[Cite as *Ashbridge v. Berry*, 2010-Ohio-2914.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

TAMI ASHBRIDGE	:	
	:	Appellate Case No. 2009-CA-83
Plaintiff-Appellant	:	
	:	Trial Court Case Nos. 2008-FS-10
v.	:	
	:	
CRAIG M. BERRY	:	(Civil Appeal from Common Pleas
	:	Court, Domestic Relations)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 25th day of June, 2010.

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BROGAN, J.

{¶ 1} N.B.'s parents divorced when he was five-years old. A non-shared parenting decree gave N.B.'s mother, Tami Ashbridge, custody of him, and N.B. has lived with her in Ohio ever since. Now fifteen, N.B. has decided that he would like to

live in Florida with his father, Craig Berry. Berry filed a motion asking the domestic-relations court to modify the parenting decree to grant him custody. After holding a two-day hearing, talking with the appointed guardian ad litem, and interviewing N.B. in chambers, the court decided to grant the motion. Ashbridge has appealed the decision. Primarily, she argues that, by modifying the parenting decree, the court abused its discretion. She also argues that the court abused its discretion by limiting the role of the appointed guardian ad litem to determining only N.B.'s wishes. We will affirm.

{¶ 2} In our review of the trial court's decision, we employ the abuse of discretion standard. See *Chelman v. Chelman*, Greene App. No. 2007 CA 79, 2008-Ohio-4634, at ¶19; see, also, *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418. A court does not abuse its discretion by modifying a parenting decree if the decision finds the support of a substantial amount of credible and competent evidence. See *Davis*, at 418. The central issue in this case is whether the trial court erred, that is, abused its discretion, by modifying the parenting decree. Because the first and third assignments of error both raise issues that arise under the central issue, we will address these assigned errors together.

First Assignment of Error

{¶ 3} "THE TRIAL COURT ERRED WHEN IT RELIED ON THE NON-RESIDENTIAL PARENT'S CHANGE OF CIRCUMSTANCES, IGNORED CURRENT STATUTORY LAW, RELIED ON OUTDATED CASE LAW AND DISREGARDED EVIDENCE ABOUT THE CHILD'S AMBIVALENCE IN FINDING A

CHANGE OF CIRCUMSTANCES."

Third Assignment of Error

{¶ 4} "THE TRIAL COURT ERRED WHEN IT DETERMINED THAT IT WAS IN THE CHILD'S BEST INTEREST TO MODIFY CUSTODY AND RELOCATE THE CHILD TO FLORIDA TO RESIDE WITH MR. BERRY EVEN THOUGH MR. BERRY MAY BE TRANSFERRED WITHIN A YEAR OF THE COURT'S DECISION AND THE CHILD HAD ESTABLISHED SCHOOLING AND RELATIONSHIPS IN OHIO."

{¶ 5} For reasons we will mention later, appellate courts accord trial courts broad discretion when they decide child-custody issues. But a court's discretion, while broad, is not unbound. Section 3109.04 of the Revised Code binds its discretion to modify a parenting decree by requiring the court to make two findings of fact.[1] First, as a threshold matter, the court must find that the facts show "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." R.C. 3109.04(E)(1)(a). Second, the court must find that "the modification is necessary to serve the best interest of the child." R.C. 3109.04(E)(1)(a).

{¶ 6} Before addressing these two findings, and though Ashbridge does not raise the issue, we note that before a court may change the residential parent two

[1]"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." R.C.

conditions must be true. "In applying these [modification] standards," the statute says, "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." R.C. 3109.04(E)(1)(a). What follows are three conditions: the pertinent third is, "The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child." R.C. 3109.04(E)(1)(a)(iii). Here, the trial court expressly said that the harm likely to be caused by a change is outweighed by the advantages of change. And, while the court does not say expressly that a change in residential parent is in N.B.'s best interest, the language of the court's decision plainly implies that it is. "The child," said the court, "has not lived with his father since he was five years old. His grandfather recently passed away and this factor may have created a greater urgency and need within the child to bond with his father." December 9, 2009 Judgment Entry Sustaining Defendant's Motion for Reallocation of Parental Rights, p.3. Later, the court said that N.B.'s grades declined after his grandfather's death. "His current age," said the court, "creates a need for increased interaction with his father. He adapted to his father's home during his [summer 2009] stay in Florida. He has made friends in Key West and has developed a keen interest in water sports that are peculiar to the region." Id. at p.7. The statutory conditions for changing N.B.'s residential parent, therefore, are satisfied.

"Change in circumstances"

3109.04(E)(1)(a).

{¶ 7} In the first assignment of error, Ashbridge argues that the court abused its discretion in finding a change in circumstances. First, she contends that the court improperly relied on the finding that Berry has experienced a change in circumstances. Second, Ashbridge contends that the court misunderstood the law with respect to the legal effect that N.B.'s decision to live with Berry has. And, third, Ashbridge contends that the court should not have found that N.B. has acquired sufficient reasoning ability and maturity to express his wishes in the matter.

{¶ 8} Ashbridge contends first that, by relying on the finding that Berry's circumstances have changed, the trial court violated section 3109.04. She points out that, according to R.C. 3109.04(E)(1)(a), the non-residential parent's change in circumstance is relevant only in the context of a shared-parenting decree, which theirs is not. Ashbridge is correct, and if the trial court's change-in-circumstances finding were based solely on the finding that Berry's circumstances have changed, we would be compelled to reverse. But such is not the case. The court also found that N.B. experienced a change in circumstances. So, even if we disregard Berry's change in circumstances, the court's independent finding that N.B. experienced a change in circumstances is sufficient.

{¶ 9} Ashbridge contends next that the trial court used superceded case-law to evaluate the legal effect that N.B.'s decision to live with Berry has in the change-in-circumstances analysis. Here, too, Ashbridge gets the law correct, the court wrong. The trial court relies on the Ohio Supreme Court's decision in *Dailey v. Dailey* (1945), 146 Ohio St. 93, and on our decision in *Bawidamann v. Bawidamann* (1989), 63 Ohio App.3d 691, to say that a child's election between two parents of equal standing

constitutes a change in circumstances. These cases, though, reflect the statutory law of the time, which is not the statutory law of today. Before 1990, the statutory law did contain this concept of a child's election, but, in a subsequent rewrite of the law, S.B. 3 swept it away. Nevertheless, despite the trial court's reliance on old law, we find that its actual analysis comports with current law.

{¶ 10} The Ohio Supreme Court has said that, under the change-in-circumstances analysis, advancing age is a relevant consideration. See *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, at ¶18 (saying that "the advancement of a child from infancy to adolescence" is a factor relevant to the statutory change-in-circumstances requirement). We have found that a child's desire to live with the non-residential parent plus the child's advancing age and related considerations may be enough to constitute a change in the child's circumstances. In *Pellettiere v. Pellettiere*, Montgomery App. No. 23141, 2009-Ohio-5407, the parties divorced when the child was four-years old and the child had lived with her father ever since. At 14-years old the child expressed a clear desire to live with her mother. Based largely on the child's wish plus her ten-year maturation from small child to adolescent, we affirmed the trial court's finding that the child had experienced a change in circumstances. We quoted from our decision in *In re Custody of M.B.*, Champaign App. No. 2006-CA-6, 2006-Ohio-3756, at ¶9, quoting *Davis*, at 420, wherein we said that "[a]lthough a child's advancing age alone does not qualify as a change in circumstances, the aging of a child combined with other related considerations 'may constitute a sufficient change of circumstances to warrant a change in custody.'" We also said, in *Pellettiere*, that "[f]rustration of and interference with visitation" is a relevant

consideration. *Pellettiere*, at ¶16, citing *Beekman v. Beekman* (1994), 96 Ohio App.3d 783.

{¶ 11} Contrary to Ashbridge's assertion, the trial court did not hold that N.B.'s wish to live with his father is sufficient by itself. Rather, after the court discussed N.B.'s wish, it went on to say that when a child has expressed his wish a court must also look at the totality of the circumstances surrounding the wish. The court noted that since his mother was given custody of him, N.B. has advanced from an infant of five years to an adolescent of fifteen years. The court found that, during those ten years, N.B. acquired reasoning ability and maturity sufficient to give his desire to live with his father weight. The court also found that, after Berry moved to Florida in 2007, Ashbridge made it difficult for N.B. to see his father. Berry testified that communication between him and Ashbridge began to break down regarding N.B. and parenting time. Berry testified further that his attempts to arrange for parenting time in Florida were met with substantial resistance or indifference.

{¶ 12} Finally, Ashbridge contends that the trial court should not have found that N.B. had acquired sufficient reasoning ability and maturity to express his wishes in the matter. She bases her contention solely on N.B.'s psychologist's testimony that N.B. expressed to him ambivalence about which parent he wanted to live with and was unable to reconcile the ambivalence. We are skeptical about Ashbridge's implied assertion that a 15-year old who occasionally expresses ambivalence about which beloved parent he wants to live with necessarily means that the child has not acquired sufficient reasoning ability and maturity to express his wishes in the matter. Surely Ashbridge does not believe that ambivalence alone necessarily means that one is

immature and the inability to reconcile two conflicting feelings or desires necessarily means that one lacks sufficient reasoning ability. Moreover, we question the weight such a finding has in the present analysis. The finding is required before the court considers the child's wishes in the best-interest analysis, see R.C. 3109.04(F)(1)(b) and (B)(2)(b), but the same is not true in the change-in-circumstances analysis. For the latter analysis, the mere desire to live with the non-residential parent alone is a factor that supports finding a change in circumstances (though not sufficient by itself to make the finding).

{¶ 13} The psychologist's testimony here is evidence of N.B.'s desire. But substantial other evidence was presented that contradicts the psychologist's testimony. During the in-chambers interview, N.B. expressed to the trial judge that he wanted to live with his father. And the guardian ad litem reported to the judge that N.B. had often expressed this wish to many others. Indeed, the psychologist admitted that N.B. had told others, and even himself, that he wished to live with his father.

{¶ 14} We find no abuse of discretion in the trial court's threshold finding of a change in N.B.'s circumstances.

"Best interest"

{¶ 15} In the third assignment of error, Ashbridge contends that the trial court abused its discretion by finding that modification is in N.B.'s best interest. In determining a child's best interest, section 3109.04 instructs courts to consider all relevant factors, including those factors enumerated in subdivision (F)(1) of the section. See R.C. 3109.04(F). The relevant statutory factors are: the wishes of the parents

regarding care; if the court interviewed the child, the child's wishes expressed to the court; the child's relations with his parents and others who might significantly affect his best interest; the child's adjustment to his home, school, and community; the mental and physical health of the child and his parents; the parent more likely to facilitate parenting time and visitation; child-support payment issues; and whether one parent lives, or plans to live, outside Ohio. R.C. 3109.04(F)(1).

{¶ 16} Here, the trial court considered these factors in finding that a modification is in N.B.'s best interest. The court found that Ashbridge and Berry were both good parents and, as such, wanted the best for N.B. Based on the in-chambers interview, the court found that, while N.B. loves both parents, his clear desire is to live with his father, a conviction from which he has not wavered. Berry's family testified to the strong bond between father and son, and testified that they have always had this strong bond, despite their separation. The court said that they both experience an immense joy in their time together. Although N.B. has ties to Ohio, the court found that, during the summer he spent with his father in Florida, he adapted well to the community. The court found that N.B. has made friends in Florida, has visited the local high school, and has developed a keen interest in the watersports peculiar to that region of the country. Both parties and N.B. are in good physical health, said the court, and N.B. has the maturity and reasoning ability sufficient to make his decision known. The court found that Ashbridge has not always facilitated Berry's parenting time. She often did not return his phone calls or acknowledge his e-mail requests for parenting time. The court found no evidence that Berry was behind on child-support payments.

{¶ 17} The trial court did not discuss Berry's current assignment in Florida, which

we will briefly address since Ashbridge expressly brings it up. Berry was assigned to Key West, Florida, in 2007 to teach combat diving for the Army. This is a temporary, non-deployable position. While Berry conceded that he could be reassigned to a deployable position, he also said that the Army may extend his current assignment, or he may be able to request an extension. If his current assignment cannot be extended, Berry said, he can likely obtain another non-deployable position with the Army (the implication being that he would also try to obtain such a position).[2]

{¶ 18} Ashbridge does not argue against the court's best-interest finding so much as she presents an exposé of all the evidence favorable to her. And there is evidence that favors her. But it is not our place, as the reviewing court, to re-weigh the evidence. Child-custody cases often raise delicate issues and demand from trial judges tough decisions based on the (often conflicting) evidence presented. For this reason, a reviewing court accords general superiority to the trial judge's custody decision. As we have said, "[t]he discretion which a trial court enjoys in custody matters should be afforded 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." *Beismann v. Beismann*, Montgomery App. No. 22323, 2008-Ohio-984, at ¶4, citing *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Deference to the trial court's factual findings, provided the findings are supported by the evidence, is "crucial in a child custody case, where there may be much evidence in the parties' demeanor and attitude that does *not*

[2]We observe that, given the time it has taken this case to come before us, Berry's three-year assignment in Florida is almost done and a decision concerning his future has likely been made. The decision may create an entirely different factual scenario than the one we find here, placing this case in a new light.

translate to the record well." *Davis*, at 419; see, also, *Chelman*, at ¶17, citing *Davis*, at 419 (saying that "[the] trial judge is in the best position to observe the demeanor, attitude and credibility of each witness"). Accordingly, provided we find in the record substantial credible and competent evidence on the relevant factors–statutory and others–to support the trial court's finding, we will not find an abuse of discretion. Here, we do find such supporting evidence.

{¶ 19} The first and third assignments of error are overruled.

The guardian ad litem's role

Second Assignment of Error

{¶ 20} "THE TRIAL COURT ERRED WHEN IT DENIED THE CHILD PROPER REPRESENTATION OF COUNSEL BY APPOINTING A GUARDIAN *AD LITEM* TO ONLY REPRESENT THE WISHES AND NOT THE BEST INTERESTS OF THE MINOR CHILD."

{¶ 21} Ashbridge argues that the trial court abused its discretion by limiting the role of the guardian ad litem. The trial court appointed the guardian ad litem in this case for the express purpose (according to the appointment order) of helping the court determine N.B.'s wishes and desires. Ashbridge says that the proper role of the guardian ad litem is to advise the court on what he believes is in the child's best interest. It is the role of an attorney, she says, to advocate for a child's wishes. Ashbridge contends that, because the court limited the guardian ad litem's role, the court did not discover what is in N.B.'s best interest and whether his best interest conflicts with his wishes. She contends further that the guardian ad litem in effect

acted as N.B.'s attorney but N.B. did not have the benefit of confidentiality that comes with an attorney-client relationship.

{¶ 22} Ashbridge relies on our decision in *Bawidamann v. Bawidamann* (1989), 63 Ohio App.3d 691, for support. There, the guardian ad litem acted as both guardian ad litem and attorney to the children. We reversed the court's custody decision because we found that duties of each role conflicted. But, unlike the guardian ad litem there, N.B.'s guardian ad litem never claimed to be also acting as his attorney, nor did the guardian ad litem hold himself out to N.B. as both attorney and guardian ad litem. Therefore, there were no conflicting duties here that demand reversal.

{¶ 23} Regardless, these issues were not raised before the trial court. Ashbridge did not object to the limited role assigned to the guardian ad litem. Nor did she ask that an attorney be appointed for N.B. Appellate courts generally "will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected." *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210. Only if the unraised error constitutes plain error will an appellate court recognize it. The Ohio Supreme Court has said that, in civil cases, "the [plain error] doctrine is sharply limited to the *extremely rare* case involving *exceptional* circumstances where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 122.

{¶ 24} We do not think that the error Ashbridge alleges here–assuming it is an error–challenges the legitimacy of the modification action. Whether to appoint a guardian ad litem at all (when neither party requests the appointment) is within the trial

court's discretion. See R.C. 3109.04(B)(2)(a). And N.B.'s wishes are a factor the court must consider in determining whether a modification is in his best interest. See R.C. 3109.04(F)(1)(b). Also, Ashbridge does not say why a court may not use a guardian ad litem in the limited fashion the court did here.

{¶ 25} We find no plain error. The second assignment of error is therefore overruled.

{¶ 26} Having overruled all the assignments of error presented in this appeal, the trial court's judgment is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

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