[Cite as *Stein v. Anderson*, 2010-Ohio-18.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MATTHEW J. STEIN

Appellant

-vs-

LESLIE J. ANDERSON

Appellee

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. W. Scott Gwin, J.
Hon. John W. Wise, J.

Case No. 2009 AP 08 0042

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2004 DC 03 0152
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 6, 2010

APPEARANCES:

For Appellant	For Appellee
MATTHEW J. STEIN, PRO SE 1027 College Avenue NW New Philadelphia, Ohio 44663	LESLIE J. ANDERSON, PRO SE 230 Second Street, Post Office Box 262 Bergholz, Ohio 43908

Wise, J.

{¶1} Appellant Matthew J. Stein appeals the decision of the Court of Common Pleas, Tuscarawas County, which denied his request to reallocate parental rights and responsibilities regarding his son and daughter. The relevant facts leading to this appeal are as follows.

{¶2} Appellant Matthew J. Stein and Appellee Leslie J. Anderson were married in 1995. The marriage was dissolved by decree in 2004. The parties at that time entered into a shared parenting plan concerning their two minor children, S.S. and I.S. Appellee was designated residential parent under the plan.

{¶3} Appellant and appellee each remarried in 2006. Appellant married Michelle (Tristano) Stein, who is the residential parent of three daughters from a prior relationship. Appellee married Steven Anderson, who has a daughter from a prior marriage. Appellee and Steven also have a child together.

{¶4} In November 2006, appellant filed a motion to reallocate parental rights and responsibilities. Via a judgment entry filed August 23, 2008, the trial court denied said motion.

{¶5} On July 7, 2009, appellee filed a notice of intent to relocate, indicating that she intended to move with the children and Steven Anderson to Bergholz, (Jefferson County) Ohio, a distance of about forty miles, where Steven would be serving as a church pastor.

{¶6} On July 9, 2009, appellant filed, inter alia, a motion objecting to the relocation and requesting a reallocation of parental rights and responsibilities regarding

S.S. and I.S. The matter proceeded to an evidentiary hearing on July 24, 2009, where both parties appeared pro se.

{¶7} Via a judgment entry filed August 19, 2009, the trial court denied appellant's motion for reallocation of parental rights and responsibilities. The trial court also therein approved appellee's relocation notice.

{¶8} On August 26, 2009, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:

{¶9} "I. THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION IN FAILING TO REALLOCATE PARENTAL RIGHTS AND RESPONSIBILITIES TO THE PLAINTIFF/APPELLANT. THE COURT'S FINDING WAS NOT SUPPORTED BY THE EVIDENCE AND IS CONTRARY TO THE WEIGHT OF THE EVIDENCE."

I.

{¶10} In his sole Assignment of Error, appellant argues the trial court abused its discretion in declining to order a reallocation of parental rights and responsibilities. We disagree.

{¶11} R.C. 3109.04(E)(1)(a) reads in pertinent 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. * * *."

{¶12} In the case sub judice, the trial court, after hearing the evidence, found that there was not a "change in circumstances that would allow for the Reallocation of Parental Rights and Responsibilities." Judgment Entry, August 19, 2009, at 5. The court also concluded, via a footnote, that "[m]oving, by itself, is legally insufficient." Id.

{¶13} Our initial focus in this appeal is thus on the element of "change in circumstances." We note R.C. 3109.04 itself does not define this concept. Ohio courts have held that the phrase is intended to denote "an event, occurrence, or situation which has a material and adverse effect upon a child." *Rohrbaugh v. Rohrbaugh* (2000), 136 Ohio App.3d 599, 604-605, 737 N.E.2d 551, citing *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416, 445 N.E.2d 1153.[1] Much of the caselaw regarding change in circumstances, as related to parental relocation, addresses out-of-state moves. However, whether intrastate or out-of-state, we think the preferred general rule is that a relocation, by itself, is not sufficient to be considered a change of circumstances, but it is a factor in such a determination. See *Green v. Green* (Mar. 31, 1998), Lake County App. No. 96-L-145. In addition, it may be necessary for a trial court to distinguish between contemplated relocations and those which have already been accomplished. See *DeVall v. Schooley*, Muskingum App.No. CT2006-0062, 2007-Ohio-2582, ¶16. Furthermore, as aptly stated by the Eleventh District Court of Appeals, " ** since a child is almost always going to be harmed to some extent by being moved, the non-custodial parent should not be able to satisfy his or her burden simply by showing that *some* harm will result; the amount of harm must transcend the normal and expected problems of

[1] *Rohrbaugh* involved a parental relocation from Youngstown to Columbus, a distance of about 170 miles. Id. at 606.

adjustment." *Schiavone v. Antonelli* (Dec. 10, 1993), Trumbull App.No. 92-T-4794, 1993 WL 548034, emphasis in original.

{¶14} Our standard of review in assessing the disposition of child-custody matters is that of abuse of discretion. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 73-74. Furthermore, as an appellate court reviewing evidence in custody matters, we do not function as fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base his or her judgment. See *Dinger v. Dinger,* Stark App.No. 2001 CA00039, 2001-Ohio-1386.

{¶15} Our review in this matter is severely hampered by the lack of a complete record. The trial transcript is cut off on page 25, following a statement by the trial court that the recording machine was revealing an "error" message. Missing in particular is the testimony of appellant himself and Steven Anderson, appellee's present spouse. On September 2, 2009, appellant filed with us a "Notice of Incomplete Recording," in which he asserts that he has prepared an App.R. 9(D) statement. However, we find appellant has not complied with the requirements of App.R. 9(D), or, in the alternative, App.R. 9(C). As a result, this Court may not consider appellant's App.R. 9(D) statement, and we are required to presume the validity of the lower court's proceeding and affirm as to the issue of "change in circumstances." See *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197,199.

{¶16} Appellant's sole Assignment of Error is therefore overruled.

{¶17} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Tuscarawas County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Gwin, J., concur.

/S/ JOHN W. WISE

/S/ SHEILA G. FARMER

/S/ W. SCOTT GWIN

JUDGES

JWW/d 1223

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MATTHEW J. STEIN	:	
	:	
Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
LESLIE J. ANDERSON	:	
	:	
Appellee	:	Case No. 2009 AP 08 0042

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ W. SCOTT GWIN_____

JUDGES