

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

ERICA L. PREECE, :
 :
 Plaintiff-Appellant, : CASE NO. CA2009-09-019
 :
 - vs - : OPINION
 : 3/8/2010
 :
 RICHARD F. STERN III, :
 :
 Defendant-Appellee. :

CIVIL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 20340003

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RINGLAND, J.

{¶1} Plaintiff-appellant, Erica Preece (Mother), appeals the decision of the Madison County Court of Common Pleas, Juvenile Division, terminating an agreed entry and establishing shared parenting. We affirm the decision of the trial court.

{¶2} The case at bar first came before this court in 2009, after the trial court terminated a prior agreed entry and adopted Richard Stern's (Father) shared parenting

plan. We affirmed the trial court's ruling on Father's child support obligation, but reversed the decision to terminate the agreed entry, and remanded so that the trial court could clarify its change of circumstances and best interest analysis. *Preece v. Stern*, Madison App. Nos. CA2008-09-024, CA2008-12-029, 2009-Ohio-2519. While the procedural and factual history of the case remains unchanged from Mother's first appeal, we reiterate the facts as they apply to the current challenge before us.

{¶13} Through a nonmarital relationship, Alyssa was born to Mother and Father in July 2002. The parties filed an agreed entry with the trial court in May 2003 whereby Mother was designated custodial parent and Father was granted visitation every other weekend. Mother and Father abided by the terms of the agreed entry until Father moved for reallocation of parental rights and responsibilities in July 2007.

{¶14} In Father's motion, he asserted that a change in circumstances warranted the revocation of the agreed entry, and further moved the court for legal custodianship of Alyssa. In the alternative, Father suggested a shared parenting plan for the trial court's consideration. After appointing a Guardian ad Litem (GAL) to represent Alyssa's best interests, the court held a hearing on the custody issue. During the hearing, multiple witnesses testified and the trial court accepted evidence from both parties. The court ultimately determined that a change in circumstances had occurred and later adopted Father's plan for shared parenting with several modifications.

{¶15} As a result of the change in custody, Alyssa spends alternating weeks with Mother and Father. During the week that Alyssa is with each parent, that parent is designated the residential parent and legal custodian for his or her specific parenting time.

{¶16} On appeal of the trial court's original decision, this court remanded the case so that the trial court could clarify its reasoning for finding that a change in

circumstances had occurred. We also directed the trial court to clarify its best interest analysis and to address certain statutory requirements. After the trial court released its clarified decision, Mother brought the appeal currently before this court, raising the following assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN NOT FOLLOWING THE CASE LAW CONCERNING THE MODIFICATION OF A PRIOR AGREED DECREE AND O.R.C. 3109.04(E)(1)(a)."

{¶9} In her first assignment of error, Mother asserts that the trial court erred by finding that a change in circumstances occurred before terminating the agreed entry and re-establishing parental rights and responsibilities. This argument lacks merit.

{¶10} According to R.C. 3109.04, a change of circumstances must occur before a court can reallocate parental rights and responsibilities. "R.C. 3109.04 does not define 'changes in circumstances'; however, courts have generally held the phrase to note 'an event, occurrence, or situation which has a material and adverse effect upon a child.'" *Lindman v. Geissler*, 171 Ohio App.3d 650, 2007-Ohio-2003, ¶33, quoting *Rohrbaugh v. Rohrbaugh* (2000), 136 Ohio App.3d 599, 604-605.

{¶11} Mother asserts that the trial court erred because Father failed to prove "a substantial change of circumstances" to justify terminating the agreed entry. However, the Ohio Supreme Court has been clear that "R.C. 3109.04 requires only a finding of a 'change in circumstances' *** Nowhere in this statute does the word 'substantial' appear." *Davis v. Flickinger*, 77 Ohio St.3d 415, 417, 1997-Ohio-260.

{¶12} Instead, the court noted that "there must be a *change* of circumstances to warrant a change of custody, and the change must be a change of substance, not a slight or inconsequential change." *Id.* at 418. (Emphasis sic.) However, a change of

substance is not the same as a substantial change. In fact, the court warned appellate courts against supplanting a trial court's discretion by requiring "a higher burden of proof than required by statute." *Id.* See, also, *Pierson v. Porter* (July 31, 2000), Warren App. No. CA99-04-043 (reversing decision of trial court because it incorrectly applied a "substantial change" test when deciding whether to terminate shared parenting).

{¶13} Therefore, we address the trial court's clarified decision mindful that the trial court need only have found a change in circumstances, and of the proper standard of review. "In determining whether a 'change' has occurred *** a trial judge must have wide latitude in considering all the evidence before him *** and such a decision must not be reversed absent an abuse of discretion." *Davis* at 418. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶14} Before terminating the agreed entry, the trial court found several changes in the circumstances of Alyssa and Mother. After reviewing the record, the trial court did not abuse its discretion in finding that the following changes warranted a reallocation of parental rights and responsibilities.

{¶15} First, the trial court noted that since the agreed entry went into place in 2003, Mother has begun nurse's training at Clark State Community College, has a different job, and has also given birth to an additional daughter.¹ Mother works at Staples in a second-shift scenario whereby she works from 12:30 p.m - 8:30 p.m., Monday through Friday. Before taking the job at Staples and starting school, Mother worked at various jobs and on differing shifts that allowed greater time with Alyssa. Taken independently, a new baby, job, or schooling would not necessarily constitute a

change as contemplated under R.C. 3109.04(E)(1)(a). However, now that Mother attends nursing school, works until 8:30 p.m. and cares for a third daughter, it is clear that a change has occurred given the collective difference to Mother's schedule.

{¶16} Second, the trial court noted that Mother "has failed to obtain medical treatment in situations in which it should have been sought." Since 2003, Alyssa has suffered multiple ailments, which have gone under or untreated by Mother. By six years old, Alyssa had 12 cavities and abscessed teeth. Due to the infection caused by the abscess, Alyssa had a boil-like sore reappear on her gums, each time popped by her maternal grandmother. When Father saw the sore in Alyssa's mouth and heard that her grandmother treated it by popping the pustule, Father took Alyssa to urgent care. The doctor there diagnosed the abscess and implored Father to take Alyssa to the dentist to have the tooth removed as soon as the office opened. When Father returned Alyssa to Mother that Sunday, Mother said she would address the issue. Instead, Mother failed to get an appointment for Alyssa until two weeks later, and then allowed Alyssa to refuse to have the tooth removed. The infection then traveled through her body, resulting in a boil on Alyssa's stomach.

{¶17} Alyssa also suffered from skin conditions. While Mother claims that Alyssa has eczema, Father provided evidence during the hearing that Alyssa had scabies for over a month and that it went mistreated during that time. After Father and his girlfriend caught scabies from Alyssa, Mother admitted that the doctor gave Alyssa some medicine in case it was scabies, though she maintained that the skin irritation was eczema. The court also heard evidence of a consistent rash on Alyssa's buttocks, and a severe case of poison ivy that lasted over six weeks. Each time Father would treat Alyssa's poison ivy, she would return the following visit with open sores and complain of

1. Alyssa also has an older sister, who was eight years old at the time of the hearing.

severe itching.

{¶18} Alyssa also has sight problems. Her school nurse tried to communicate with Mother regarding Alyssa's failed eye tests at school, however Mother's phone was disconnected at that time. The nurse then communicated her concerns over Alyssa's sight with Father who took her to the eye doctor.

{¶19} The court also heard testimony that Alyssa is frequently ill and has a constant cough. Father presented evidence that he took Alyssa to Urgent Care where she was diagnosed with tonsillitis. According to the doctor there, Alyssa had been suffering from the illness for a while, and the testimony revealed that both Mother and Grandfather smoke in their homes and in front of Alyssa.

{¶20} Overall, Mother testified that she does not take Alyssa to the doctor for every bump and bruise, and instead, knows when medical attention is necessary. However, on many occasions, Father has taken Alyssa to the doctor or has followed up on his medical concerns over his daughter's health and well-being. Father's concerns were substantiated via medical diagnoses and Alyssa received much-needed medical attention because of Father's willingness to address her deteriorating health.

{¶21} Similarly, Alyssa's lack of hygiene also constitutes a change from the original agreed entry. Since 2003, Mother has given Alyssa increased independence regarding her hygiene and choice in clothing. These changes have had a material and adverse effect on Alyssa.

{¶22} During the hearing, the court heard testimony that when Father picked up Alyssa for his visitation, she would often smell badly and be dirty. The court also heard testimony that Alyssa would frequently wear clothes that were too small for her (often exposing her stomach when she would raise her arms) and that she did not have appropriate clothes for the colder seasons. When asked to explain, Mother testified that

Alyssa liked to wear her pants low on her waist and that she was not going to buy winter socks for Alyssa because she refused to wear anything but ankle socks. Mother's additional testimony further demonstrates that she allows Alyssa to make decisions regarding her hygiene, stating that Alyssa is a "very independent" child.

{¶23} While the trial court did not find that the multitude of health ailments and poor hygiene constituted neglect, the mistreatment or under treatment of illnesses and conditions, as well as Alyssa's lack of hygiene, had an obvious material and adverse effect on her. See *Toothman v. Toothman* (Mar. 26, 1985), Licking App. No. CA-3086, 1985 WL 9174,*1 (finding that "deteriorating health and hygiene conditions are more than enough to trigger the 'change in circumstances' element required to be found in a change of custody").

{¶24} Third, the trial court found that since the time of the 2003 agreed entry, Alyssa now spends "inordinate" amounts of time with her maternal grandfather (Grandfather). Because of Mother's school and work schedules, Grandfather cares for Alyssa and her two sisters from 2:00 p.m. until Mother picks them up at 9:00 p.m. At the time the agreed entry was enacted, and for the two years after it went into effect, Mother had a friend caring for Alyssa and her other children. However, when Grandfather retired in 2005, he began watching the children while Mother worked.

{¶25} Mother's counsel emphatically asserted to this court that the trial court abused its discretion in finding a change because Grandfather has always provided care for Alyssa. However, Grandfather's own testimony demonstrates that he worked prior to 2005, did not watch the children other than a periodic Saturday, and did not begin providing full-time care for the children until he retired in 2005, a full two years after the agreed entry. Grandfather testified that before he started caring for the girls, they would only spend Saturday night with him on some weekends or come over to play in his yard.

However, since 2005 and two years after the agreed entry went into effect, Grandfather now cares for the girls seven hours a day.

{¶26} Mother also testified that before Grandfather retired in 2005, he did not provide constant day care. Instead, when Father's counsel asked Mother if Grandfather watched Alyssa and her sisters while Mother worked at previous jobs, Mother responded, "no, because he worked. The only time that he's been primary is when he retired." When asked who provided daycare up until 2005, Mother responded, "a friend of mine that I used to work with."

{¶27} The fact that Grandfather now watches Alyssa until 9:00 p.m. five days a week has a material effect on her. Beside the fact that Grandfather cares for the three young girls seven hours a day, the trial court heard testimony that Grandfather has been accused of sexual molestation.

{¶28} During the hearing, Emily Trego, a witness for Father, testified that she and Mother were close childhood friends, and that she spent time at Mother's house in Grandfather's care. Trego testified that during these times, Grandfather would "inappropriately touch" her. When asked in what way, she responded, "he would usually start with my back and rub my back or scratch my back and then work his way to the front and touch my breasts and my private areas." When asked how often it occurred, Trego testified that it "happened just about every time I stayed all night. *** It was very frequent." According to Trego's testimony, Grandfather would sit with her on the couch and put a blanket over them, and then proceed to molest her.

{¶29} After Trego reported the abuse to children services, she was no longer friends with Mother and the county performed some sort of investigation but no charges were officially filed against Grandfather. However, Trego testified that a few years later, when she and Mother were in high school, a mutual friend informed Trego that Mother

believed Trego was telling the truth about the molestation and that she feared that her daughter (Alyssa's older sister, born when Mother was a sophomore in high school) had experienced similar abuse. According to Trego's testimony, she and Mother had a conversation as a result of the mutual friend's comments wherein Mother stated that Grandfather was about to have heart surgery and that she hoped he did not make it through alive because of what he had done and what "he was." Grandfather later testified that he did have heart surgery around the time Mother was in high school.

{¶30} Even absent the molestation charges and the fact that the court heard testimony from Trego regarding her firsthand account of the abuse, Mother's new schedule necessitates leaving Alyssa in Grandfather's care, a change in circumstances from the time of the agreed entry.

{¶31} Having found that the trial court did not abuse its discretion in finding that a change in circumstances occurred, Mother's first assignment of error is overruled.

{¶32} Assignment of Error No. 2:

{¶33} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN FINDING THAT MODIFICATION OF THE VISITATION SCHEDULE WAS IN THE CHILD'S BEST INTEREST."

{¶34} In her second assignment of error, Mother asserts that the trial court erred in finding that reestablishing parenting rights was not in Alyssa's best interest and that the harm likely to occur by the change outweighed any advantages of a change in Alyssa's environment. There is no merit to this argument.

{¶35} Once a trial court finds that a change of circumstances warrants reconsideration of custody, it must then determine whether modifying parental rights and responsibilities is in the child's best interest and that "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).

{¶36} In its clarified opinion, the trial court stated that it considered the R.C. 3109.04 factors, and that based on those factors, changing custody was in Alyssa's best interests. A review of the record indicates that the trial court did not abuse its discretion in finding as such.

{¶37} In addition to the evidence discussed above, the trial court also heard evidence that Father and Alyssa have a very positive and loving relationship, and that Father takes a very active role in Alyssa's education and health. The court also heard testimony that Father's current girlfriend and her family have a very positive and caring relationship with Alyssa, and are also active in her life. The trial court heard from various witnesses that Alyssa is a well-adjusted and intelligent girl, and that she desired to spend more time with Father.

{¶38} In addition to the health concerns stated above, the trial court also heard testimony that Mother has made several questionable parenting decisions. Through her own testimony, Mother stated that she smokes in her house and allows others to smoke around Alyssa. Mother also testified that her utilities had been shut off and that she had suffered several financial set-backs that caused her to file bankruptcy.

{¶39} Mother also testified that she was arrested for domestic violence when her live-in boyfriend, Mr. Mayabb, filed false charges against her. According to Mother, the two were fighting at a doctor's office and Mayabb pulled her hair, and then went to the police station and filed charges against Mother, claiming that she slapped him. While the domestic violence charges were later dropped, the incident occurred in front of Alyssa. Mother also testified that she had to call the police when Mayabb would not leave her house, and that Alyssa was sometimes present during such altercations.

{¶40} Before Father filed his motion to terminate shared parenting, Mother would

often allow him extra time with Alyssa, especially for family events or fun activities. However, once Father filed, Mother stopped allowing Father extra time. On several occasions, Mother gave Father permission to take Alyssa to planned events but later withdrew her permission so that Alyssa could not attend events such as a family Christmas party or a trip to Kings Island. During her testimony, Mother admitted that she had "put a halt" to being so lenient with Father once he filed his motion.

{¶41} The court also heard testimony regarding the way in which Grandfather cares for Alyssa. During these seven hours of care-giving a day, Grandfather testified that the children do their homework, eat dinner, and take a bath. However, after the bath, the children put on the same clothes they just took off, only changing underclothes. The court also heard testimony that Alyssa and her sisters have slept in Grandfather's bed when staying the night.

{¶42} When the girls are not doing homework, bathing, or sleeping, Grandfather testified that they are watching television. Father testified that he often drives past Grandfather's house and that by 6:00 to 7:00 p.m. Grandfather has turned off every light in the house, and leaves only the television on. When Father asked Alyssa to explain what happens at Grandfather's house, she responded "Grandpa likes to sit in the dark and watch TV."

{¶43} After considering the evidence and the pertinent factors, the trial court also concluded that the harm likely to be caused by a change of Alyssa's environment is outweighed by the advantages of the change. We agree.

{¶44} The testimony demonstrated that Alyssa enjoys spending time with her father, and that she has been successfully integrated into his home and life. Because of the new custody arrangement, with each parent having one week with her, Alyssa is able to spend time with her two sisters and Mother while still spending time with Father.

The trial court also found despite the parties' disagreement over Alyssa's custody, both parties are able to generally cooperate and encourage the sharing of love, affection, and contact between Alyssa and each parent. The court also considered the GAL's recommendation that shared parenting is proper.

{¶45} After reviewing the record, the trial court did not abuse its discretion in finding that a change in custody was in Alyssa's best interest, that the harm of a change in her environment is outweighed by the advantages of the change, and that the shared parenting plan now in effect is in her best interests. Mother's second assignment of error is therefore overruled.

{¶46} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.