[Cite as *Wartman v. Livengood*, 2010-Ohio-6005.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MELISSA WARTMAN	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009CA00284
JOSHUA LIVENGOOD	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Family Division Case No. JU133598
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	November 29, 2010

APPEARANCES:

For Plaintiff-Appellant:	For Defendant-Appellee:
JAMES W. HAUPT, JR. 1150 W. State Street Alliance, Ohio 44601	THOMAS W. KIMMINS 11 Lincoln Way East Massillon, Ohio 44646

Delaney, J.

{¶1} Defendant-Appellant, Melissa Wartman, appeals the judgment of the Stark County Court of Common Pleas, Family Division, awarding custody of her minor child, A.L., with Plaintiff-Appellee, Joshua Livengood, to Appellee.

{¶2} A.L., who was born on April 26, 2003, had lived with Appellant from the time she was born. On October 22, 2009, the Stark County Family Court awarded Appellee the status of residential parent and legal custodian of A.L. The factual background surrounding this decision is as follows.

{¶3} Appellant resided in Stark County her entire life, with the exception of a nine month period wherein she and A.L. lived in Akron, Ohio. At the time of the trial, Appellant lived with A.L. and Appellant's boyfriend, Toussaint Batiste. According to those who had viewed Appellant's home, it was clean, and A.L. had her own bedroom and her own play room. Appellant had been involved in various domestic violence incidents, the most notable one occurring while she was living in Akron. In October, 2008, she was the victim of a physical assault wherein a male acquaintance broke into her home and beat her with a sawed off shotgun. A.L. was present in the house during the assault. Child Protective Services immediately became involved in A.L.'s life and enrolled her in a counseling program to address any trauma issues A.L. may have suffered as a result of the assault on Appellant.

{¶4} Appellant admitted to the Guardian ad Litem (GAL) that she had previously engaged in inappropriate relationships with males, that she had friends who had criminal records, and that she had provided an unstable household at times to A.L.

Appellant's lifestyle continued to revolve around the same groups of people, even after the assault.

{¶5} The GAL reported receiving multiple reports of instability in A.L.'s life, specifically reports of criminal activity or violence involving Appellant or her acquaintances. Those who reported to the GAL were concerned that such actions were putting A.L. at risk, even though there had not been a reported violent physical act against A.L.

{¶6} Appellant's mother, Barbara Wartman, testified that she was constantly involved in A.L.'s life and that she did not approve of Appellant's boyfriends that Appellant had around A.L. Mrs. Wartman reported that Appellant previously dated a man whom she believed to be a drug dealer and that another of Appellant's boyfriends had stolen money from Mrs. Wartman. Mrs. Wartman stated that Appellant moved frequently due to the people she associated with.

{¶7} Appellant has a prior criminal record. Her record includes two prior domestic-related disorderly conduct charges, a menacing charge, various traffic violations, underage consumption, littering, and misdemeanor drug abuse. At the time of the hearing in the underlying matter, Appellant's boyfriend, Toussaint Batiste, had a criminal record including convictions for obstruction of official business, disorderly conduct for fighting, robbery (which was returned as a no bill), various traffic violations, OVI, disorderly conduct by intoxication, two counts of felonious assault, one count of resisting arrest, underage possession of alcohol, and criminal trespass. Batiste had served time in prison.

{¶8} At the time of trial, Appellee was employed by Ram Construction services and lived with his fiancée, Amanda Bleigh, and their daughter, who was two years old. Appellee was involved with A.L. and had taken her boating, camping, on family trips, and attempted to help A.L. with her school work. Appellee reported that Amanda also helped A.L. with her school work.

{¶9} The GAL reported that Appellee's home was very nice and appropriate.

{¶10} Appellee also has a criminal record, including convictions for receiving stolen property and failure to comply with the signal of a police officer. He was also placed in the Stark County Drug Court program, from which he was unsuccessfully terminated, and went to prison. He also has convictions for assault, resisting arrest, obstructing official business, and menacing, domestic violence, and disorderly conduct by intoxication. He was also the respondent of a protection order issued by the Stark County Family Court on March 3, 2005.

{¶11} The trial court conducted an in camera interview with A.L. and determined that she was not of sufficient age or competency to express to the Court her wishes and concerns regarding the allocation of parental rights.

{¶12} The GAL reported, after interviewing all parties that "it is in A.L.'s best interest to designate father as A.L.'s sole legal custodian. Mother should have a visitation order the Court deems appropriate given the circumstances. . .."

{¶13} The trial court issued an extensive decision and entry regarding the allocation of parental rights after the parties were afforded a full hearing wherein the above information was disclosed. Specifically, the trial court stated that it had exercised

its jurisdiction in compliance with R.C. 3109.04, 3109.21-3109.36, and 5103.20-5103.28, pursuant to R.C. 2151.23(F)(1).

{¶14} The court found that A.L. is bonded and interacts appropriately with both of her parents. A.L. also interacts appropriately with her father's fiancée and her step-sister. A.L. also is bonded with and interacts well with her grandparents.

{¶15} The court determined that there was not a significant adjustment to home, school, or community as A.L. was just beginning in school and was having significant difficulties with her schooling that needed to be addressed. The court noted that Appellant stated that she spends a significant amount of time with A.L. working on her schooling. Appellee acknowledged a learning disability on his part, but stated that he still attempts to assist A.L. and that his fiancé also helps A.L. with her school work.

{¶16} The court stated that A.L. has been frequently relocated while living with her mother, that her mother has bipolar disorder, which is being medicated properly. However, the court stated that Appellee complained that Appellant utilizes his visitation as a means to control him and denies companionship as a form of punishment. Appellant denied doing so. However, the GAL stated, "I have received several reports concerning mother refusing visits with both father and maternal grandmother when mother is upset with them. This form of punishment is troubling, as it does not allow for what is best for the child."

{¶17} The court determined it is more likely that the father would comply with the Court ordered companionship.

{¶18} While the court found that neither parent had been convicted of or pled guilty to an offense resulting in an abused or neglected child, the court stated that Child

Protective Services has twice been involved in investigating the child's condition. The court noted both parents' extensive criminal histories, finding them "concerning."

{¶19} In determining that Appellee is the appropriate party to be designated as residential parent and legal custodian of A.L., the Court stated as follows:

{¶20} "While there is evidence that the mother has adequately cared for [A.L.] physically, the Court shares the concerns outlined by the Guardian ad Litem with regard to her lack of stability and difficulties with interpersonal relationships. She has exposed A.L. to situations which are not conductive [sic] to child rearing or her safety.

{¶21} "Both parents have prior histories that seriously concern the Court as it relates to A.L.'s best interest. Neither party sees any abuse of alcohol or drugs on their own part or the part of the other parent. However a look at their criminal records and behaviors would indicate that both are at high risk for substance abuse.

{¶22} "As they come to the Court, both parents attempt to convince the Court that they have now been able to put their past behind them and will work diligently to ensure A.L.'s best interest. Mr Livengood appears to be sincere in this desire. It appears that he still has some anger management issues, however the Court finds that his current domestic situation is a stable one that is likely to permit him to carry through with his promises. An assessment of mother is not as promising. Her conduct repeats itself throughout the history of the case. Her current boyfriends [sic] has criminal history, she is financially reliant upon him and mother has not made significant improvements in making decisions based upon A.L.'s welfare or best interest.

{¶23} "The Court, having considered all of the evidence as set forth in the preceding Findings of Fact as well as the conclusions of law therein, it is hereby

ORDERED AND DECREED that the father, Joshua Livengood, be granted status of residential parent and legal custodian of A.L. Because of the bonding between A.L., her mother, and her maternal grandmother, it is found to be in her best interest that Ms. Wartman be awarded parenting time. . ..”

{¶24} Appellant raises two Assignments of Error:

{¶25} “I. THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION BY AWARDING LEGAL CUSTODY TO APPELLEE. THE COURT’S FINDING WAS NOT SUPPORTED BY EVIDENCE OF A CHANGE OF CIRCUMSTANCES AS REQUIRED BY R.C. 3109.04(E)(1)(a).

{¶26} “II. THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION BY AWARDING LEGAL CUSTODY TO DEFENDANT/APPELLEE. THE COURT’S FINDING WAS NOT IN THE BEST INTERESTS OF THE CHILD AS REQUIRED BY R.C. 3109.04(E)(1)(a).”

I.

{¶27} In Appellant’s first assignment of error, Appellant argues that the trial court abused its discretion by awarding legal custody of A.L. to Appellee because the court’s finding was not supported by evidence of a change of circumstances as required by R.C. 3109.04(E)(1)(a).

{¶28} R.C. 3109.04(E)(1)(a) provides:

{¶29} “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. 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 one of the following applies:

{¶30} "(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

{¶31} "(ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.

{¶32} "(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."

{¶33} In other words, a trial court may modify parental rights and responsibilities if it finds that there has been (1) a change in circumstances; (2) a modification is in the best interest of the child; or (3) any harm likely to result from a change of environment is outweighed by advantage of the change. Id.; see also *Zinneker v. Zinneker*, 133 Ohio App.3d. 378, 2000-Ohio-431, 728 N.E.2d 38.

{¶34} In custody proceedings, a trial court enjoys a broad discretion in making decisions. "A trial judge must have wide latitude in considering all the evidence before him or her-including many of the factors in this case-and such a decision must not be reversed absent an abuse of discretion." *Miller v. Miller* (1988), 37 Ohio St.3d 71, 523 N.E.2d 846.

{¶35} The record must support the court's findings regarding the change in circumstances. While certainly it would be better if the trial court explicitly used the "magic words" of change in circumstances before discussing the best interest of the child, an appellate court may still affirm a trial court's decision regarding a change in circumstances even if that explicit language is not used. See *Nigro v. Nigro*, 9th Dist. No. 04CA008461, 2004-Ohio-6270.

{¶36} While the court in the present case did not explicitly state that there had been a "change in circumstances," it did state that it considered R.C. 3109.04 in making its determination. Clearly, the evidence, as discussed in our statement of facts above, denote a change in circumstances warranting a change in the designation of the residential parent. As the court below found, Appellant's "conduct repeats itself throughout the history of the case. Her current boyfriend has criminal history, she is financially reliant on him and mother has not made significant improvements in making decisions based upon A.L.'s welfare or best interest."

{¶37} Appellant had also recently been involved in a violent attack wherein an acquaintance of hers broke into her house and beat her with a shotgun while A.L. was upstairs in the home. Additionally, A.L. had been repeatedly relocated by Appellant due to instability in housing.

{¶38} We find sufficient evidence existed that proved a change in circumstances which warranted a reallocation of parental rights. Appellant's first assignment of error is overruled.

II.

{¶39} In Appellant's second assignment of error, she argues that the trial court abused its discretion by awarding custody to Appellee because such a finding was not in the best interest of the child pursuant to R.C. 3109.04(E)(1)(a). We disagree.

{¶40} Again, the standard of review is whether the trial court abused its discretion in making its decision. *Miller*, supra.

{¶41} The GAL testified that he "just couldn't get past the concerns of mom's . . . unstable uh lifestyle. Um…the constant . . . involvement with men who are criminally involved." Moreover, the GAL testified, "because I'm given a number of reports, ah, regarding this instability as I'll call it with mother . . . where there's just constantly . . . basically criminal activity or violence . . . things that are putting the child at, at constant risk."

{¶42} The trial court is in the best position to judge the credibility of witnesses, was able to observe the GAL's demeanor on the stand, as well as the other witnesses who testified, including the parents of A.L. The court noted in its entry that Appellee was more likely to comply with court-ordered companionship and that he appeared sincere in his desire to put his past behind him. The court also noted that Appellant's conduct continues to repeat itself and that she has not made significant improvements in her lifestyle based upon A.L.'s welfare or best interest.

{¶43} We do not find that the trial court abused its discretion in awarding custody to Appellee and find that doing so was in the best interest of the child.

{¶44} Appellant's second assignment of error is overruled.

{¶45} The judgment of the Stark County Court of Common Pleas, Family Division, is affirmed.

By: Delaney, J.

Hoffman, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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-vs-	:	JUDGMENT ENTRY
	:	
JOSHUA LIVENGOOD	:	
	:	
Defendant-Appellee	:	Case No. 2009CA00284
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas, Family Division is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

_____
HON. WILLIAM B. HOFFMAN

_____
HON. SHEILA G. FARMER