[Cite as *Musson v. Musson,* 2016-Ohio-1311.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ANNA MUSSON,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2015-T-0049**
- vs -	:	
CHAD MUSSON,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 2010 DR 264.

Judgment: Affirmed.

Elise M. Burkey, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483 (For Plaintiff-Appellee).

Chad Musson, pro se, 6350 Alexander Road, Pemberville, OH 43450 (Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Chad Musson appeals from the judgment entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, adopting the decision of its magistrate, and denying Chad's motion to reallocate parental rights regarding his son, WJM. The boy's mother, Anna Musson, is his custodial parent. Finding no error, we affirm.

{¶2} This is Chad's third appeal arising from his divorce from Anna, and custody disputes regarding their son. *See, e.g.*, *Musson v. Musson*, 11th Dist. Trumbull No. 2013-T-0113, 2014-Ohio-5381; *Musson v. Musson*, 11th Dist. Trumbull No. 2014-T-0048, 2014-Ohio-5621. The couple was married in February 2009. WJM was born May 18, 2009. In July 2010, Anna left the marital home near Toledo, and returned with WJM to her parent's farm in Trumbull County. Eventually, she obtained a divorce from Chad, who continues to live near Toledo.

{¶3} WJM was diagnosed early with deficits regarding his language development. Chad has consistently expressed a belief that Anna is not doing enough to correct this problem. Chad filed his motion to reallocate parental rights July 18, 2014. Due to the pendency of the two other appeals, and extensive motion practice in the trial court, hearing was not held before the magistrate until April 30, 2015. She filed her decision denying the motion May 7, 2015. The trial court adopted the magistrate's decision the same day. Chad never filed any objections to the magistrate's decision, but rather, noticed this appeal, assigning five errors.

{¶4} Chad's first assignment of error reads: "The trial court committed prejudicial error and abused its discretion in granting Debra Katz's Motion to Quash Subpoena." Ms. Katz is a speech therapist Chad hired in Toledo. Chad subpoenaed her for the April 30, 2015 hearing. She moved to quash, noting that she would be required to produce confidential treatment records regarding WJM, without Anna having waived privilege. She also noted Chad had not tendered the fees required by Civ.R. 45, and that it would be an undue burden for her to travel to Trumbull County on April 30, 2015, since she had sessions scheduled for that day.

{¶5} Chad's second assignment of error reads: "The trial court committed prejudicial error and abused its discretion in granting Jason Drummond's Motion to Quash Subpoena." Dr. Drummond had provided WJM therapy in Toledo. He moved to quash since all relevant records could be obtained from the facility at which he works; since Chad had not tendered the requisite fees required by Civ.R. 45; improper service; and, because it would impose an undue burden on him to travel to Trumbull County on April 30, 2015, since he had sessions scheduled.

{¶6} Being interrelated, we treat these assignments of error together.

{¶7} We review a trial court's decision regarding motions to quash for abuse of discretion. *In re Subpoena for Windland*, 190 Ohio App.3d 109, 2010-Ohio-4577, ¶6 (4th Dist.) Regarding this standard, we recall the term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶8} Civ.R. 45(C)(3) governs motions to quash subpoenas, and provides, in pertinent part:

{¶9} "(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

{¶10} "* * *

{¶11} "(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;

{¶12} "(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ.R. 26(B)(5), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;

{¶13} "(d) Subjects a person to undue burden."

{¶14} The subpoenas directed to Ms. Katz and Dr. Drummond were subject to being quashed pursuant to Civ.R. 45(C)(3)(b), (c), and (d). The trial court did not abuse its discretion in granting the motions to quash.

{¶15} The first and second assignments of error lack merit.

{¶16} Chad's last three assignments of error attack the magistrate's decision. As we noted above, he failed to object to that decision. Normally, we review a trial court's adoption of its magistrate's decision for abuse of discretion. *In re Gochneaur*, 11th Dist. Ashtabula No. 2007-A-0089, 2008-Ohio-3987, ¶16. However, since no objections were filed, our review of these assignments of error in this case is limited to civil plain error. Civ.R. 53(D)(3)(b)(iv).

{¶17} "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d

116, syllabus (1997).

{¶18} Chad's third assignment of error reads: "The trial Court committed plain error, prejudicial error, and abused its discretion by accepting the report and placing too much credibility on the testimony of Marisa Tremaine, an obviously hostile and unreliable witness." Ms. Tremaine is WJM's speech therapist. The magistrate found that she testified WJM has improved significantly, and now has language skills typical for his age.

{¶19} Chad's fourth assignment of error reads: "The trial court committed prejudicial error and abused its discretion misrepresenting the testimony of a witness." This assignment of error is directed to the testimony of WJM's school superintendent, Russell McQuaide. He testified that WJM had displayed certain behavioral incidents, but was not a behavior problem.

{¶20} There is support in the transcript for the magistrate's description of the testimony. There is no plain error.

{¶21} The third and fourth assignments of error lack merit.

{¶22} Chad's fifth assignment of error reads: "The trial court erred in committing a logical fallacy, specifically that in order to determine if a change has occurred, two measurements are required, while the court only had one measurement to use." Chad argues that evaluations of WJM show a worsening of his speech and behavioral issues, and that this constitutes a change in circumstances, supporting his motion.

{¶23} In *Cireddu v. Clough*, 11th Dist. Lake No. 2012-L-103, 2013-Ohio-2042, ¶28-29, this court stated:

{¶24} "R.C. 3109.04(E) sets forth the procedure for modifying a prior decree allocating parental rights and responsibilities for the care of children. R.C. 3109.04(E)(1)(a) states that '(t)he 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 (* * *), 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.'

{¶25} "In applying the change of circumstances prong of R.C. 3109.04(E)(1)(a), this court has held on many occasions that '(a) change of circumstances "is intended to denote an event, occurrence, or situation which has a material and adverse effect upon a child."' (Emphasis deleted.) *Haskett v. Haskett*, 11th Dist. No. 2011-L-155, 2013 Ohio 145, ¶35, citing *Schiavone v. Antonelli*, 11th Dist. No. 92-T-4794, 1993 Ohio App. LEXIS 5891, *9 (Dec. 10, 1993); *Makuch v. Bunce*, 11th Dist. No. 2007-L-016, 2007 Ohio 6242, ¶12."

{¶26} Essentially, Chad is arguing evidence exists in the record that WJM is not improving. That may be. The magistrate relied on the evidence he is improving, which is certainly in the record. She did not commit plain error by doing this. Having determined there was no change in WJM's circumstances, she was not required to advance to a best interest analysis.

{¶27} The fifth assignment of error lacks merit.

{¶28} The assignments of error lacking merit, the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.