[Cite as *Janecek v. Marschall,* 2015-Ohio-941.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STEVE A. JANECEK,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NOS. 2013-L-136 and 2014-L-013**
MARILYN MARSCHALL,	:	
Defendant-Appellee.	:	

Appeals from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2008 PR 00020.

Judgment: Reversed and remanded.

Joseph G. Stafford, Vincent A. Stafford, and *Anne C. Fantelli,* Stafford Law Co., L.P.A., 55 Erieview Plaza, 5th Floor, Cleveland, OH 44114 (For Plaintiff-Appellant).

Marilyn Marschall, pro se, 7240 South Jester Place, Concord, OH 440707 (Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Steve A. Janecek, appeals from the judgment of the Lake County Court of Common Pleas, Juvenile Division, terminating the parties' prior shared parenting decree. For the reasons discussed below, we reverse the trial court's judgment and remand the matter for further proceedings.

{¶2} Although never married, the parties in this matter resided together for a period of four years and one child was born as issue of their relationship. Appellant owns a business and appellee, Marilyn Marschall, works as a registered nurse for the

Cleveland Clinic, which provided a stable and consistent income during the parties' relationship. In late 2007, however, appellee moved out of the residence and the parties ended their relationship.

{¶3} On January 7, 2008, appellant filed a complaint in the trial court for allocation of parental rights and responsibilities pertaining to the parties' minor child. Appellee subsequently filed a motion to establish child support. The parties eventually entered a shared parenting agreement, which provided each party would be the residential parent while the child was in his or her care. The trial court accepted the agreed plan and entered a decree ordering the parties to adhere to the written plan. The trial court also issued an "agreed judgment entry" in which the parties agreed appellant would pay appellee $1,185 per month in child support. The agreed entry also provided the following:

> **{¶4}** [T]he parties reserve the right to argue, at the time of final hearing in the within matter, that the amount of interim support is inappropriate and not supported by statutory guidelines, and accordingly this Court has jurisdiction to retroactively increase or decrease the amount of interim support ordered herein based upon the evidence presented at trial.

{¶5} On January 7, 2009, appellee filed a motion to show cause alleging appellant had failed to meet his child support obligations under the August 12, 2008 agreed judgment entry. Appellant subsequently moved to modify the interim order set forth in the agreed judgment, arguing his earnings had been "substantially reduced" due to "the current recession's impact on his business."

{¶6} The matter was tried before the magistrate on September 24, 2009. In his decision, the magistrate overruled appellant's motion to decrease child support. And, given the evidence adduced at trial, the magistrate determined the interim support order should be increased from $1,185 per month to $1,614.45 per month retroactive to the date of the parties' separation in February 2008. Appellant filed timely objections to the magistrate's decision. And, on April 28, 2010, the trial court filed its judgment entry overruling appellant's objections and adopting the decision of the magistrate. In *Janecek v. Marshall*, 11th Dist. Lake No. 2010-L-059, 2011-Ohio-2994 ("*Janecek I*"), this court affirmed the trial court's judgment.

{¶7} While the foregoing appeal was pending, on October 5, 2010, appellant filed a "Motion to Modify Parental Rights and Responsibilities, Motion to Show Cause and Motion to Modify Child Support." Appellee subsequently filed a combined "Motion to Show Cause and Motion for Attorney Fees." She additionally opposed appellant's motion to modify parental rights and responsibilities and requested the court to terminate the shared parenting decree. After the issuance of *Janecek I*, the matter proceeded to trial before the magistrate on the various outstanding motions. And, on August 16, 2013, the magistrate issued his findings and conclusions. In relevant part, the magistrate: denied appellant's motion to modify the shared parenting plan; granted appellee's request to terminate the shared parenting plan; the court designated appellee the sole residential parent and legal custodian of the parties' child; granted appellee's motion to show cause for appellant's failure to pay child support; granted appellant's motion to modify child support; and denied appellant's motion to show cause.

{¶8} Appellant filed objections to the magistrate's decision. And, on December 2, 2013, the trial court overruled appellant's objections and adopted the magistrate's decision in its entirety. This appeal follows.

{¶9} Appellant assigns three errors for this court's review. They provide:

{¶10} "[1.] The trial court erred and/or abused its discretion by terminating the shared parenting plan and designating Marilyn as the residential parent and legal custodian of the parties' minor child.

{¶11} "[2.] The trial court erred and/or abused its discretion by decreasing Steve's parenting time with the minor child.

{¶12} "[3.] The judgment entries are not in the best interest of the parties' minor child."

{¶13} Appellant's three assignments of error collectively argue the magistrate's decision was against the manifest weight of the evidence and, as a result, the trial court erred in adopting the same.

{¶14} R.C. 3109.04(E) sets forth the procedure for modifying a prior decree allocating parental rights and responsibilities for care of children. According to R.C. 3109.04(E)(1)(a), a prior decree may be modified if a court makes the following mandatory findings: (1) a change of circumstances; (2) that the modification is necessary to serve the best interest of the child; and (3) one of the thee conditions listed under subsections (i) through (iii) must be satisfied. *Lehman v. Lehman*, 11th Dist. Trumbull No. 95-T-5327, 1997 Ohio App. LEXIS 716, *8-*9; *see also Makuch v. Bunce*, 11th Dist. Lake No. 2007-L-016, 2007-Ohio-6242, ¶11.

{¶15} This court has previously held that a trial court is not permitted to modify its prior decree allocating parental rights and responsibilities *unless* it makes a threshold

finding that a change has occurred in the circumstances of the child or his residential parent. *Loudermilk v. Lynch*, 11th Dist. Ashtabula Nos. 2002-A-0044 and 2002-A-0045, 2004-Ohio-5299, ¶21, citing *Lehman*, *supra*. "It is only after the court determines that a change of circumstances has occurred that all factors bearing on what is in the best interest of the child are activated * * *." *Butland v. Butland*, 10th Dist. Franklin No. 95APF09-1151, 1996 Ohio App. LEXIS 2773, *32 (June 27, 1996).

{¶16} In this case, a shared parenting decree was issued by the trial court on August 6, 2009. Pursuant to the order, the parties shared the title of residential parent, i.e., the parent who had custody of the child was the residential parent for the custodial period. After hearing on the motion to modify the shared parenting decree, the magistrate determined the prior order should be terminated; that appellant should have parenting time pursuant to Juvenile Rule V; and that appellee should be named sole residential parent. In drawing the foregoing conclusions, however, the magistrate only considered the child's best interest. Because it modified a prior decree *and* did not retain the prior residential parenting designation, the magistrate was obligated to (1) make a threshold finding of a change of circumstances and (2) enter a finding that one of the three conditions listed under R.C. 3109.04(E)(1)(a)(i) through (iii) had been satisfied.

{¶17} Appellant did not specifically object to the magistrate's omission. Failure to file objections to an alleged error in a magistrate's decision functions to waive the issue for appeal save plain error. *See e.g. Marshall v. Firster*, 11th Dist. Trumbull No. 99-T-0147, 2000 Ohio App. LEXIS 4589, *4-*5 (Sept. 29, 2000). "The plain error doctrine provides for the correction of errors clearly apparent on their face and

prejudicial to the complaining party even though the complaining party failed to object to the error at trial." *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 223 (1985).

{¶18} The trial court's failure to make the mandatory specific finding that a change of circumstances occurred in this case as well as its failure to indicate which condition was satisfied to trigger a re-designation of the child's residential parent is apparent from the record. Moreover, because the magistrate was statutorily required to enter these findings before it terminated the prior shared parenting degree and these findings require some quantum of evidence to support the modification, appellant, whose parenting time was lessened, suffered prejudice. Given the trial court's failure to make these legal determinations, we take notice of plain error in this matter.

{¶19} Because the trial court must first make the threshold finding of a change of circumstances, appellant's assigned errors are not yet ripe for review. The trial court may accept additional evidence on remand, hold a further hearing, or determine the change of circumstances issue on the existing record; the course it takes is within its sole discretion. *See Lopez-Ruiz v. Botta*, 10th Dist. Franklin No. 10AP-610, 2011-Ohio-2414, ¶12

{¶20} For the reasons discussed above, the judgment of the Lake County Court of Common Pleas, Juvenile Division, is reversed and the matter is remanded for the trial court to make the necessary factual and legal conclusions required by R.C. 3104.09(E)(1)(a).

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.