

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

JUSTIN FALK,	:	
	:	
Petitioner-Appellant,	:	CASE NO. CA2011-06-097
	:	
- vs -	:	<u>OPINION</u>
	:	10/31/2011
	:	
TRISHA FALK,	:	
	:	
Petitioner-Appellee.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR-07-06-0763

Fred S. Miller, Baden & Jones Building, 246 High Street, Hamilton, Ohio 45011, for petitioner-appellant

Trisha Falk, 311 West Ritter Street, Seven Mile, Ohio 45062, petitioner-appellee, pro se

HUTZEL, J.

{¶1} Plaintiff-appellant, Justin Falk (Father), appeals a decision of the Butler County Court of Common Pleas, Domestic Relations Division, modifying the parties' shared parenting plan and naming defendant-appellee, Trisha Falk (Mother), residential parent for school purposes.¹

1. Pursuant to Loc.R. 6(A), we sua sponte remove this appeal from the accelerated calendar.

{¶2} The parties divorced in 2007 and at that time entered into a shared parenting plan for their daughter, Ashlynn (born in June 2003). Under the plan, both parents were named the residential parent of their daughter; Father was also named the residential parent for school purposes. Now in second grade, Ashlynn attends school in the Talawanda School District. Neither parent lives in that school district. Father lives in the Edgewood School District as did Mother until December 2010 when she moved to the Hamilton City School District. Ashlynn has been attending school in the Talawanda School District since kindergarten, first by using the home address of a grandparent, and currently by qualifying for open enrollment. Mother's relocation has increased the time Ashlynn spends in transportation to and from school.

{¶3} In December 2010, both parents moved to modify the shared parenting plan with regard to the allocation of parenting time due to Father's work schedule. Mother also filed a motion to be designated the residential parent for school purposes. Following a hearing on the motions, the magistrate modified the shared parenting plan with regard to the allocation of parenting time and granted the parties the parenting time schedule they had agreed upon. The magistrate, however, denied Mother's motion to be designated residential parent for school purposes:

{¶4} "I find that it is in Ashlynn's best interest to maintain Father as the residential parent for school purposes so long as Ashlynn qualifies for open enrollment in the Talawanda School District. In the event that Father does not reside within the Talawanda School District or Talawanda School District no longer allows for open enrollment or if Ashlynn otherwise is not approved for open enrollment within said District, then I recommend that Mother be named the residential parent for school purposes."

{¶15} Mother filed objections to the magistrate's decision. On May 5, 2011, after applying the best interest factors set forth in R.C. 3109.04(F)(1), the trial court overruled the magistrate's decision and named Mother the residential parent for school purposes:

{¶16} "This is a difficult case. Ashlynn has done well academically in the Talawanda School District, although she is only in second grade. * * * While the Court understands the Magistrate's reasoning in her Decision, the order denying [Mother's] motion is overruled. [Mother] shall be designated the residential parent for school purposes only. Neither of the parents nor Ashlynn ever lived in the Talawanda District. They first enrolled Ashlynn in kindergarten deceptively by using paternal grandmother's address when they were denied open enrollment. The district could once again deny open enrollment at any time. Both parents testified that they did not wish for Ashlynn to be enrolled in Edgewood Schools where [Father] resides. The Court finds that it is in Ashlynn's best interest to attend school in a district where she resides and thus can build stronger ties with her school and community. * * * The Court does not make this ruling for the convenience of [Mother], but for the best interest of the child. This Order will take effect at the end of the 2010-2011 school year."

{¶17} Father appeals, raising one assignment of error:

{¶18} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT WHEN IT DESIGNATED APPELLEE TO BE THE RESIDENTIAL PARENT FOR SCHOOL PURPOSES."

{¶19} Father argues the trial court abused its discretion by naming Mother the residential parent for school purposes because the trial court did not base its decision on the sole issue before it (the increased transportation time to and from school due to Mother's relocation) and instead improperly based its decision on facts that were neither argued nor in evidence.

{¶10} It is well-settled that a trial court's decision modifying a shared parenting plan will not be reversed absent an abuse of discretion. *Porter v. Porter*, Summit App. No. 21040, 2002-Ohio-6038, ¶11. An abuse of discretion implies that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying an abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Picciano v. Lowers*, Washington App. No. 08CA38, 2009-Ohio-3780, ¶25.

{¶11} In naming Mother the residential parent for school purposes, the trial court found, inter alia, that (1) "Ashlynn attends school in a different geographic area from either parent's residence. It does not appear from the evidence that she is able to socialize outside of school with her classmates, or has an opportunity to make friends and develop ties in either parent's community; she often returns home on school days around 6 pm;" and (2) "the students live for the most part in the districts where they attend school."

{¶12} We agree with Father that it was improper for the trial court to partly base its decision on the foregoing facts as they were not in evidence. During the hearing on the parties' motions, no one testified and there was absolutely no evidence regarding Ashlynn's ties (or lack of) to her parents' communities, her lack of friendships, or her inability to socialize outside of school as a result of her attending school in the Talawanda School District. Nor was there testimony or evidence presented regarding whether students live for the most part in the districts where they attend school. The trial court therefore erred in relying on these facts.

{¶13} In addition to the above findings of fact, the trial court also found that (1) Ashlynn has done well in the Talawanda School District; (2) she is well adjusted to both parents' homes and her elementary school in the Talawanda School District; (3) the parties agreed to a parenting schedule to allow Father to spend more parenting time when he is not

required to work; (4) Father's new work schedule requires him to be at work at 10:45 p.m. during the week; he does not return home until 8-9 a.m. the next morning, depending on his workload; (5) the paternal grandfather, who lives in the Talawanda School District, is Ashlynn's before and after school caregiver; (6) the school bus ride between Ashlynn's school in the Talawanda School District and her grandfather's house takes 45 minutes; (7) Father plans to have his live-in girlfriend, Sarah, take Ashlynn to the grandfather's house whenever Father cannot take Ashlynn to school in the morning; and (8) neither parent alleges that Ashlynn's interactions and relationship with either parent or extended family are negative, "other than the required travel time for this second grader to commute back and forth to her current school."

{¶14} Upon thoroughly reviewing the record, we cannot say the trial court abused its discretion in naming Mother the residential parent for school purposes. At the outset, we note that contrary to Father's assertion, the trial court did address the issue of the increased transportation time to and from school due to Mother's relocation, albeit in a piecemeal fashion.

{¶15} It is undisputed that Ashlynn is a very good student who does well at school in the Talawanda School District. Both parents are happy with the education she is receiving there. The current parenting schedule had apparently been followed by the parties long before they asked the trial court to adopt it. The parties have been following this parenting schedule to allow Father to spend more parenting time with Ashlynn when he is not working. Under the parenting schedule, Father has Ashlynn every other Thursday night, and every Friday and Saturday night. Over a two-week period, Father is responsible for taking Ashlynn to school twice and picking her up from school or the grandfather's house three times; over the same two-week period, Mother is responsible for taking Ashlynn to school eight times and picking her up from school or the grandfather's house seven times.

{¶16} Under the parenting schedule, Father is responsible for taking Ashlynn to school every other Monday and every other Friday. Because he does not start his shift until 10:45 p.m., Father can take Ashlynn to school every other Monday. In the event he could not take Ashlynn to school every other Friday due to his work schedule, Father testified Sarah could do it for him. Based on whether Sarah would have to work or take her sons to school on those Fridays, Sarah would have to leave the house with Ashlynn around 6:15 a.m. in order to drop off Ashlynn at the grandfather's house and make it to work or her sons' school on time. Ashlynn would then wait for the 8:05 a.m. school bus and ride the bus for 45 minutes. Father lives four miles away from his father and 12 minutes from the Talawanda school.

{¶17} Mother is a self-employed hair stylist who has some flexibility over her work hours. During the week, she works on Mondays, Thursdays, and Fridays. As a result of her relocation, Mother now lives 20 minutes away from the grandfather's house (she used to live four miles away), and 20 minutes from the Talawanda school (it used to be about 12 minutes). Mother takes Ashlynn to the Talawanda school in the mornings (rather than to the grandfather's house). Her testimony indicates she picks up Ashlynn from the grandfather's house in the afternoon. Were Ashlynn to attend school in the Hamilton City School District, it would take three minutes to go to school by car, and seven minutes by school bus (the bus stops near Mother's house at 8:43 a.m.). Once school is over at 3:30 p.m., the Hamilton City school has a latchkey program at the school until 6 p.m.

{¶18} It is true Mother's relocation has to some extent increased the time spent transporting Ashlynn to and from the Talawanda school. However, it is also undisputed that the bulk of the transportation squarely falls onto Mother as a result of the parenting schedule followed by the parties, which was specifically designed to allow Father to spend more parenting time with Ashlynn when he is not working. In other words, the combination of

Mother's relocation and the parties' parenting schedule has increased the time Ashlynn, a second grader, spends in transportation to and from the Talawanda school. By contrast, by attending school in the Hamilton City School District, the time Ashlynn will spend being transported to and from school will be greatly reduced, especially in the afternoons.

{¶19} Given the foregoing, and having closely reviewed the record, we find no abuse of discretion in the trial court's decision naming Mother as the residential parent for school purposes. Father's assignment of error is overruled.

{¶20} Judgment affirmed.

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