[Cite as *Foxhall v. Lauderdale*, 2011-Ohio-6213.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STEVEN A. FOXHALL,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2011-P-0006**
- vs -	:	
HEATHER L. LAUDERDALE,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2004 JPI 0004.

Judgment: Affirmed.

James E.J. Ickes and *Errol A. Can*, Williams, Welser, Kratcoski & Can, L.L.C., 11 South River Street, Suite A, Kent, OH 44240 (For Plaintiff-Appellant).

Michael E. Grueschow, 409 South Prospect Street, P.O. Box 447, Ravenna, OH 44266 (For Defendant-Appellee).

Holly Kehres Farah, Kehres & Farah, 638 West Main Street, Ravenna, OH 44266 (Guardian ad litem).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Steven A. Foxhall, appeals the judgment of the Portage County Court of Common Pleas, Juvenile Division, overruling his objection to the magistrate's decision and denying his third motion to reallocate parental rights and responsibilities. For the reasons that follow, we affirm.

{¶2} Steven and appellee, Heather L. Lauderdale, while never married, had a daughter, P.F., on January 22, 2004. At the time of the trial on Steven's motion, she was six years old. On February 13, 2004, Steven filed a complaint for paternity, requesting that he be named the child's residential parent or that he be granted shared parenting. The parties subsequently entered a shared parenting plan, which was adopted by the court on November 2, 2004, pursuant to which Heather was named the child's "residential parent and legal custodian."

{¶3} Three months later, on January 31, 2005, Steven filed a motion for reallocation of parental rights and responsibilities, asking that he be named the child's residential parent. The parties eventually entered an amended shared parenting plan, which the court approved on October 25, 2005. Pursuant to the amended plan, Heather was again named P.F.'s residential parent and legal custodian.

{¶4} On August 31, 2006, after Steven relocated to Illinois for his job, the court approved an agreed second amended shared parenting plan in which, again, Heather was designated P.F.'s residential parent and legal custodian.

{¶5} On July 27, 2007, Steven filed a second motion for reallocation of parental rights and responsibilities, again asking that he be designated the child's residential parent. Following a trial on the motion, on November 30, 2007, the trial court found there was no change of circumstances and denied Steven's motion.

{¶6} On April 25, 2008, the parties entered a stipulated judgment entry ("the interim entry") in which they agreed to "temporary revisions to their current shared parenting plan." The parties agreed that Heather could temporarily relocate to Georgia for training and employment for six to nine months. According to the interim entry,

Heather would continue to be the child's residential parent. P.F. was to reside with Steven in Illinois until Heather returned to Ohio on a permanent, full-time basis. Heather was to provide Steven with 30 days notice of her intent to return to Ohio. According to the interim entry, Heather's return was "currently estimated to be between October, 2008 and December, 2008."

{¶7} While out of state, Heather left her employment, in July 2008, to pursue a license as an insurance adjuster. After receiving her license in August 2008, she obtained experience in adjusting property damage claims arising from major catastrophes, including windstorms, hurricanes, and tornadoes. Between August 2008 and February 2010, Heather was retained as an independent contractor by seven different insurance companies to adjust insurance claims, and was assigned to work in six different states. In this period, Heather continued contact and visitation with P.F.

{¶8} Meanwhile, due to the demands of her work, Heather did not return to Ohio within nine months of the date of the interim entry, i.e., by January 2009, as contemplated by the parties. Instead, she continued her work as an insurance adjuster out of state.

{¶9} Then, in February 2010, Heather obtained full-time employment with Paramount Building Solutions in Virginia as an office manager/insurance adjuster. On May 15, 2010, Heather's employer advised her that she was being permanently reassigned to its offices in Canton, Ohio. On that date, she called Steven and told him that she would be returning to Ohio permanently and requested that he return P.F. to her. On June 4, 2010, Heather also filed a notice with the court of her intent to relocate to Ohio.

{¶10} Thereafter, Steven commenced an action in Illinois under the Uniform Child Custody Jurisdiction and Enforcement Act, requesting that he be granted sole custody of P.F. Steven subsequently dismissed that action.

{¶11} On July 16, 2010, Steven filed a third motion to reallocate parental rights and responsibilities, again requesting that he be designated P.F.'s residential parent. The case proceeded to trial before the magistrate on Steven's motion on August 24, 2010 and October 8, 2010.

{¶12} Steven testified that between April 2008, when P.F. first came to live with him, and May 15, 2010, when Heather notified him of her return to Ohio, P.F. completed kindergarten, made friends, played various sports, and became acclimated to his home environment in Illinois.

{¶13} Steven testified that when he and P.F. would return to Ohio for visits with his family, Heather would travel to Ohio to have visits with P.F. Heather also had summer visitation with P.F. for at least four weeks each in 2008, 2009, and 2010. In addition, Heather traveled to Illinois four times for visitation with P.F. During the first year of the temporary arrangement, when Heather was constantly on the road, she called P.F one to two times a week. Thereafter, she called her two to four times a week. Heather testified that, not counting her summer 2010 visit, during the two-year period she was out of state, she had P.F. for 130-140 days.

{¶14} In support of his request to be named P.F.'s residential parent, Steven testified the period of time P.F. lived with him beyond the time contemplated in the interim entry amounts to a change in circumstances justifying a reallocation of parental rights and responsibilities.

{¶15} Heather testified that when she entered into the interim entry in April 2008, she was struggling financially, and intended to return to Ohio in six to nine months, but the temporary relocation lasted one year and three months longer than she anticipated. During that time, neither party took any action to terminate the interim entry; instead, they complied with it and made mutually agreeable accommodations to allow Heather to have parenting time with P.F. Steven never attempted to seek a change in residential parent status until after Heather advised him that she was returning to Ohio and requested that P.F. be returned to her.

{¶16} Heather testified that Steven refused her request to return P.F. to her, but permitted Heather to have her summer visitation with P.F. Heather finally moved to Ohio in mid-June 2010. She earns $40,000/year and is now doing much better financially. She resides in an apartment in Akron, Ohio, under a six-month lease. She and her fiancé are now looking to buy a home in Ohio where she plans to reside permanently.

{¶17} Heather testified that virtually all of her and Steven's relatives reside in Ohio. P.F. has a close relationship with members of both families and sees them on a regular basis.

{¶18} Heather has another daughter, H.J., who was eight years old at the time of the trial. Heather made similar temporary arrangements with H.J.'s father with whom she also has a shared parenting plan. P.F. and H.J. are very close. Prior to April 2008, both children lived with Heather and she raised them together. While Heather was out of state, she had visitation with H.J., and occasionally had P.F. and H.J. for visitation at

the same time. Upon Heather's return to Ohio, H.J.'s father complied with their agreement and returned H.J. to Heather.

{¶19} Brittany Wishman testified that she has been a close friend of Heather for many years. She had contact with Heather and P.F. before Heather left Ohio, during Heather's time out of state, and following her return to Ohio. Ms. Wishman said that Heather and P.F. have a great relationship, which was not affected by Heather's time out of state. Ms. Wishman said that after each time they were apart, Heather and P.F. picked up exactly where they left off. Also, Cheryl Berry, another longtime friend of Heather, testified that Heather and P.F. are very close and that their relationship is the same as before Heather left Ohio.

{¶20} Holly Farah, P.F.'s guardian ad litem, testified that P.F. and Heather love each other, and that P.F. would be happy in either household. On one occasion P.F. said she wanted to live with Heather, while on another, she said she wanted to stay with Steven. Ms. Farah said that, in her opinion, a six-month lease is not sufficient to justify "uprooting the child," and recommended Steven be named P.F.'s residential parent.

{¶21} Following the trial, on October 21, 2010, the magistrate issued his decision denying Steven's motion to modify parental rights. The magistrate found that the circumstances, i.e., Heather working out of state and P.F. staying with Steven, were exactly what the parties contemplated when they entered into the interim entry, except that they lasted one year longer than expected. The magistrate found that, contrary to Steven's argument, the fact that these circumstances lasted longer than expected did not amount to a change in circumstances warranting a change of residential parent. He also found that a change of residential parent was not in the child's best interest

because there was no evidence her needs would be better served with Steven than with Heather. Further, the magistrate found that the harm caused by such change would outweigh any benefit. In support, the magistrate found that residing with Steven in Illinois effectively isolates P.F. from her immediate and extended maternal and paternal families in Ohio, including her half-sister, H.J., with whom, the magistrate found, P.F. has a close bond.

{¶22} Steven filed an objection to the magistrate's decision, arguing the magistrate erred in finding that there was no change in circumstances and that a change of residential parent would not be in P.F.'s best interest. Following a hearing on Steven's objection, on January 19, 2011, the trial court entered judgment denying Steven's objection. First, the trial court found that the circumstances are exactly what the parties anticipated or should have anticipated when they made their agreement in April 2008. They knew the child would be staying with Steven in Illinois, attending school there, and engaging in related activities for at least nine months. The court found the fact that the arrangement lasted one year and three months longer than either party anticipated was not a change in circumstances that would justify a modification of the shared parenting plan to change the residential parent. Second, the court found that a change of the residential parent was not in P.F.'s best interest. Third, the court noted that P.F.'s maternal and paternal families reside in Ohio and that P.F. has a close relationship with H.J., with whom she was raised. As a result, the court found that the harm caused by a change in P.F.'s residence, which would distance P.F. from her relatives, would not be outweighed by any benefit from such a change. As a result, the

trial court denied Steven's request to be named P.F.'s residential parent, and ordered the parties' second amended shared parenting plan would remain in effect.

{¶23} Steven appeals the trial court's judgment, asserting two assignments of error. Because the assigned errors are interrelated, they shall be considered together. They allege:

{¶24} "[1.] The Trial Court erred by determining a change in circumstances had not occurred to support Appellant's Motion for Reallocation of Parental Rights and Responsibilities.

{¶25} "[2.] The Trial Court erred by not determining that naming Appellant custodial, residential parent was in the Minor Child's best interest."

{¶26} This court has held that decisions involving the custody of children are "accorded great deference on review." *Bates-Brown v. Brown*, 11th Dist. No. 2006-T-0089, 2007-Ohio-5203, at ¶18, citing *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Thus, any judgment of the trial court involving the allocation of parental rights and responsibilities will not be disturbed absent a showing of an abuse of discretion. *Bates-Brown*, supra, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260. Further, we review a judgment of the trial court adopting the decision of its magistrate for an abuse of discretion. *Rutherford v. Rutherford*, 11th Dist. No. 2009-P-0086, 2010-Ohio-4195, at ¶10.

{¶27} This court has stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *Gaul v. Gaul*, 11th Dist. No. 2009-A-0011, 2010-Ohio-2156, at ¶24, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District has also

adopted this definition of the abuse-of-discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶65, citing Black's Law Dictionary (4 Ed.Rev.1968) 25 ("[a] discretion exercised to an end or purpose not justified by and clearly against reason and evidence").

{¶28} 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." *Wyatt v. Wyatt*, 11th Dist. No. 2004-P-0045, 2005-Ohio-2365, at ¶13. In determining whether the trial court has abused its discretion, a reviewing court is not to weigh the evidence, "but must ascertain from the record whether there is some competent evidence to sustain the findings of the trial court." *Clyborn v. Clyborn* (1994), 93 Ohio App.3d 192, 196. "A custody award supported by some competent, credible evidence will not be reversed *** as being against the manifest weight of the evidence." *Bates v. Bates* (Dec. 7, 2001), 11th Dist. No. 2000-A-0058, 2001-Ohio-8743, 2001 Ohio App. LEXIS 5428, *8, citing *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23.

{¶29} "A modification of the designation of residential parent and legal custodian of a child requires a determination that a 'change in circumstances' has occurred, as well as a finding that the modification is in the best interest of the child. R.C. 3109.04(E)(1)(a).[ ]" *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, syllabus.

{¶30} R.C. 3109.04(E)(1)(a) governs modification of a prior decree allocating parental rights and responsibilities. In interpreting this provision, this court has held that

in order for a trial court to modify a prior decree regarding allocation of parental rights and responsibilities, the party requesting the modification must demonstrate each of the following three factors: (1) a change has occurred in the circumstances of the child, his residential parent, or either of the parents subject to a shared parenting decree; (2) the requested modification is necessary to serve the best interest of the child; and (3) as pertinent here, the harm likely to be caused by a change of the child's environment is outweighed by the advantages of the change of environment. *In re Seitz*, 11th Dist. No. 2002-T-0097, 2003-Ohio-5218, at ¶36.

{¶31} Further, there is a rebuttable presumption that retaining the residential parent designated in the prior decree is in the child's best interest. *Elam v. Elam* (Dec. 10, 2001), 12th Dist. No. CA2001-02-028, 2001 Ohio App. LEXIS 5472, *4; accord, *Weisberg v. Sampson*, 11th Dist. No. 2005-P-0042, 2006-Ohio-3646, at ¶43. "Therefore, it necessarily follows that the burden is on the party seeking a change in custody to demonstrate sufficient indicia of the three factors to rebut this presumption and justify a modification." *Weisberg*, supra. In the case sub judice, the interim entry provided that Heather "shall continue to be the residential parent." Thus, Heather remained the residential parent under the interim entry, and, as the non-custodial parent, Steven had the burden to demonstrate each of the foregoing factors.

{¶32} "[T]he trial court may not modify a prior decree allocating parental rights and responsibilities unless it first finds a change has occurred in the circumstances of the child or his residential parent; and then, upon further inquiry, the court finds that the modification is in the child's best interests." *Lehman v. Lehman* (Feb. 28, 1997), 11th Dist. No. 95-T-5327, 1997 Ohio App. LEXIS 716, *8; R.C. 3109.04(E)(1)(a). Thus, the

court may proceed to a best-interest analysis only after the court has determined that a change in circumstances has occurred. Id. at *8-*10. This change-in-circumstances determination is meant to serve as a "barrier that must be hurdled before inquiry can be made on those issues affecting the best interest of the child." *Perz v. Perz* (1993), 85 Ohio App.3d 374, 376. The change in circumstances of the child or the parent must be based on facts arising since the prior decree or from facts unknown at the time of the prior decree. *Makuch v. Bunce*, 11th Dist. No. 2007-L-016, 2007-Ohio-6242, at ¶12. This barrier is meant to operate as the "domestic relations version of the doctrine of res judicata," and is meant to prevent the "constant relitigation of the same issues" adjudicated in prior custody orders. *Perz*, supra, at 376.

{¶33} "The requirement that a parent seeking modification of a prior decree allocating parental rights and responsibilities show a change of circumstances is purposeful: '"The clear intent of [R.C. 3109.04(E)(1)(a)] is to spare children from a constant tug of war between their parents who would file a motion for change of custody each time the parent out of custody thought he or she could provide the child a 'better' environment. The statute is an attempt to provide some stability to the custodial status of the children, even though the parent out of custody may be able to prove that he or she can provide a better environment."' *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, 1997-Ohio-260, quoting *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416." *Fisher*, supra, at 59-60.

{¶34} "*** In general, the phrase 'change in circumstances' is intended 'to denote an event[,] occurrence, or situation which has a material and adverse effect upon a child.' *Willoughby v. Masseria*, 11th Dist. No. 2002-G-2437, 2003-Ohio-2368, at

¶22; see, also, *Schiavone v. Antonelli* (Dec. 10, 1993), 11th Dist. No. 92-T-4794, 1993 Ohio App. LEXIS 5891, *3. In determining whether a change of circumstances has occurred, the trial court has great latitude in considering all evidence before it. *In re M.B.*, 2d Dist. No. 2006-CA-6, 2006-Ohio-3756, at ¶9, citing *Wyss*[, supra]." *Makuch*, supra.

{¶35} Steven argues that there was a change in circumstances here because Heather stayed out of town one year and three months longer than the parties expected. He argues that during this time, P.F. lived with him, completed kindergarten, made friends, and became acclimated to his environment. However, by entering into the interim entry, the parties contemplated that all these things would occur while P.F. was residing with Steven until January 2009. Steven presented no evidence that the additional time P.F. stayed with him had a material, adverse effect on her. He therefore failed to demonstrate a change in circumstances for purposes of reallocation of parental rights and responsibilities.

{¶36} Moreover, Ohio Appellate Districts that have considered the issue do not support Steven's argument. In *Butler v. Butler* (1995), 107 Ohio App.3d 633, the child was 11 months old when the original custody decree was entered in favor of the mother and five years old at the time of the hearing on the father's motion to change custody. The Third District held that the passage of time alone is not sufficient to find a change in circumstances. Id. at 637. However, in finding a change in circumstances, the court noted the time involved included the period when the child went from infancy to educable child. Further, the mother had two incidents of unruly conduct requiring police intervention since the entry of the original decree.

{¶37} Next, in *Perz*, supra, the child was a one-year-old infant at the time of the original custody decree and 12 years old at the time of the hearing on the father's motion for custody. In finding a change in circumstances, the Sixth District noted the child had progressed from infancy to a completely different and more advanced stage of life with different needs.

{¶38} Further, in *Wilson v. Wilson*, 4th Dist. No. 09CA1, 2009-Ohio-4978, the child was two years old at the time of the original decree and eight years old at the time of the hearing on the father's motion for custody. The court stated that, while a change in the child's age alone is not dispositive of a change in circumstances, a child's maturation, when coupled with other factors, may establish a change in circumstances. In *Wilson*, such factors included the child's progression from toddlerhood to boyhood and his statement that he wanted to live with his father.

{¶39} Applying these principles to the instant case, since Steven agreed to Heather leaving the state for up to nine months, i.e., until January 2009, the issue is whether a change in circumstances occurred between that date and May 2010. The period of time involved in the foregoing cases was at least five years, as opposed to just over one year in the instant case. Further, there is no evidence here that, during this extended period, P.F. progressed from one stage in her life to another or that her needs were any different. During this period, P.F. continued to attend school, engage in extracurricular activities, and play with her friends. Further, there was nothing different about the circumstances of either parent. Consequently, the only change here is that Steven had P.F. just over one year longer than the parties had originally contemplated.

Based on these facts, we cannot say the trial court abused its discretion in finding that there was no change in circumstances.

{¶40} As a result, the trial court was not required to engage in a best-interest analysis. However, even if there had been a change in circumstances and a best-interest analysis was necessary, the court did not abuse its discretion in finding that a reallocation of parental rights was not in P.F.'s best interest. This finding was supported by the undisputed evidence of the close, loving relationship between P.F. and Heather, between P.F. and her half-sister, and between P.F. and her maternal and paternal families, nearly all of whom reside in Ohio. The court found that distancing P.F. from her relatives is not in her best interest. The court also found that the harm caused by a change in P.F.'s residence would not be outweighed by any benefit from such a change.

{¶41} Steven argues the court should have given more consideration to the fact that he facilitated visitation with P.F.'s half-sister. R.C 3109.04(F)(1) provides that in determining the best interest of a child, "the court shall consider all relevant factors, including, but not limited to: *** (c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest ***." Steven concedes the trial court considered the fact that nearly all of P.F.'s maternal and paternal relatives reside in Ohio and the importance of reuniting P.F. with her half-sister. The court was entitled to find, as it obviously did, that P.F.'s need to be near H.J. was more important than Steven's efforts to arrange occasional telephone calls and visits between the girls.

{¶42} Steven argues that Heather's temporary departure from Ohio was a conscious attempt "to put more distance between herself and [P.F.]. However, Steven

ignores the fact that he agreed to Heather's temporary relocation so she could keep her job. Moreover, Heather's departure was no more an attempt to distance herself from the child than Steven's voluntary decision to permanently relocate to Illinois for his job in 2006.

{¶43} Next, Steven challenges the magistrate's finding that Heather satisfied the requirement in the interim entry that she give 30 days notice of her intent to return to Ohio. However, Heather testified she told Steven on May 15, 2010, that she intended to return to Ohio and that she finally returned to Ohio in the second week in June 2010. Thus, the evidence supported the magistrate's decision that Heather satisfied the 30-day notice requirement. In any event, the entry provides that the purpose of the notice requirement was "to ensure CSEA has the opportunity to reactivate [Steven's] support obligation effective on the date of [Heather's] return." Thus, even if Heather had not strictly complied with the notice requirement, Steven failed to demonstrate prejudice.

{¶44} Steven argues the court should have considered Heather's "transient lifestyle." However, there is no evidence that she ever maintained such a lifestyle. The fact that Heather pursued certification and experience as an insurance adjuster out of state and then received her present full-time, permanent position as an office manager/insurance adjuster does not suggest that Heather pursues a transient lifestyle. To the contrary, it shows her dedication to providing for the economic security of her and her children.

{¶45} Next, although Steven concedes the trial court found Heather's testimony credible, he argues there was little to support her testimony that her return to Ohio was permanent. First, he argues that certain inconsistencies in her testimony showed she

lacked credibility. He argues she gave two different reasons at trial for her entering a six-month lease, i.e., (1) there were financial incentives for her to enter such a lease and (2) at the time she was looking for a home to purchase in Ohio and did not want to be tied down to a long-term lease. Heather's testimony was not inconsistent on this point because she said she signed the lease for both reasons. Second, Steven argues Heather's testimony that she told him on May 15, 2010, that she was returning to Ohio is belied by the fact that the call lasted only six minutes. However, there was nothing so complicated about telling Steven she was returning home that would necessarily have taken Heather more than six minutes. Third, Steven argues the May 11, 2010 e-mail correspondence between him and Heather regarding summer visitation proves she did not tell him on May 15, 2010, that she was moving to Ohio. However, Heather testified her employer told her on May 15, 2010, that she was being reassigned permanently to Ohio. Consequently, there would have been no reason for the parties to discuss her moving back to Ohio on May 11, 2010.

{¶46} Thus, any inconsistencies in Heather's testimony were trivial and inconsequential and adequately explained by Heather's testimony. As the trier of fact, the court was entitled to believe Heather's testimony that she intended her move back to Ohio to be permanent. In denying Steven's motion to reallocate parental rights, the court obviously found her testimony credible, and we cannot say that in doing so the court abused its discretion.

{¶47} Finally, Steven argues this court should reverse the trial court's judgment and follow the guardian ad litem's recommendation. "A trial court is not required to follow the recommendation of a guardian ad litem." *In re P.T.P. Custody*, 2d Dist. No.

2005 CA 148, 2006-Ohio-2911, at ¶24. Further, "the trial court does not err in making an order contrary to the recommendation of the guardian ad litem." Id. In any event, the guardian noted that it was "very difficult" for her to make a recommendation because P.F. loves both parents and would be happy in either household. She said she based her recommendation primarily on the fact that Heather signed a six-month lease, rather than one for a longer period. However, the trial court was entitled to disregard the guardian's recommendation and to believe Heather's testimony that her move to Ohio was permanent. In any event, as the trial court noted, "[s]hould [Heather] move away from Ohio and [P.F.]'s sibling and extended family, a change of circumstances and best interest review would be merited."

{¶48} Steven failed to demonstrate a change in circumstances. He also failed to demonstrate that a modification of the prior custody decree was in P.F.'s best interest or that the harm caused by a reallocation of parental rights and responsibilities was outweighed by the benefit of such a change. Further, the trial court's judgment was based on competent, credible evidence. We therefore hold the court did not abuse its discretion in denying Steven's motion and his objection to the magistrate's decision.

{¶49} For the reasons stated in the opinion of this court, Steven's assignments of error are overruled. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas, Juvenile Division, is affirmed.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶50} I concur in the majority's conclusion that the juvenile court's determinations regarding whether a change of circumstances has occurred and the child's best interests were proper exercises of the court's discretion. I write separately, however, to express certain reservations regarding the magistrate's analysis of these issues.

{¶51} The magistrate found that there was "nothing significant about the passage of time (age four to age six) nor any of the events that occur in the life of a typical child of this age" that supported appellant's claim that a change of circumstances has occurred. The magistrate cites several cases for the proposition that the "passage of time" is not per se sufficient to constitute a change of circumstances.

{¶52} The magistrate misconstrues the nature of the changed circumstances. It is not the passage of time but, rather, the fact that the child was in the custody of the non-custodial parent for those two years that would constitute the change in circumstances. This fact may be, and has been found to be, a change in circumstances significant enough to satisfy R.C. 3109.04(E)(1)(a) and trigger a best interests of the child analysis. *Johnson v. Johnson*, 3rd Dist. No. 14-03-32, 2003-Ohio-6710, at ¶¶6-8 (where "[the nonresidential parent] had physical custody of the children for approximately two years before she filed her motion" and "had physical custody of the children with the full knowledge and consent of [the residential parent,] *** the circumstances of the children have changed greatly since the prior decree").

{¶53} The magistrate's decision that no change of circumstances has occurred is justifiable in the present case, however, because the parties anticipated that the child's residing with the appellant would be a temporary situation and there was no evidence that this temporary arrangement adversely affected the child. *Davis v. Flickinger*, 77 Ohio St.3d 415, 417, 1997-Ohio-260 ("[t]he changed conditions, we stress, must be substantiated, continuing, and have a materially adverse effect upon the child") (citation omitted).

{¶54} With respect to the best interests of the child, I write to clarify that the child's relationship with her half-sister is only one factor of relative significance to be considered. When conducting an analysis of a child's best interests, the child's relationships with their siblings is a valid consideration. R.C. 3109.04(F)(1)(c) (among the "relevant factors" the court shall consider in determining the best interests are "[t]he child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest"). Accordingly, the magistrate noted that the child's relationship with the half-sister "is critical to determining her best interests and any harm that might be caused by a change of residence."

{¶55} A child's relationship with their siblings, however, does not carry the same weight as the fundamental right of a parent to the care and custody of their child. *In re Murray* (1990), 52 Ohio St.3d 155, 157 (citations omitted). Where, as in the present case, both parents are suitable but are separated, the "courts must choose one parent and the decision may rest upon slight differences of opinion regarding the better overall environment for the child." *Crites v. Dingus*, 4th Dist. No. 07CA38, 2008-Ohio-7039, at ¶19. In this situation, one of the factors to be considered is the child's relationship with

their siblings, although this is not necessarily a determinative factor. "Although some jurists could reasonably conclude that a bond with a half-sibling should be fostered by giving custody to the parent of that sibling, such conclusion is not required of all jurists." *Barber v. Barber*, 7th Dist. No. 05 CO 46, 2006-Ohio-4956, at ¶28.