

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY**

IN THE MATTER OF:

LUKE ILLIG,

CASE NO. 13-08-26

[DALE ILLIG –

O P I N I O N

FATHER-APPELLANT].

**Appeal from Seneca County Common Pleas Court,
Juvenile Division
Trial Court No. 20150040**

Judgment Affirmed

Date of Decision: March 2, 2009

APPEARANCES:

***Richard A. Kahler* for Appellant**

***Yvette Kessler, nka Yvette Kinder*, Appellee**

***Donald Bennett*, Guardian Ad Litem**

SHAW, J.

{¶1} Appellant Dale Illig (“Dale”) appeals from the July 1, 2008 Judgment Entry of the Court of Common Pleas, Juvenile Division, Seneca County, Ohio designating Yvette Kessler (“Yvette”) as the residential parent and legal custodian of Luke Illig (“Luke”).

{¶2} Dale and Yvette are the parents of Luke. On December 8, 2004 Dale moved to terminate the shared parenting plan that was previously put in place for the division of Luke’s care. In his motion to terminate the shared parenting plan, Dale also requested that he be designated as the legal custodian and residential parent of Luke.

{¶3} On August 3, 2005 the motion to terminate the shared parenting plan was heard. The magistrate’s decision was filed on August 22, 2006. After Dale requested findings of fact and conclusions of law, he objected to the magistrate’s decision on September 5, 2006. The juvenile court sustained Dale’s objections on September 28, 2006.

{¶4} The magistrate issued a Supplemented Decision in the matter on January 5, 2007. On January 19, 2007 Dale objected to the Supplemented Decision of the magistrate. The juvenile court again sustained Dale’s objection and remanded the proceedings to the magistrate with certain orders.

{¶5} On August 20, 2007 the magistrate issued his decision, consistent with the juvenile court's orders. Dale filed an objection to the August 20, 2007 magistrate's decision. Both Dale and Yvette filed numerous briefs in the matter. On July 1, 2008 the juvenile court affirmed the magistrate's decision.

{¶6} Dale now appeals, asserting one assignment of error.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED, WHEN THE SHARED PARENTING WAS TERMINATED, IN DESIGNATING THE MOTHER YVETTE KESSLER AS THE LEGAL CUSTODIAN AND RESIDENTIAL PARENT OVER THE FATHER DALE ILLIG.

{¶7} In his sole assignment of error, Dales argues that the trial court erred in designating Yvette as the legal custodian and residential parent of Luke.

{¶8} Initially, we note that the Appellate Rules state: "if an appellee fails to file his brief within the time provided by these rules, or within the time as extended, he will not be heard at oral argument * * * and in determining the appeal, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action." App.R. 18(C); *State v. Young*, 3rd Dist. No. 13-03-52, 2004-Ohio-540. In the instant case Yvette failed to submit a brief to this court. Accordingly, we elect to accept the statement of facts and issues as presented by Dale, the appellant, as correct pursuant to App.R. 18(C).

{¶19} The standards for our evaluation of the juvenile court’s decision in this case are set forth in *Davis v. Flickinger*, 77 Ohio St.3d 415, 674 N.E.2d 1159, 1997-Ohio-260.

[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.

The standard for abuse of discretion was laid out in the leading case of *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, but applied to custody cases in *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus:

“Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court. (*Trickey v. Trickey* [1952], 158 Ohio St. 9, 47 O.O. 481, 106 N.E.2d 772, approved and followed.)”

The reason for this standard of review is that the trial judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page. As we stated in *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81, 10 OBR 408, 410-412, 461 N.E.2d 1273, 1276-1277:

“The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is 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. * * *

A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. 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. The determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal, especially to the extent where the appellate court relies on unchallenged, excluded evidence in order to justify its reversal.”

This is even more crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does *not* translate to the record well.

Davis v. Flickinger, 77 Ohio St.3d at 418-419.

{¶10} Furthermore, the trial court's discretion in determining parental rights must remain within the confines of the relevant statutory provisions. *Miller v. Miller*, 37 Ohio St.3d at 74. R.C. 3109.04 deals with parental rights and responsibilities, shared parenting, modifications of orders, the best interests of the child and the child's wishes. This section sets out in great detail the court's duties and responsibilities in dealing with these issues. *Badgett v. Badgett* (1997), 120 Ohio App.3d 448, 450, 698 N.E.2d 84.

{¶11} Revised Code 3109.04 governs court awards of parental rights and responsibilities, as well as the modification of shared parenting agreements, providing in pertinent part as follows:

(E)(1)(a) 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:

(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.

(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.

(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.

(b) One or both of the parents under a prior decree allocating parental rights and responsibilities for the care of children that is not a shared parenting decree may file a motion requesting that the prior decree be modified to give both parents shared rights and responsibilities for the care of the children. The motion shall include both a request for modification of the prior decree and a request for a shared parenting order that complies with division (G) of this section. Upon the filing of the motion, if the court determines that a modification of the prior decree is authorized under division (E)(1)(a) of this section, the court may modify the prior decree to grant a shared parenting order, provided that the court shall not modify the prior decree to grant a shared parenting order unless the court complies with divisions (A) and (D)(1) of this section and, in accordance with those divisions, approves the submitted shared parenting plan and determines that shared parenting would be in the best interest of the children.

(2) In addition to a modification authorized under division (E)(1) of this section:

(a) Both parents under a shared parenting decree jointly may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree. Modifications under this division may be made at any time. The modifications to the plan shall be filed jointly by both parents with the court, and the court shall include them in the plan, unless they are not in the best interest of the children. If the modifications are not in the best interests of the children, the court, in its discretion, may reject the modifications or make modifications to the proposed modifications or the plan that are in the best interest of the children. Modifications jointly submitted by both parents under a shared parenting decree shall be effective, either as originally filed or as modified by the court, upon their inclusion by the court in the plan. Modifications to the plan made by the court shall be effective upon their inclusion by the court in the plan.

(b) The court may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree upon its own motion at any time if the court determines that the modifications are in the best interest of the children or upon the request of one or both of the parents under the decree. Modifications under this division may be made at any time. The court shall not make any modification to the plan under this division, unless the modification is in the best interest of the children.

(c) The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(i) of this section upon the request of one or both of the parents or whenever it determines that shared parenting is not in the best interest of the children. The court may terminate a prior final shared parenting decree that includes a shared parenting plan approved under division (D)(1)(a)(ii) or (iii) of this section if it determines, upon its own motion or upon the request of one or both parents, that shared parenting is not in the best interest of the children. If modification of the terms of the plan for shared parenting approved by the court and incorporated by it into the final shared parenting decree is attempted under division (E)(2)(a) of

this section and the court rejects the modifications, it may terminate the final shared parenting decree if it determines that shared parenting is not in the best interest of the children.

(d) Upon the termination of a prior final shared parenting decree under division (E)(2)(c) of this section, the court shall proceed and issue a modified decree for the allocation of parental rights and responsibilities for the care of the children under the standards applicable under divisions (A), (B), and (C) of this section as if no decree for shared parenting had been granted and as if no request for shared parenting ever had been made.

{¶12} The Ohio Supreme Court recently addressed the standard a court must follow under R.C. 3109.04(E) when modifying a shared parenting plan in *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 876 N.E.2d 546, 2007-Ohio-5589. In *Fisher*, the court acknowledged a split among Ohio's appellate districts regarding when each of two subsections of R.C. 3109.04(E) applies in modifying a shared parenting plan. *Fisher*, 116 Ohio St.3d at 54.

{¶13} Prior to the decision in *Fisher*, this Court had held that the trial court was permitted to modify the shared-parenting plan with respect to the residential parent and legal custodian of the child under R.C. 3109.04(E)(2)(b). However, this Court is now bound by the *Fisher* decision. In *Fisher*, the Ohio Supreme Court addressed the certified question:

[i]s a change in the designation of residential parent and legal custodian of children a 'term' of a court approved shared parenting decree, allowing the designation to be modified solely on a finding that the modification is in the best interest of the children pursuant to R.C. 3109.04(E)(2)(b) and without a

determination that a ‘change in circumstances’ has occurred pursuant to R.C. 3109.04(E)(1)(a)?

Fisher, 116 Ohio St.3d at 54.

{¶14} The *Fisher* Court determined the applicable statutory standard that must be applied to modify a shared parenting plan depended on what part of a shared parenting plan was being modified. Specifically, the court found as follows:

Within the custody statute, a “plan” is statutorily different from a “decree” or an “order.” A shared-parenting order is issued by a court when it allocates the parental rights and responsibilities for a child. R.C. 3109.04(A)(2). Similarly, a shared-parenting decree grants the parents shared parenting of a child. R.C. 3109.04(D)(1)(d). An order or decree is used by a court to grant parental rights and responsibilities to a parent or parents and to designate the parent or parents as residential parent and legal custodian.

However, a plan includes provisions relevant to the care of a child, such as the child's living arrangements, medical care, and school placement. R.C. 3109.04(G). A plan details the implementation of the court's shared-parenting order. For example, a shared-parenting plan must list the holidays on which each parent is responsible for the child and include the amount a parent owes for child support.

A plan is not used by a court to designate the residential parent or legal custodian; that designation is made by the court in an order or decree. Therefore, the designation of residential parent or legal custodian cannot be a term of shared-parenting plan, and thus cannot be modified pursuant to R.C. 3109.04(E)(2)(b).

Modification of a prior decree, pursuant to R.C. 3109.04(E)(1)(a), may only be made “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 shared parenting decree, and that the modification is necessary to serve the best interest of the child.” This is a high standard, as a “change” must have occurred in the life of the child or the parent before the court will consider whether the current designation of residential parent and legal custodian should be altered. Conversely, R.C. 3109.04(E)(2)(b) requires only that the modification of the shared-parenting plan be in the best interest of the child.

The standard in R.C. 3109.04(E)(2)(b) for modification of a shared-parenting plan is lower because the factors contained in a shared-parenting plan are not as critical to the life of a child as the designation of the child's residential parent and legal custodian. The individual or individuals designated the residential parent and legal custodian of a child will have far greater influence over the child's life than decisions as to which school the child will attend or the physical location of the child during holidays. Further, factors such as the physical location of a child during a particular weekend or holiday or provisions of a child's medical care are more likely to require change over time than the status of the child's residential parent and legal custodian.

Fisher, 116 Ohio St.3d at 59-60.

{¶15} Therefore, when a court is seeking to modify the designation of a residential parent, it must apply R.C. 3109.04(E)(1)(a) and find a change in circumstances prior to modifying the shared parenting plan. However, if the court is only seeking to change the method of implementation of a shared parenting plan,

by changing its terms, it may apply R.C. 3109.04(E)(2)(b) and look only to what is in the best interest of the child. *Fisher*, supra.

{¶16} In the present case, we know that the original shared parenting plan designated both parents as the residential parents of Luke and provided for an equal division of parenting time. The July 1, 2008 Judgment Entry changed the designation and designated Yvette as legal custodian and residential parent. According to the distinction articulated in *Fisher*, the July 1, 2008 Judgment Entry modifies the designation of the residential parent. Accordingly, we find that the trial court was required to apply the standard as articulated in R.C. 3109.04(E)(1)(a). Given that both parents requested a change in the shared parenting plan, the trial court was required to determine if 1) a change in circumstances occurred, requiring modification of the shared parenting plan; 2) that modification was in the best interest of the child; and 3) that the benefit of the change in environment outweighed any harm that could result from the change of environment.

{¶17} Luke was born on February 5, 2001. It appears that prior to Luke's birth, Dale and Yvette were not seeing each other regularly. However, after Luke was born, Dale moved into Yvette's home and resided with Yvette and Luke for approximately one month. After that month, Dale moved in with a friend, and subsequently into the home he currently resides in.

{¶18} After Dale moved out of Yvette's home, they entered into an agreed shared parenting plan which provided for an equal sharing of parenting time with neither party paying child support. When Luke was approximately eight months old, an incident occurred during which Dale spanked Luke, resulting in bruises. This incident resulted in Dale having limited, supervised visits with Luke. Dale also entered counseling. Since attending counseling, Dale has not spanked Luke again.

{¶19} Subsequent to the incident, Dale and Yvette returned to the shared parenting plan, which was in place for approximately two and a half years. No subsequent incidents occurred concerning Dale disciplining Luke. Various testimony was elicited at the hearing, indicating why both parents would be better residential parents.

{¶20} The juvenile court determined that both Dale and Yvette, as well as the guardian ad litem, were in favor of terminating the shared parenting agreement. No party expressed any interest in modifying the shared parenting plan as all parties agreed that it was in Luke's best interest to terminate shared parenting. Moreover, in addition to disagreements between Dale and Yvette regarding custody changes, Luke was approaching school age, making the shared parenting plan unworkable. The magistrate specifically found, in his decision, that

“termination and not modification of the subject shared parenting agreement is necessary to serve the best interest of the child. . .”

{¶21} Additionally, the magistrate found that “the harm likely to be caused by a change of environment is outweighed by the advantages of the change in environment.” In finding that the benefits outweighed the harm of the change of environment, the magistrate relied on the fact that Dale and Yvette reside in different school districts, making shared parenting difficult. The magistrate also noted that Luke would benefit from a simplified custody arrangement to add consistency to his routine.

{¶22} In determining that it was in the best interest of Luke to be placed with Yvette the trial court relied on the recommendation of the guardian ad litem. The guardian ad litem believed that Yvette was the more nurturing parent, and therefore, would make the better residential parent.

{¶23} The magistrate additionally found that

It will provide the child with a nurturing ‘two-parent-like household’ which includes a step sibling. Other siblings come to mother’s house for regular visitations. Mother is a stay-at-home ‘mom.’ The undersigned also finds that mother will be much more likely to communicate with father and be flexible with father over visitation issues than father would be with mother.

{¶24} The magistrate found it important that Yvette would be more likely to facilitate visitation than Dale would, as Dale exhibited significant disdain for

communicating with Yvette and often refrained from giving Yvette all of his contact information.

{¶25} Based on the differences in the home environments, in which Yvette has a fiancé and other children in the home and Dale lives alone, as well as Yvette's greater likelihood of facilitating visitation, the magistrate recommended that Yvette be designated residential parent. The juvenile court adopted that recommendation.

{¶26} The findings that a change in circumstances occurred, that it was in Luke's best interest to designate Yvette as the residential parent, and that the benefit of the change in environment outweighed any possible harm from the change in environment are all supported by a substantial amount of competent credible evidence. *Davis v. Flickinger*, 77 Ohio St.3d at 418. Therefore, we cannot find that the juvenile court abused its discretion in designating Yvette as the residential parent. Accordingly, Dale's assignment of error is overruled.

{¶27} Based on the foregoing, the July 1, 2008 Judgment Entry of the Court of Common Pleas, Juvenile Division, Seneca County, Ohio designating Yvette as the residential parent and legal custodian of Luke is affirmed.

Judgment Affirmed

WILLAMOWSKI and ROGERS, J.J., concur.