[Cite as *Williams v. Evans,* 2012-Ohio-3204.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

CHERITA F. WILLIAMS fka JOHNSON,	:	
Plaintiff-Appellant,	:	CASE NO. CA2011-05-043
	:	O P I N I O N
- vs -		7/16/2012
	:	
JAMES E. EVANS, JR.,	:	
Defendant-Appellee.	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 05 JH 13186

Nichols, Speidel & Nichols, Donald W. White, 237 Main Street, Batavia, Ohio 45103, for plaintiff-appellant

James E. Evans, Jr., 1038 Hopedale Court, Cincinnati, Ohio 45240, defendant-appellee, *pro se*

HUTZEL, J.

{¶ 1} Plaintiff-appellant, Cherita F. Williams (Mother), appeals a decision of the Clermont County Court of Common Pleas, Juvenile Division, denying her motion to modify custody. We affirm the decision of the juvenile court.

{¶ 2} Mother and defendant-appellee, James Evans, Jr. (Father), became parents to a son, J.E., on June 15, 2004. Custody of J.E. was awarded to Father on April 7, 2007, with

Mother receiving guideline visitation. At some time during 2007 and 2008, Mother moved to Georgia to pursue a music career. During this time, Mother's only contact with J.E. was during her brief return visits to Ohio. Mother moved back to Ohio permanently in September of 2009.

{¶ 3} In September of 2010, Mother moved to modify parental rights and responsibilities. Mother alleged that a change in circumstances had occurred and that it was in J.E.'s best interest to spend more time with her. Specifically, Mother asserted that J.E.'s numerous tardies and absences from school, and the possibility that the child would have to repeat kindergarten, were changes warranting modification of custody.

{¶ 4} The juvenile court denied the modification and found that Mother failed to present evidence of a change in circumstances. Further, the juvenile court determined that even had a change in circumstances existed, Mother failed to meet the requirements of R.C. 3109.04 that it was in the best interests of the child for a modification to occur. Mother appeals, raising two assignments of error.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE [JUVENILE] COURT'S FAILURE TO FIND THAT A CHANGE HAS OCCURRED IN THE CIRCUMSTANCES OF THE CHILD AND/OR THE FATHER WAS CONTRARY TO THE EVIDENCE AND AN ABUSE OF DISCRETION.

{¶ 7} Mother argues that the juvenile court abused its discretion by finding that J.E.'s 73 tardies and 16 absences from school and the consideration that he should repeat kindergarten did not constitute a change in circumstances.

{¶ 8} Trial courts enjoy broad discretion in custody proceedings. *Davis v. Flickinger*, 77 Ohio St.3d 415 (1997), paragraph one of the syllabus. As "custody issues are some of the most difficult and agonizing decisions a trial judge must make," the judge must be given "wide latitude in considering all the evidence" and the decision must not be reversed absent

an abuse of discretion. *Id*. at 418. The term 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*, 5 Ohio St.3d 217, 219 (1983).

{¶ 9} "In reviewing a custody determination, an appellate court must 'review the record to determine whether there is any evidence in support of the prevailing party.'" *Sallee v. Sallee*, 142 Ohio App.3d 366, 370 (12th Dist.2001), citing *Ross v. Ross*, 64 Ohio St.2d 203, 206 (1980). "While reviewing the record, the appellate court must keep in mind that the trial court is better equipped to examine and weigh the evidence and to make decisions concerning custody[.]" *Sallee* at 370; *Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988).

{¶ 10} In determining whether a change of custody is warranted, a court must follow R.C. 3109.04(E)(1)(a), which provides, in pertinent part:

> 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, [or] his residential parent, * * * and that the modification is necessary to serve the best interest of the child.

{¶ 11} Mother relies on this court's opinion in *Foltz v. Foltz*, 12th Dist. No. CA98-08-099, 1999 WL 211693 (Apr. 12, 1999), to argue that absenteeism and tardiness at school constitute a change in circumstances. In *Foltz*, we found that the juvenile court did not abuse its discretion in ruling that excessive tardiness and absences from school, as well as a myriad of other issues including the nonmoving parent's recent drug convictions and failure to recognize the child's learning disability, constituted a change in circumstances. *Id*. at *2.

{¶ 12} "Although R.C. 3109.04 does not provide a definition of the phrase 'change in circumstances,' Ohio courts have held that the phrase is intended to denote 'an event, occurrence, or situation which has a material and adverse effect upon a child.'" *Lewis v. Lewis*, 12th Dist. No. CA2001-09-209, 2002-Ohio-1601, ¶ 7, citing *Rohrbaugh v. Rohrbaugh*,

136 Ohio App.3d 599, 604-05 (7th Dist.2000). In order to warrant the abrupt disruption of the child's home life, the change in circumstances must be one "of substance, not a slight or inconsequential change." *Flickinger*, 77 Ohio St.3d at 418.

{¶ 13} In this case, although J.E. missed 16 days and was late 73 times during his first year of kindergarten, these facts, alone, do not rise to the level of a material and adverse effect upon the child without a clear showing that these absences were harmful. *See Leonard v. Yenser*, 3rd Dist. No. 10-2003-01, 2003-Ohio-4251, ¶ 11. Although the child's continuous late arrival at school affected his daily kindergarten routine, J.E. was still able to move up to the first grade and there is no evidence in the record that the absences and tardiness have continued. Further, J.E.'s behavioral problems appear to stem from his diagnosis of attention deficit hyperactivity disorder rather than his absences from kindergarten. Accordingly, we find that the juvenile court did not abuse its discretion by ruling that a change in circumstances had not occurred.

{¶ 14} Mother's first assignment of error is overruled.

{¶ 15} Assignment of Error No. 2:

{¶ 16} THE [JUVENILE] COURT'S CONCLUSION THAT "EVEN IF THERE HAS BEEN AN (SIC) SUFFICIENT CHANGE IN THE CIRCUMSTANCES OF [FATHER] OR [J.E.] SINCE THE PRIOR DECREE, [MOTHER] HAS FAILED TO MEET THE REQUIREMENTS OF R.C. 3109.04(E)(1)(a)(i), (ii), OR (iii)," WAS CONTRARY TO THE EVIDENCE AND AN ABUSE OF DISCRETION.

{¶ 17} Mother argues that the juvenile court abused its discretion by determining that, even if a change in circumstances had occurred, a modification of custody was not in J.E.'s best interest. Specifically, Mother contends that the juvenile court erred in finding that she did not meet the requirements of R.C. 3109.04(E)(1)(a)(iii) 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."

{¶ 18} We first note that because a change in circumstances has not occurred in this case, it is unnecessary to determine whether it would be in the best interest of the child to modify custody. However, as the juvenile court made a best interest determination, we will address the issue.

{¶ 19} In making its ruling, the juvenile court was privy to a custody investigation, including conversations with the child, a guardian ad litem report, and the testimony of both parents. The juvenile court's review of this information was sufficient to determine that it would not be in the best interest of the child to change living environments. Although Father clearly has limitations as a parent, Mother has virtually no history of parenting J.E. and was primarily absent from the child's life for several years. Therefore, the juvenile court did not abuse its discretion in finding that Mother failed to demonstrate that the harm in changing J.E.'s living environment is outweighed by the advantages.

{¶ 20} Mother's second assignment of error is overruled.

{¶ 21} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.