[Cite as *Kirchhofer v. Kirchhofer*, 2010-Ohio-3797.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

MELANIE KIRCHHOFER nka Buchanan	C.A. No. 09CA0061
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
SEAN KIRCHHOFER	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellee	CASE No. 00-DR-0072

DECISION AND JOURNAL ENTRY

Dated: August 16, 2010

BAIRD, Judge.

INTRODUCTION

{¶1} Melanie Buchanan has appealed the trial court's order adopting the shared parenting plan suggested by her ex-husband, Sean Kirchhofer. This Court affirms because the trial court did not abuse its discretion by finding that a change in circumstances warranted a modification of the existing custody order, that the testimony of the guardian ad litem was more credible than that of the child's counselor, or by adopting the shared parenting plan.

BACKGROUND

{¶2} Ms. Buchanan and Mr. Kirchhofer were briefly married and had one child together. Their son, S.K., was born August 31, 1997. When Mr. Kirchhofer and Ms. Buchanan divorced, the trial court named Ms. Buchanan S.K.'s residential parent. The court did not issue visitation orders at that time because Mr. Kirchhofer had not yet attended the required counseling class.

{¶3} In September 2004, Mr. Kirchhofer moved the trial court for companionship rights. In April 2005, the trial court entered an agreed order that designated Ms. Buchanan the residential parent and granted Mr. Kirchhofer the standard order of visitation. Initially, the parties had problems adhering to the schedule, leading Mr. Kirchhofer to twice move the trial court to find Ms. Buchanan in contempt for failure to follow the visitation order.

{¶4} In March 2006, the trial court found Ms. Buchanan in contempt for failure to comply with the parenting time order. The trial court gave her a jail sentence suspended on various conditions. The court also ordered that, "[p]ending further order of this Court, neither party shall consume or be under the influence of alcohol in the presence of the minor child." The record reflects that, following entry of the agreed order, the parties did not have further difficulty adhering to the parenting schedule.

{¶5} In September 2008, Mr. Kirchhofer moved the trial court to modify parental rights and responsibilities. By affidavit in support of his motion, Mr. Kirchhofer testified that Ms. Buchanan was in jail, having been convicted of possession of marijuana and driving with a prohibited blood alcohol concentration. The court had sentenced Ms. Buchanan to serve 60 days in jail plus 18 months of probation and ordered her to pay a fine. Mr. Kirchhofer requested full custody of S.K.

{¶6} Over two days in February and April 2009, a magistrate held a hearing on Mr. Kirchhofer's custody motion. On the first day of the hearing, the magistrate interviewed S.K. in camera. The magistrate later heard testimony from both parents, both of S.K.'s grandfathers, his paternal grandmother, his step-mother, his guardian ad litem, his therapist and Ms. Buchanan's therapist. Between the first and second hearing dates, Mr. Kirchhofer moved the court for adoption of a shared parenting plan.

{¶7} On April 28, 2009, the magistrate recommended that the trial court follow the suggestion of the guardian ad litem to adopt a shared parenting plan giving each parent time on a week on/week off basis throughout the year. On the same day, the trial court entered an order adopting Mr. Kirchhofer's shared parenting plan including the week on/week off schedule. Ms. Buchanan objected to the magistrate's decision and the trial court overruled her objections. Ms. Buchanan has timely appealed.

STANDARD OF REVIEW

{¶8} A custody determination will not be disturbed on appeal absent an abuse of discretion implying that "the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219 (1983); *Miller v. Miller*, 37 Ohio St. 3d 71, 74 (1988). The trial court's discretion in custody matters "should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned." *Miller*, 37 Ohio St. 3d at 74. This is due in large measure to the fact that "[t]he knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *Id.* Therefore, "the reviewing court . . . should be guided by the presumption that the trial court's findings were indeed correct." *Id.* The presumption may be overcome, however, based on a review of the evidence in the record. "In some instances, the record might disclose that the presumption is not met because of insufficiency of the evidence or that the evidence conclusively demonstrates, through oversight or mistake, that a particular finding is so contrary to the manifest weight of the evidence so as to lead to an ultimate finding of abuse of discretion." *Kern v. Kern*, 6th Dist. No. 91FU000012, 1992 WL 172701 at *3 (July 24, 1992) (quoting *Benlein v. Benlein*, 6th Dist. No. S-89-39, 1991 WL 64868 at *4 (Apr. 26, 1991)).

MODIFICATION OF CUSTODY DECREE:
CHANGE IN CIRCUMSTANCES

{¶9} The first part of Ms. Buchanan's first assignment of error is that the trial court incorrectly modified the existing custody decree because its determination that there had been a change in circumstances is either against the manifest weight of the evidence or is contrary to law. "While a trial court's discretion in a custody modification proceeding is broad, it is not absolute, and must be guided by the language set forth in R.C. 3109.04." *Miller v. Miller*, 37 Ohio St. 3d 71, 74 (1988).

{¶10} A trial court is not permitted to modify an existing decree allocating parental rights and responsibilities "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, [or] the child's residential parent . . . and that the modification is necessary to serve the best interest of the child." R.C. 3109.04(E)(1)(a). In order to satisfy Section 3109.04(E)(1)(a), "the change need not be 'substantial,' but must at least be one which is 'a change of substance, not a slight or inconsequential change.'" *Page v. Page*, 2d Dist. No. 07CA0109, 2008-Ohio-3011, at ¶21 (quoting *Davis v. Flickinger*, 77 Ohio St. 3d 415, 418 (1997)). According to the Ohio Supreme Court, "[i]n determining whether a 'change' has occurred, . . . a trial judge must have wide latitude in considering all the evidence . . . . and such a decision must not be reversed absent an abuse of discretion." *Davis*, 77 Ohio St. 3d at 418 (citing *Miller v. Miller*, 37 Ohio St. 3d 71, 74 (1988)).

{¶11} There was evidence that, during the years since the prior decree was issued, S.K. had been doing well in school and had generally been appropriately supervised while in his mother's care. It is uncontested, however, that just before Mr. Kirchhofer moved to modify custody, Ms. Buchanan was arrested for possession of marijuana and driving while under the

influence of alcohol. She testified that this was her second DUI conviction in six years and she was sentenced to sixty days in jail and eighteen months of probation. She served just eleven days in jail, however, before finishing her sentence via house arrest.

{¶12} The court also suspended Ms. Buchanan's driver's license for five years, forcing S.K. to depend on extended family members and his mother's boyfriend or other friends for his transportation needs, including rides to and from the school he attends that is outside the home districts of both of his parents. Ms. Buchanan testified that her father, Dan Buchanan, regularly drives S.K. to school and other places as needed. On February 11, 2009, the first day of the hearing in this matter, Ms. Buchanan and S.K. were living in Dan Buchanan's house. By the second day of testimony, on April 1, 2009, Ms. Buchanan and S.K. had moved into the home of Ms. Buchanan's boyfriend. Ms. Buchanan testified that she and S.K. had moved four times in the four years since the prior decree had been entered.

{¶13} Ms. Buchanan has correctly pointed out that S.K.'s guardian ad litem and his therapist testified that S.K. is a good kid and has been doing fairly well in school while in Ms. Buchanan's custody. In fact, S.K. is participating in an advanced curriculum in fifth grade. Ms. Buchanan has argued that her arrest and conviction have not materially and adversely affected S.K. so as to justify a modification of custody. S.K.'s counselor testified that S.K. was upset about his mother's criminal charges and that he had cried about it, but that she felt it had made him a stronger kid. The guardian ad litem pointed out that S.K. had not had behavior problems in school until after his mother was jailed. The magistrate expressed concern about Ms. Buchanan's choices in companions, recent arrest and conviction, and her somewhat transient lifestyle since the time of the prior decree. Considering all of the evidence in the aggregate, the magistrate determined that the changes in the circumstances of S.K. and his mother since April

2005 were not inconsequential. See *Page v. Page*, 2d Dist. No. 07CA0109, 2008-Ohio-3011, at ¶21 (quoting *Davis v. Flickinger*, 77 Ohio St. 3d 415, 418 (1997)). The trial court agreed with the magistrate's decision. The trial court's determination that a change of circumstances warranted a modification of the custody decree was not an abuse of discretion.

ADOPTION OF A SHARED PARENTING PLAN:
BEST INTEREST ANALYSIS

{¶14} The second part of Ms. Buchanan's first assignment of error is that the trial court's adoption of a shared parenting plan is against the manifest weight of the evidence because it is not in the child's best interest. Ms. Buchanan has also argued that the trial court improperly adopted the shared parenting plan based on an incorrect weighing of the contested evidence, including the importance of S.K.'s counselor's testimony as compared to that of his guardian ad litem.

{¶15} "What is in the best interests of a child is primarily a question of fact." *In re Gill*, 4th Dist. No. 84 X 4, 1985 WL 6533 at *2 (Feb. 11, 1985). "A trial court's decision on a question of fact should be reversed only if it is against the manifest weight of the evidence." *Stocker v. Cochran's Decorative Curbing Inc.*, 7th Dist. No. 09 MA 128, 2010-Ohio-1542, at ¶34. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶24 (quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St. 2d 279, syllabus (1978)).

{¶16} In order to determine whether shared parenting is in the best interest of the child, the trial court must consider "all relevant factors, including, but not limited to" the factors listed in Sections 3109.04(F)(1), 3109.04(F)(2), and 3119.23 of the Ohio Revised Code. R.C. 3109.04(F)(2). Under Section 3109.04(F)(1), the relevant factors include: "(a) [t]he wishes of

the child's parents regarding the child's care; (b) . . . the wishes and concerns of the child, as expressed to the court; (c) [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; (d) [t]he child's adjustment to the child's home, school, and community; (e) [t]he mental and physical health of all persons involved in the situation; (f) [t]he parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights; . . . [and] (i) [w]hether the residential parent . . . has continuously and willfully denied the other parent's right to parenting time . . . ."

{¶17} Section 3109.04(F)(1)(a) requires the trial court to consider the parents' wishes. Ms. Buchanan testified that she would like to retain her designation as S.K.'s residential parent and legal custodian while Mr. Kirchhofer testified that he would prefer full custody, but he would be happy with any additional time with his son.

{¶18} Under Section 3109.04(F)(1)(b), the court must consider the child's wishes. The magistrate interviewed S.K. in camera, but indicated that S.K. specifically requested that the magistrate not discuss the interview with his parents or their lawyers. The magistrate stated only that the testimony of both the guardian ad litem and S.K.'s counselor seemed to be accurate regarding the child's demeanor and attitude. The child's counselor testified that S.K. was very guarded and difficult to get to know in therapy sessions. She said this was due to his fear that people will find out what he has said to her and that it would either hurt his mother or anger his father.

{¶19} Section 3109.04(F)(1)(c) requires a consideration of S.K.'s "interaction and interrelationship with [his] parents, siblings, and any other person who may significantly affect [his] best interest." Everyone seemed to agree that S.K. loves both of his parents and wants to

continue to spend time with each of them. Everyone also agreed that S.K. is more bonded with his mother than with his father. The guardian ad litem explained that "a village has raised this child." S.K. has enjoyed close, loving relationships with all four of his grandparents. He and his mother have even lived with his maternal grandfather for periods of time.

{¶20} According to the guardian ad litem, S.K. and his father have a good relationship since Mr. Kirchhofer has been working on being a part of his son's life for the past five years, after having been largely absent for the first six. Mr. Kirchhofer testified that S.K. gets along well with his stepmother, Angela, and they enjoy an affectionate, comfortable relationship. The guardian ad litem agreed that Mrs. Kirchhofer is a good step-mother and that S.K. seems to be a part of his father's new family. The Kirchhofers include S.K. in their family vacations and treat S.K. as a brother, rather than a half-brother, to their daughter, Alice. Mr. and Mrs. Kirchhofer both testified that S.K. loves his little sister and enjoys playing with her.

{¶21} Although everyone agreed that S.K. and his mother are well-bonded, the guardian ad litem testified that she believed Ms. Buchanan had not been spending a lot of time with S.K. before the litigation began. According to the guardian ad litem, Mr. Buchanan, S.K.'s maternal grandfather, has been S.K.'s main caregiver over the years and has generally spent more time with his grandson than his daughter has. Everyone agreed that S.K. and his maternal grandfather have a very close relationship. Ms. Buchanan testified that she and S.K. had moved into her father's house on three different occasions, but were no longer living there by the second day of testimony in this case due to S.K.'s poor relationship with Mr. Buchanan's live-in fiancé. S.K.'s counselor testified that she believed S.K. felt safest in his mother's care and that, although he loves his father, he is scared of making him angry.

{¶22} Under Section 3109.04(F)(1)(d), the trial court must consider S.K.'s adjustment to his home, school, and community. Both the guardian ad litem and S.K.'s counselor testified that S.K. likes his school and has been doing pretty well academically. Both parents testified that S.K. has friends in their respective neighborhoods and that they have invited them over to play. Mr. Kirchhofer expressed some concern about how much supervision S.K. is given when in his mother's care. In his opinion, when with his mother, S.K. spends too much time playing gory video games when he could be outside playing sports and being "exposed to a lot more things." Mr. Kirchhofer said that S.K. has adapted well to the increased "consistency, . . . structure, . . . rules, . . . and manners" required at his house. He believes that S.K. needs more structure in his life and believes that he and his wife, who is not employed outside the home, are well suited to provide it. Ms. Buchanan testified that S.K. is well supervised at her house. When she is working, one of her parents usually watches S.K. S.K.'s counselor said that she did not believe that S.K. had too much freedom while in his mother's care.

{¶23} Section 3109.04(F)(1)(e) requires consideration of the mental and physical health of everyone involved. In this case, both parents have some mental health issues. Ms. Buchanan testified that she suffers from panic attacks and takes antidepressant medication. She said that she is receiving counseling and will continue to do so as part of her probation requirements. Neither the guardian ad litem nor Ms. Buchanan's counselor believed that her mental health symptoms interfere with her parenting. The guardian ad litem was concerned that Ms. Buchanan said she did not have an alcohol problem and that she had not used marijuana in a couple of years, yet she was not immediately honest about her 2008 arrest for driving while intoxicated and possession of marijuana.

{¶24} Mr. Kirchhofer testified that he has been diagnosed with anxiety and is taking a prescription medication for it. He had been to therapy briefly, but was not participating in therapy at the time of the hearing. The guardian ad litem expressed some concern about Mr. Kirchhofer's history of anger issues in marriage, but said that she did not believe it affected his parenting.

{¶25} Sections 3109.04(F)(1)(f) and (i) require consideration of which parent is "more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights" and whether Ms. Buchanan, as residential parent, has "continuously and willfully denied [Mr. Kirchhofer's] right to parenting time." Although Ms. Buchanan had once been found in contempt for interfering with visitation, everyone agreed that, over the previous three years, she had consistently permitted the court-ordered visitation. She had even made special arrangements, on occasion, to accommodate Mr. Kirchhofer's parents' requests to visit with S.K. and she allowed S.K. to spend time with his father when S.K.'s half-sister Alice was born.

{¶26} Mr. Kirchhofer testified, however, that visitation can be complicated because Ms. Buchanan can be hard to find due to her frequent moves and changing jobs without alerting him. He also said that Ms. Buchanan did not contact him when she was arrested, but merely gave S.K. to her own father. Mr. Kirchhofer testified that he would not interfere with Ms. Buchanan's parenting time if he were named S.K.'s residential parent.

{¶27} In considering shared parenting, the trial court was required to evaluate the additional best interest factors found in Sections 3109.04(F)(2) and 3119.23 of the Ohio Revised Code. The relevant Section 3109.04(F)(2) factors include: (a) the parents' ability to cooperate and make joint decisions regarding the child, (b) each parent's ability to encourage a loving

relationship between the child and the other parent, (c) "[a]ny history or potential for . . . spouse abuse [or] other domestic violence," and (e) the guardian ad litem's recommendation. R.C. 3109.04(F)(2)(a-e).

{¶28} The guardian ad litem testified that she did not believe Ms. Buchanan was open to the idea of S.K. developing his relationship with his father. Mr. Kirchhofer testified that he knows S.K. loves his mother, but there was evidence that Mr. Kirchhofer may have made negative comments about her to his son. Although there was evidence that Mr. Kirchhofer was charged with domestic violence in relation to his current wife sometime before April 2005, there was no evidence that he had been convicted.

{¶29} Despite both of S.K.'s parents admitting that they have not communicated well over the years, the guardian ad litem recommended that they try shared parenting on a week on/week off basis. The guardian ad litem acknowledged that S.K. might have some difficulty with the frequent transitions between Ms. Buchanan's parenting style and Mr. Kirchhofer's much more structured and rule-oriented style, but she believes that S.K. needs to spend significant time with each parent at this point in his life.

{¶30} Finally, under Section 3109.04(F)(2), the court had to consider the factors found in Section 3119.23 of the Ohio Revised Code. The relevant factors in that section include: disparity of income between the households, taxes to be paid by each party, and each parent's responsibility to support others. R.C. 3119.23(G), (I), (O). The magistrate's decision includes references to each parent's income and tax obligations. The record indicates that Mr. Kirchhofer earns more than twice Ms. Buchanan's income, but that Mr. Kirchhofer is also supporting a wife and another child. There was testimony that he and Mrs. Kirchhofer were expecting their second child together soon after the hearing.

{¶31} After taking evidence relating to the relevant factors found in Sections 3109.04(F)(1) and (F)(2) as well as in Section 3119.23 of the Ohio Revised Code, the trial court adopted Mr. Kirchhofer's shared parenting plan. There was competent, credible evidence to support the trial court's finding that the shared parenting plan was in S.K.'s best interest and its decision to adopt the shared parenting plan was not an abuse of discretion. Ms. Buchanan's first assignment of error is overruled.

GUARDIAN AD LITEM VS. COUNSELOR

{¶32} Ms. Buchanan's second assignment of error is that the trial court abused its discretion because it believed the testimony and followed the recommendations of the guardian ad litem over those of the child's counselor. At the hearing, the guardian ad litem recommended shared parenting while the child's counselor testified that shared parenting would be too difficult for S.K. The trial court considered the guardian ad litem to be more credible and adopted her recommendation. Ms. Buchanan has argued that that determination was "unconscionable" in light of the counselor's testimony that S.K. is more relaxed at his mother's house and the two households are too different to facilitate shared parenting.

{¶33} The trial court, as the trier of fact, "[was] best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. Inc. v. City of Cleveland*, 10 Ohio St. 3d 77, 80 (1984). "A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Davis v. Flickinger*, 77 Ohio St. 3d 415, 419 (1997).

{¶34} There is nothing in the record to suggest the trial court abused its discretion by finding the guardian ad litem more credible than the child's counselor. In fact, the trial court had

good reasons to put more faith in the testimony of the guardian ad litem. First, Section 3109.04(F)(2)(e) of the Ohio Revised Code requires the trial court to consider the recommendation of the guardian ad litem when evaluating a request for shared parenting. Furthermore, the guardian ad litem acknowledged that the parents have different parenting styles, but she testified that S.K. needs "more structure and consistency than he is receiving right now if we want him to continue on and do well in school." She agreed that S.K. seems more relaxed in his mother's care because he has more freedom and because he has had less time with his father over the years. She believes that he needs more time with his father to work on building that relationship.

{¶35} The guardian ad litem testified that she was aware that the child's counselor disagreed with her recommendation regarding shared parenting. She said that she respected the counselor's professional opinion, but that, in comparison to the counselor, she had considered more information about S.K.'s situation. The guardian ad litem testified that, in addition to discussions with the parents and stepmother, she had investigated a variety of other sources, including Ms. Buchanan's counselor, her probation officer, her father, the Child Support Enforcement Agency, S.K.'s school, and Mr. Kirchhofer's parents as well as his doctor. S.K.'s counselor, on the other hand, had conducted just ten sessions with S.K. and a couple involving his parents and stepmother. Both the guardian ad litem and S.K.'s counselor testified at the hearing and each party subjected them to lengthy cross-examination. The trial court did not abuse its discretion by resolving the conflicts in the evidence in favor of the guardian ad litem's recommendations over those of the child's counselor. Ms. Buchanan's second assignment of error is overruled.

CONCLUSION

{¶36} The trial court did not abuse its discretion by finding there had been a change in circumstances sufficient to modify the existing custody decree or by judging the testimony of the guardian ad litem to be more credible than that of the child's counselor. The trial court's determination that Mr. Kirchhofer's shared parenting plan is in S.K.'s best interest is not against the manifest weight of the evidence. The trial court's decision to adopt the shared parenting plan was not an abuse of discretion. The judgment of the Wayne County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

WILLIAM R. BAIRD
FOR THE COURT

WHITMORE, J.
BELFANCE, P. J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(c), Article IV, Constitution.)

APPEARANCES:

ROSANNE K. SHRINER, Attorney at Law, for Appellant.

PATRICIA A. RODGERS, Attorney at Law, for Appellee.