kids were doing much better in the Cleveland Metropolitan School District system; (3) Mother did not have stable employment; (4) concern that Mother was saving her money to purchase the home for the twins, who were so young; and (5) concern about Mother’s brother, who had only left the home about a week before the hearing.

{¶ 27} In judgment entries (one for each child) dated July 27, 2018, the trial court granted Father’s motion to modify custody. Mother now appeals, raising the following assignments of error for our review:

- I. The trial court abused its discretion or committed prejudicial error by its use of the guardian ad litem testimony, report and recommendation.
- II. The trial court abused its discretion by failing to conduct an in camera interview of the children when a motion for in camera interview was filed May 11, 2017.
- III. The trial court’s decision was against the manifest weight and sufficiency of the evidence in its determination that a significant change in circumstances has occurred which resulted in the modification of the court’s previous custody order of 2/9/2014.

Law and Analysis

Standard of Review

{¶ 28} Our review of a trial court’s decision concerning the allocation of parental rights and responsibilities is for an abuse of discretion. *In re A.M.S.*, 8th Dist. Cuyahoga No. 98384, 2012-Ohio-5078, ¶ 17, citing *In re D.J.R.*, 8th Dist. Cuyahoga No. 96792, 2012-Ohio-698; *Drees v. Drees*, 3d Dist. Mercer No. 10-13-04, 2013-Ohio-5197, ¶ 20. An abuse of discretion suggests that the trial court’s judgment is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Under this standard, an appellate court may not merely substitute its judgment for that of the trial court. *Id.*

GAL’s Report and Testimony

{¶ 29} In a September 2017 order, the trial court appointed the GAL. The order stated that the GAL “shall comply with * * * Rule 48 of the Rules of Superintendence for the Courts of Ohio.” Sup.R. 48 governs “all domestic relations and juvenile cases in the courts of common pleas where a court appoints a guardian ad litem to protect and act in the best interest of a child.” Sup.R. 48(A). In her first assignment of error, Mother contends that the GAL’s investigation fell below the minimum standards established by the rules and therefore the trial court should not have relied on it.

{¶ 30} Specifically, Mother challenges the following in regard to the report:
(1) that it was not admitted into evidence and was not given to the parties to review;

(2) there was no indication that the twins were interviewed one-on-one outside of the presence of the parents; (3) there was no indication that the twins' wishes were determined; (4) there was no indication that a background check on Father was conducted; (5) there was no review of the twins' school, medical, and mental health records; (6) no drug and alcohol assessment of the parents was conducted; and (7) "there seems to be a lack of evidence that the guardian ad litem completed any substantive investigation into the best interest of the children."

{¶ 31} We disagree with Mother and initially note that the "rules of superintendence are merely guidelines and do not have the force and effect of statutory law." *O'Malley v. O'Malley*, 8th Dist. Cuyahoga No. 98708, 2013-Ohio-5238, ¶ 56, citing *In re D.C.J.*, 8th Dist. Cuyahoga Nos. 97681 and 97776, 2012-Ohio-4154, ¶ 48.

{¶ 32} It is true, as Mother states, that the GAL's report was not admitted into evidence. That notwithstanding, the record demonstrates that the report was filed with the clerk of courts on January 19, 2018, which was over two months prior to the trial. Notice was provided to the parties that the report had been filed; thus, the parties were free to access and review it before the trial. Moreover, the GAL provided a summation of the report at trial and the court allowed the parties to cross-examine her on it.

{¶ 33} In *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, 776 N.E.2d 485, the Ohio Supreme Court held that in custody proceedings in which the GAL's report will be a factor in the trial court's decision, parties to the proceeding have the

right to cross-examine the guardian ad litem concerning the contents of the report and the basis for a custody recommendation. *Id.* at syllabus. That occurred here.

{¶ 34} Further, our review demonstrates that the GAL's investigation was not lacking, as Mother contends. The record shows that the GAL was appointed in October 2017, and at that time the trial was set for January 2018. She filed her report on the date she believed the trial would commence. Thus, she completed her investigation in three months. During that three-month period, the GAL did the following: (1) interviewed Mother, Father, maternal grandmother, maternal uncle, and the twins (outside of the presence of Mother or Father); (2) saw Mother and Father interact with the twins; (3) reviewed the twins' voluminous school records; (4) conducted a home visit at Mother's home; (5) reviewed the prior court records in this case, which dated back to 2012; (6) attended all court proceedings after her appointment; and (7) reviewed Mother and maternal uncle's criminal records.

{¶ 35} Father concedes that it would have been preferable for the GAL to conduct a visit of his home, but notes that no issues were ever raised about the suitability of his home. We agree. Mother had the opportunity to question both Father and his mother about the home; she did not ask them any questions about it.

{¶ 36} On this record, we find that the GAL conducted a thorough investigation. Mother had access to the GAL's report prior to trial, and she was able to cross-examine the GAL at trial about the contents of the report and the recommendation. The trial court therefore did not abuse its discretion by relying on the report and the first assignment of error is overruled.

Request for In Camera Interview of Twins

{¶ 37} As mentioned, early in the proceedings relative to the issue of this appeal, in May 2017, Mother filed a request for an in camera interview of the children (the request was filed by counsel before he withdrew from the case). A review of the docket and transcript are silent about the request, with potentially the exception of the GAL stating at trial that she had interviewed the boys at the courthouse. Neither the parties nor the court ever raised Mother’s motion. Thus, on this record it appears that it became a “nonissue.” The Ninth Appellate District addressed this scenario, where husband – father had filed a motion for an in camera interview of the subject child, but never renewed his request at trial. *Schmitt v. Ward*, 9th Dist. Summit No. 27805, 2016-Ohio-5693. The court held that

even if a party has filed a written motion for an in camera interview of the parties’ minor child under Section 3109.04(B)(1), the party must raise the issue at trial in order to preserve it for appeal. *Miracle v. Allen*, 9th Dist. Lorain No. 05CA008843, 2006-Ohio-5063, ¶ 6. A party that fails “to raise the issue of the trial court’s failure to interview the minor child at a time when the trial court could have corrected the error,” forfeits the issue for purposes of appeal. *Id.*

Schmitt at ¶ 16.

{¶ 38} Because Mother did not renew her request for an in camera interview of the children at trial (or anytime) throughout the relevant proceedings, she has waived the issue. We note, however, the GAL stated that as part of her investigation she had interviewed the boys outside of their parents’ presence. The second assignment of error is overruled.

Change of Circumstances

{¶ 39} In her final assignment of error, Mother challenges the trial court's finding that there was a change in circumstances warranting Father's request for the change in custody.

{¶ 40} As previously stated, in order to overturn the trial court's decision we would have to find that it abused its discretion. A trial court does not abuse its discretion in parental rights cases when the determination "is supported by a substantial amount of credible and competent evidence." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997), quoting *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 550 N.E.2d 178 (1990), syllabus.

{¶ 41} R.C. 3109.04(E)(1)(a) governs modification of parental rights and responsibilities and provides in relevant part as follows:

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:

* * *

(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.

{¶ 42} Thus, before the juvenile court can modify the allocation of parental rights and responsibilities, it must find that: (1) a change in circumstances has occurred since the last decree; (2) modification is necessary to serve the best interest of the child; and (3) the advantages of modification outweigh the potential harm.

{¶ 43} The trial court made all three of the above-mentioned findings and our review of the record demonstrates that they were supported by competent, credible evidence. As mentioned, Mother challenges the change-in-circumstances finding and that is what we focus our discussion on.

{¶ 44} R.C. 3109.04 does not define what constitutes a change of circumstances. Courts have generally held that it means “an event, occurrence, or situation which has a material and adverse effect upon a child.” *Rohrbaugh v. Rohrbaugh*, 136 Ohio App.3d 599, 737 N.E.2d 551 (7th Dist.2000), quoting *Schiavone v. Antonelli*, 11th Dist. Trumbull No. 92-T-4794, 1993 Ohio App. LEXIS 5891 (Dec. 10, 1993), citing *Wyss v. Wyss*, 3 Ohio App.3d 412, 445 N.E.2d 1153 (10th Dist.1982).

{¶ 45} Mother relies on two cases to support her contention that there was no change in circumstances: *Yasher v. Yasher*, 8th Dist. Cuyahoga No. 65545, 1994 Ohio App. LEXIS 1243 (Mar. 24, 1994), and *Duer v. Moonshower*, 3d Dist. Van Wert No. 15-03-15, 2004-Ohio-4025. Mother cites *Yasher* for the proposition that the change in circumstances must be a “substantial change,” a contention we do not disagree with. *Id.* at 7.

{¶ 46} Mother cites *Duer* as being akin to her case. In *Duer*, the mother was designated as the residential parent and legal custodian of the subject child. Approximately seven months after that designation, the father filed a motion to change custody and a motion for temporary custody. After a hearing, the court denied the father's motions and he appealed. The Third Appellate District affirmed the trial court.

{¶ 47} In denying the father's motions, the trial court noted that at the time of the hearing, only one year had passed since the original order had been issued, and although the mother "did move a couple of times and did serve some time in jail for underage consuming charge[,] * * * otherwise, there was no evidence of any substantial change in circumstances." *Id.* at ¶ 11. The trial court further stated the following:

The problems noted in the hearing almost all existed at the time of the prior order — the child's medical condition, the mother's young age and limited income, the parents' basic living arrangement. The changes were all very minor and mostly just the result of normal one-year activities. In short, the court does not find any change of circumstances required under R.C. 3109.04(E) for a modification of custody.

Id.

{¶ 48} In affirming the trial court's decision, the appellate court did not find that the trial court abused its discretion by finding no change of circumstances.

The fact that [mother] was ordered to serve thirty (30) days in jail within several months after the [original] custody decree had been issued, does not ipso facto establish a sufficient basis for the trial court to find a change in circumstances. [Mother] completed her jail sentence approximately five months prior to the hearing on [father's] motion to change residential parent status. Since the time of her release,

[mother] has returned to the status quo, including finding employment and has undergone drug and alcohol assessments. Moreover, in contrast to [father's] allegations of [mother's] care for the health concerns of [the child], there was equally compelling evidence presented by [mother] to the trial court that she was seeking the proper medical attention for [the child] and was doing her best to care for [the child].

Although there are several issues of concern which have arisen since the [original] custody decree, the record reveals that the trial court considered these issues and exercised its discretion in finding that there had not been a change in circumstances sufficient to warrant a modification of the prior custody decree. While it is apparent that [mother] certainly has to make personal improvements in her care for [the child], we find that that the trial court did not abuse its discretion in overruling [father's] motion to change [mother's] status as the residential parent.

Id. at ¶ 20-21.

{¶ 49} *Duer* is distinguishable from this case. Here, three years had passed since the issuance of the prior order, as opposed to the one year in *Duer*. And Mother here had not lived with the twins for two years. Mother's own testimony established that in the subject years, she had been using cocaine, heroin, and other drugs, had been "on the run for five months," and was "in and out of the streets, institutions and jails." During that time period she was diagnosed with mental health issues, and as of the date of the trial, still had not found medication to address one of the issues. Further, up until approximately one week before trial, her brother, whom Mother described as "bad news," had been living in the same house with her. Moreover, Mother acknowledged that during the time period she was unavailable for the twins while they were living with her, it was her mother that was taking care of them.

{¶ 50} On this record, there was sufficient competent, credible evidence supporting the trial court's decision. The third assignment of error is overruled.

Trial Court's Judgment Entries

{¶ 51} Finally, we address an issue raised by Mother, albeit not as an assigned error, and which Father concedes, that being, the nomenclature used by the trial court in its judgment entries. Specifically, the entries provide that each party is the legal custodian of the children when the children are in their respective possession. That is for a shared parenting plan; there is no shared parenting plan in this case.

{¶ 52} Based on our review of the record, the intent of the trial court was to grant sole legal custody of the boys to Father. Thus, as a matter of housekeeping, we remand the case so that the entries can accurately reflect the court's intention.

{¶ 53} Affirmed and remanded.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the common pleas court, juvenile division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27
of the Rules of Appellate Procedure.

LARRY A. JONES, SR., JUDGE

MARY EILEEN KILBANE, A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR