

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JENNIFER PRYOR

C. A. No. 25294

Appellant

v.

KERRY D. HOOKS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 1997-09-2432

Appellee

DECISION AND JOURNAL ENTRY

Dated: December 15, 2010

WHITMORE, Judge.

{¶1} Appellant, Jennifer Pryor (“Mother”), appeals from a judgment of the Summit County Court of Common Pleas, Domestic Relations Division, that denied her motion to modify parental rights and responsibilities. This Court affirms.

I

{¶2} Mother and Kerry Hooks (“Father”) were married for approximately three years and had one child together. The Summit County Court of Common Pleas, Domestic Relations Division, granted the parties a divorce on December 3, 1998 and designated Mother as the residential parent of the child. Over the next several years, the parties filed numerous motions to modify their parental rights and responsibilities, many of which focused on Mother’s desire to relocate to Arizona with the child. The matter was ultimately resolved on June 29, 2005, when an agreed judgment entry and shared parenting plan was filed, which provided that the child would remain in Ohio with Father as his residential parent and would have visitation time with

Mother in Arizona. The agreed entry further provided that the parties “agree to revisit the matter of [the child’s] residence upon [the child] reaching age 12. [The child’s] preference shall be considered by the court.”

{¶3} On June 7, 2007, Mother filed a motion to modify the court’s June 2005 agreed order. Although Mother did not state these facts in her motion, the child had reached the age of twelve and allegedly had expressed his desire to live with Mother in Arizona. Following an evidentiary hearing, the magistrate denied Mother’s motion, reasoning that there had been no change in circumstances that would authorize the court to modify the parties’ parental rights and responsibilities and that changing the residential parent would not be in the child’s best interest.

{¶4} Mother filed objections to the magistrate’s decision, arguing among other things that the parties had agreed that the child reaching the age of twelve would automatically constitute a change of circumstances, and that designating Mother as the residential parent would be in the child’s best interest. The trial court overruled Mother’s objections and denied her motion to modify the prior order. Mother appeals from the trial court’s denial of her motion, raising two assignments of error for our review.

II

Assignment of Error Number One

“THE TRIAL COURT’S DETERMINATION THAT THERE HAD BEEN NO CHANGE IN CIRCUMSTANCES IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶5} In her first assignment of error, Mother argues that the trial court erred in concluding that there had been no change of circumstances within the meaning of R.C. 3109.04. We disagree.

{¶6} R.C. 3109.04(E)(1)(a) provides, in relevant part, that a trial court “shall not modify a prior decree allocating parental rights and responsibilities” unless it finds that “a change has occurred in the circumstances of the child, the child’s residential parent, or either of the parents” and that the modification “is necessary to serve the best interest of the child.”

{¶7} Mother argues that the trial court should have found the requisite change of circumstances because: (1) the parties agreed that the child reaching the age of twelve would constitute a change of circumstances; and (2) even without the agreement, the child reaching an older age and expressing his desire to live with Mother necessarily constituted a change of circumstances. We will address each argument in turn.

{¶8} Mother’s first argument is that the child reaching the age of twelve constituted a change of circumstances pursuant to the terms of the prior agreed entry. She argues that, because the prior entry provided that the parties agreed to revisit the child’s residence when he reached the age of twelve, the child attaining the age of twelve automatically constituted a change of circumstance.

{¶9} The trial court considered the language of the parties’ agreement that they “agree to revisit the matter of [the child’s] residence upon [the child] reaching age 12[.]” and concluded that this language did not constitute an agreement that the child reaching the age of twelve would necessarily constitute a change of circumstances under R.C. 3109.04. This Court agrees with that interpretation of the parties’ agreement.

{¶10} Next, Mother argues that the child reaching the age of twelve and expressing his desire to live with her were sufficient facts to demonstrate a change of circumstances. The Ohio Supreme Court has held that the requisite change of circumstances “must be a change of substance, not a slight or inconsequential change.” *Davis v. Flickinger* (1997), 77 Ohio St.3d

415, 418. Although a change in the child's age, coupled with his expressed desire to live with a different parent might constitute the requisite change of circumstances in certain cases, the trial court must make this determination on a case by case basis, considering all of the surrounding circumstances unique to each case. *Id.* In the case before us, there was a change in the child's age. The child also expressed his desire to live with Mother because he liked the warmer climate and had more fun in Arizona. Based upon the record before us and in keeping with the requirement in *Davis* that the change in circumstances be a change of substance, the trial court did not err in determining that there had been no change of circumstances as required by R.C. 3109.04. Mother's first assignment of error is overruled.

Assignment of Error Number Two

"THE TRIAL COURT'S DETERMINATION THAT IT WAS IN [THE CHILD'S] BEST INTEREST TO REMAIN WITH HIS FATHER IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶11} Mother's second assignment of error challenges the trial court's best interest determination. Because the trial court properly found that there had been no change of circumstances, the trial court was without authority to modify the prior order designating Father as the residential parent. Therefore, Mother's second assignment of error is moot and will not be addressed. See App.R. 12(A)(1)(c).

III

{¶12} Mother's first assignment of error is overruled and her second assignment of error was not addressed because it is moot. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, 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 Summit, 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.

BETH WHITMORE
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

CHRISTINE D. FINAN, Attorney at Law, for Appellant.

LYNDA HARVEY WILLIAMS, Attorney at Law, for Appellee.