[Cite as *Delly v. Delly*, 2011-Ohio-6004.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

DANIEL J. DELLY,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2011-L-018
- vs -	:	
DEBORAH M. DELLY,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Domestic Relations Division, Case No. 07 DR 000699.

Judgment: Affirmed.

Laura A. DePledge, 7408 Center Street, Mentor, OH 44060 (For Plaintiff-Appellee).

James W. Reardon, Carrabine & Reardon Co., L.P.A., 7445 Center Street, Mentor, OH 44060 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Appellant, Deborah M. Delly, now known as Deborah M. Larson, appeals the Judgment Entry of the Lake County Court of Common Pleas, Domestic Relations Division, granting Daniel Delly legal custody of Larson and Delly's minor child, A.D. The issues to be determined by this court are whether a change in custody is in a child's best interest when the custodial parent has moved to another state, and whether a court must make an express finding of harm under R.C. 3109.04(E)(1)(a)(iii). For the following reasons, we affirm the decision of the trial court.

{¶2} On April 22, 2009, Daniel and Deborah were granted a divorce on the grounds of incompatibility. At the time of the divorce, they had one child together, A.D., born July 14, 2004. Pursuant to a Parenting Plan attached to the Judgment Entry of Divorce, Deborah was designated A.D.'s legal custodian and residential parent. Daniel was to receive parenting time as designated in the plan. The Parenting Plan also included a provision stating that "neither parent shall remove the child from Lake County or an immediately adjacent county" without either obtaining written permission from the other parent or filing a notice of intent to relocate and receiving permission of the court.

{¶3} On August 17, 2009, Daniel filed a Motion for Emergency Temporary Custody, requesting ex parte relief, and asserting that Deborah advised him she was planning to move to Idaho with A.D. On August 19, 2009, the trial court ordered that neither parent remove A.D. from Lake County until further order of the court.

{¶4} On August 31, 2009, Deborah filed a Motion for Permission to Relocate.

{¶5} On October 2, 2009, the trial court awarded emergency temporary custody of A.D. to Daniel and again ordered that A.D. not be removed from Lake County.

{¶6} A hearing was held on this matter on June 9 and 10, 2010. The following testimony was presented at the hearing.

{¶7} Michelle Walker, the principal at A.D.'s school, testified that A.D. had completed kindergarten and, according to his progress reports, is a "hard working, personable boy." She also noted that both his academics and behavior were "great." She testified that he interacts well with other children. She stated that she had good communication with both parents regarding A.D.'s schooling, that she had observed

Daniel picking up A.D., and the interaction between the A.D. and Daniel has been "positive."

{¶8} Pamela Delly, Daniel's stepmother, testified that Daniel is very patient with A.D. She stated that A.D. gets along well with Daniel's family.

{¶9} Bonnie Bischof, Daniel's mother, testified that A.D. and Daniel reside in her home and stay in the same bedroom together, although she has an extra bedroom in her home. She described Daniel and A.D.'s relationship as "very close." She explained that A.D. has established relationships with his paternal family members, including his aunts and uncles, although while Deborah was living in Ohio, A.D. had rarely been able to visit with these relatives. She explained that if A.D. were to live with Deborah, she believed it would interfere with these relationships.

{¶10} Deborah Larson testified that she lived in Idaho for most of her life and that her parents and other family members still live there, and she had only lived in Ohio for a few years. She moved back to Idaho from Ohio in September of 2009 with her daughter, Kierra, who is 14 years old. Deborah explained that she interviewed for a job as a probation officer in June of 2009 while on vacation in Idaho because she believed that her employer in Ohio would be laying off employees. She stated that in July of 2009, she met with Daniel and "asked him if he would allow her to take A.D. to Idaho if [she] were to move there." According to Deborah, Daniel responded "absolutely not."

{¶11} Deborah testified that her son Anthony, who is currently 17 years old, moved to Idaho in August of 2007 because he did not want to continue living in Ohio. She testified that A.D. has a good relationship with both Anthony and Kierra, his half-

siblings. Deborah also expressed a concern that A.D. had gained 20 to 30 pounds since she moved to Idaho.

{¶12} Daniel Delly testified that generally, he and Deborah would "adjust to each other's schedules" regarding visitation, and on one occasion, he allowed A.D. to stay in Idaho a few more days than planned because Deborah's grandfather was sick. Likewise, Deborah allowed Daniel to keep A.D. for an extra night on a few occasions. In June of 2009, Daniel was laid off from his job and asked Deborah if he could take A.D. out of day care to spend more time with him, but Deborah would not allow him to do so. Daniel testified that he is still unemployed and receives unemployment.

{¶13} Daniel testified that in July of 2009, he met with Deborah, who told him she was taking a job in Idaho and would be taking A.D. with her.

{¶14} Daniel admitted that he had previously watched pornography on the internet, but explained that he has parental controls on his computer so that A.D. cannot access any websites without a password.

{¶15} Dr. Michael Leach, a clinical forensic psychologist, was appointed by the court to render an opinion regarding parental rights and had previously evaluated the parties, prior to the divorce. He recommended that A.D. should reside with his mother and have visitation with his father. Based on tests given to the two parents, Dr. Leach concluded that Daniel's responses regarding parenting skills were "inadequate." He also expressed a concern that Daniel views pornography, although he stated that he would not be concerned about A.D. as long as Daniel had adequate password protection on his computer. Dr. Leach believed that A.D. had a strong relationship with his half-siblings, Kierra and A.D., which he regarded as an important factor in his

decision. He also stated that he was concerned about the lack of furniture and books in Daniel's home.

{¶16} Dr. Leach admitted that he was in Idaho for two days observing A.D., Deborah, and Deborah's family members. He spent approximately five or six hours at Deborah's home. He also spent a few hours at Deborah's mother's home on Easter Sunday. He stated that he did not spend any holidays with Daniel's family or his relatives. He spent one or two hours at Daniel's home, and one hour with Daniel at his office. Dr. Leach did not visit Daniel's mother's home, where Daniel is currently living with A.D.

{¶17} On July 16, 2010, a Magistrate's Decision was issued, finding that it was in A.D.'s best interest that Daniel be designated residential parent and legal custodian. In the decision, the magistrate found that a change of circumstances had occurred and considered each of the best interest factors. The magistrate found that it could not be predicted how A.D. would respond to the move to Idaho, that A.D. is well cared for in Ohio, he has done well in school in Ohio, and he has developed a relationship with his paternal relatives and his environment in Lake County. The magistrate granted Deborah parenting time for six weeks during the summer, as well as during other holidays and breaks. Extra parenting time was also permitted during the school year, provided Deborah travels to Ohio.

{¶18} Deborah filed Objections to the Magistrate's Decision on July 23, 2010, and supplemented the Objections on September 10, 2010.

{¶19} On January 13, 2011, the trial court issued a Judgment Entry overruling Deborah's Objections, adopting the Magistrate's Decision in its entirety, and requesting

that Daniel's attorney prepare a Judgment Entry consistent with the Magistrate's Decision. On March 10, 2011, the trial court issued a second Judgment Entry, repeating certain findings from the January 13 Judgment Entry, including that there was a change in circumstances and that it is in the best interest of A.D. for Daniel to be designated the residential parent and legal custodian. The Entry also detailed Deborah's parenting time and explained the parties' obligations regarding child support and health care.[1]

{¶20} Deborah timely appeals and raises the following assignment of error:

{¶21} "The trial court erred to the prejudice of appellant by designating father as the residential parent of the parties' minor child and denying mother's Motion to Relocate."

{¶22} On appeal, appellate courts only review legal custody determinations for abuse of discretion. *Cireddu v. Clough*, 11th Dist. No. 2010-L-008, 2010-Ohio-5401, at ¶19. "The highly deferential abuse of discretion standard is particularly appropriate in child custody cases, since the trial judge is in the best position to determine the credibility of the witnesses and there 'may be much that is evident in the parties' demeanor and attitude that does not translate well to the record.'" *Salisbury v. Salisbury*, 11th Dist. Nos. 2005-P-0010 and 2005-P-0084, 2006-Ohio-3543, at ¶89 (citation omitted).

{¶23} "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

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1. Deborah filed her appeal from the January 13, 2011 Judgment Entry on February 11, 2011. On March 10, 2011, the trial court's second Judgment Entry was issued. This court found that Deborah's Notice of Appeal was considered premature, and the appeal was taken from the March 10 Judgment Entry, which was the final appealable order in this case.

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 *** [t]he 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); *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, at paragraph one of the syllabus; *In re B.J.*, 11th Dist. No. 2009-G-2933, 2010-Ohio-2284, at ¶33 (citations omitted).

{¶24} A change in custody analysis normally creates a rebuttable presumption in favor of the custodial parent retaining custody unless the change is one which would have a "material and adverse effect upon the child." *Rohrbaugh v. Rohrbaugh* (2000), 136 Ohio App.3d 599, 604-605 (citation omitted). "Therefore, it necessarily follows that the burden is on the party seeking a change in custody to demonstrate sufficient indicia of these three factors to rebut this presumption and justify a modification." *Salisbury*, 2006-Ohio-3543, at ¶91.

{¶25} "However, the analysis changes when the divorce decree expressly or impliedly prohibits the custodial parent's ability to remove the child from the jurisdiction. In such cases, the burden then shifts to the custodial parent to demonstrate that the decree should be modified to permit the child's removal." Id. at ¶93 (citations omitted).

{¶26} In such situations, the court has the option of enjoining a parent from removing the child, pursuant to the decree's terms, changing custody to that of the

parent residing in the jurisdiction, or modifying the decree to permit removal of the children. *Hauck v. Hauck*, 8th Dist. No. 44908, 1983 Ohio App. LEXIS 14490, at *4. "Where the decree contains an express or implied provision restricting the custodial parent's ability to move from the area, the child can only be moved from the state upon a finding that the relocation would be in the best interests of the child." *Salisbury*, 2006-Ohio-3543, at ¶93 (citation omitted).

{¶27} We note that in this case, the Parenting Plan, made part of the Judgment Entry of Divorce, stated that A.D. could not be moved from Lake County. Therefore, the burden is on Deborah to demonstrate that relocating A.D. was in his best interest and that custody should not have been granted to Daniel.

{¶28} Deborah does not argue that the trial court erred in finding that a change in circumstances occurred. Instead, she argues that the trial court abused its discretion by determining that a change of custody was in A.D.'s best interest, pursuant to R.C. 3109.04(F)(1).

{¶29} In determining "whether the trial court's determination that the best interests of the children would be served by a modification of custody was against the manifest weight of the evidence," a reviewing court "does not undertake to weigh the evidence and pass upon its sufficiency but will ascertain from the record whether there is some competent evidence to sustain the findings of the trial court." *Ross v. Ross* (1980), 64 Ohio St.2d 203, 204.

{¶30} Deborah asserts that the evidence presented supported a finding that she should retain custody of A.D. She first argues that when considering A.D.'s relationship with his parents, siblings, and others who affect his best interest, the trial court

discounted A.D.'s relationship with his siblings in Idaho. Regarding this factor, there was some evidence presented that A.D. was close to his half-siblings and was happy to see them in Idaho. However, the court expressed concerns about a significant age difference between the siblings, which may impact their relationship. In addition, the evidence shows that A.D. also has a strong relationship with his father, his paternal relatives, and other individuals within his community in Ohio. The evidence in the record reveals that A.D. has strong relationships in both Ohio and Idaho, and, therefore, this factor alone does not support a finding that Deborah should retain custody.

{¶31} Regarding A.D.'s adjustment to his home and community, Deborah asserts that because Daniel had recently had his house foreclosed upon and moved in with his mother, A.D. was living in a "state of transition." However, the testimony of Daniel, his mother, and A.D.'s principal established that A.D. was doing well in school, both socially and intellectually, interacted well with other children, and had a strong home environment. Although A.D. moved into Daniel's mother's home a few months before the hearing, there was no evidence indicating that A.D. was not well adjusted to his living situation or that the move had resulted in negative changes to A.D's life or relationships. Even if the move to A.D.'s grandmother's home resulted in such a "state of transition," a move to Idaho would create yet another change in A.D.'s life.

{¶32} Deborah also asserts that Daniel has a problem with internet pornography. While the evidence indicates that Daniel has viewed pornography and seen a therapist regarding this issue in the past, the evidence presented at the trial established that Daniel's use of the internet did not negatively impact A.D. Dr. Leach's report notes that the computer use was not a "major issue," as long as it was done in private and not

around A.D. Dr. Leach also believed that it would not be a concern as long as Daniel's internet was password protected, which Daniel testified was the case. Although Deborah asserts that Daniel told Dr. Leach that he "possibly" had child pornography on his computer, Daniel denies this assertion and there is no evidence that Daniel possesses such material. There is no evidence in the record that Daniel's internet use has had any impact whatsoever on A.D. or his best interest.

{¶33} In addition, in determining the best interest of a child, the court should, and did, consider relocation of the mother. Deborah moved to Idaho and requested an order allowing her to relocate A.D. The record indicates that A.D. has always lived in Ohio, has paternal relatives in Ohio, has established relationships with these relatives, and has succeeded within his school and community. Moving to Idaho would constitute a major change in A.D.'s life, which is properly weighed in the best interest analysis.

{¶34} When viewing all of the evidence presented at the hearing, this court cannot conclude that the trial court's decision to grant custody of A.D. to Daniel was not supported by competent, credible evidence or that the court abused its discretion in determining that granting custody to Daniel was in A.D.'s best interest.

{¶35} Deborah also argues that the trial court erred in failing to make a finding, pursuant to R.C. 3109.04(E)(1)(a)(iii), that the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child and mentioned the statute "only in passing."

{¶36} Although the trial court is required to consider the statutory factors, including R.C. 3109.04(E)(1)(a)(iii), "it is not necessary for the trial court to set forth its analysis as to each factor in its judgment entry so long as it is supported by some

competent, credible evidence." *Schneider v. Schneider*, 11th Dist. No. 2010-T-0012, 2011-Ohio-252, at ¶47. See *Sayre v. Hoelzle-Sayre* (1994), 100 Ohio App.3d 203, 212 (the trial court complied with the statute, even though it did not include language expressly applying balancing test of harm versus advantages). "However, this court must review the record to determine whether a substantial amount of credible and competent evidence supports the trial court's finding." *Schneider*, 2011-Ohio-252, at ¶47, citing *Alessio v. Alessio*, 10th Dist. No. 05AP-988, 2006-Ohio-2447, at ¶27 (citation omitted).

{¶37} The Magistrate's Order and the trial court's Judgment Entries did not include express findings regarding R.C. 3109.04(E)(1)(a)(iii). However, the record establishes that the trial court was aware of the statutory procedure and considered the appropriate factors, including R.C. 3109.04(E)(1)(a)(iii). In the Magistrate's Decision, adopted by the trial court, the magistrate stated that the statute required a finding of whether the harm caused by a modification is outweighed by the advantages of the change and noted that in this case, A.D. had already been in Daniel's care from approximately nine months and, therefore, the facts showed what would occur if such a modification in custody did occur. In its best interest findings, the court made findings that A.D. had fared well while in Daniel's care.

{¶38} The record supports a finding that there is competent and credible evidence that the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child. A.D. had been living with Daniel for nine months prior to the hearing, while Deborah had been living in Idaho. The testimony demonstrated that A.D. was doing very well in school, had formed

relationships with his paternal relatives, and had also formed relationships with children in his community. In addition, although A.D. has relationships with his half-siblings, there is no evidence as to how he would succeed in Idaho or that moving him to a new state would be beneficial. No harm had been suffered by A.D. in the time while he was in his father's custody, while there are questions as to the benefits of moving to Idaho. These factors were all discussed and considered by the court in its best interest analysis. Based on the evidence in the record, there is competent and credible evidence to support a finding that, pursuant to R.C. 3109.04(E)(1)(a)(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.

{¶39} Deborah finally argues that the trial court "ignored" the expert testimony given by Dr. Leach and failed to adopt his recommendation that Deborah retain permanent custody of A.D.

{¶40} We note that "[a] trial court is not required to adopt the recommendations of a psychologist, in full or in part." *Eitutis v. Eitutis*, 11th Dist. No 2009-L-121, 2011-Ohio-2838, at ¶85; *Dunkle v. Dunkle*, 2nd Dist. No. 10743, 1988 Ohio App. LEXIS 2186, at *1 (the court must only consider the results and recommendations of a psychological evaluation because "it is merely a recommendation," and the trial court must make the ultimate decision in a custody case).

{¶41} Moreover, as noted previously, there was competent credible evidence supporting a grant of custody to Daniel, even though such a determination was contrary to Dr. Leach's recommendation. A considerable amount of evidence was presented at the hearings, through the testimony of Daniel, his mother, and Dr. Leach himself, that

Dr. Leach spent significantly more time with Deborah and her family than with Daniel and his family. There was also testimony presented that Daniel was not able to adequately represent his living situation, as Dr. Leach came to Daniel's prior home, from which he was moving, and did not view the home with furnishings or other items. Dr. Leach also did not see A.D. interact with any members of Daniel's family, while Dr. Leach was able to observe A.D. with Deborah's relatives at an Easter dinner. Dr. Leach himself testified that he did not request A.D.'s school records and was unaware that A.D. was doing very well in his school at Ohio. All of these considerations negatively impact the weight to be given to Dr. Leach's opinion. Therefore, we cannot find that the trial court erred by failing to follow Dr. Leach's recommendation regarding custody.

{¶42} The sole assignment of error is without merit.

{¶43} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, granting Daniel legal custody of A.D., is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.